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significant financial risks, yet the appellant Canadian airports operating under government supervision are obliged by statute to allow financially troubled airlines to make use of their services (and sometimes the airport will not know if an airline is in financial trouble or not). Airport costs are largely recovered through landing fees. If these and other fees go unpaid, the airport is out of pocket for the cost of the service it was obliged by law to provide.

4 "Nav Canada", the privatized successor to the former government-run civil air navigation system, is also obliged to offer its services to any aircraft flying through Canadian airspace on a cost-recovery basis. Its business is even riskier than that of the airports because quite often these aircraft do not even land in Canada, as in the case of transatlantic traffic flying the great circle route to and from the eastern seaboard of the United States: *Pan American World Airways Inc. v. R.*, [1981] 2 S.C.R. 565 (S.C.C.).

5 When Parliament adopted its policy of privatizing major airports and navigation services in the early 1990s putting such services on a commercial footing, potential investors were expected to insist on some assurance that they would in fact be financially viable serving the chronically unstable aviation business. Thus, Parliament decided to extend to the private operators of airport and navigation services a statutory power to apply to a superior court judge for an order to seize and detain aircraft until outstanding charges are paid, similar to the power Parliament had earlier conferred on the Crown in pre-privatization days under the *Aeronautics Act*, R.S.C. 1985, c. A-2, s. 4.5.

6 It is worth emphasizing that no power to seize and detain as such is conferred. A superior court judge is interposed between the aircraft sought to be seized and the airports or NAV Canada. As discussed below, the role of the judge is crucial to an understanding of the statutory detention remedy.

7 The respondents are primarily entities with the ultimate ownership of the aircraft in respect of which the charges in issue were incurred ("the legal titleholders"). Their position is that under the terms of their various leases with the defaulting airlines, they did not operate the aircraft, nor did they make use of the services for which charges were levied, nor did they derive benefit therefrom. They say that they are investors, and that when the lessees failed they were entitled to repossess their aircraft free of the charges which the defaulting airlines — not the legal titleholders — incurred. They consider it unjust that they were required in these cases to post security as a condition of removing "their" aircraft from the airports in question. The appellant airport authorities and NAV Canada, on the other hand, argue that the failure of Canada 3000 and Inter-Canadian reflects the sort of air carrier instability that Parliament rightly anticipated and in light of which it created the statutory remedies in question. Parliament must be taken to appreciate, they say, that an airline may be only a corporate shell but an aircraft under detention is a good, solid and enduring hostage for payment.

8 I agree with the courts below that the respondent legal titleholders are not subject to personal or corporate liability to pay the unpaid charges under s. 55 *CANSCA*. But that is not to say that the aircraft are similarly unburdened.

9 In my view, the appellants are entitled to obtain judicially-authorized seize and detain orders (hereinafter sometimes collectively referred to as the detention remedy) to be exercised against the security posted in substitution for the aircraft. The matters should be remitted to the motions judges to work out the details of the orders. Considered in the context in which the detention remedy was intended by Parliament to operate, the detention remedy cannot be circumvented as suggested by the respondents by the expedient of leasing arrangements made between the airlines and the aircraft lessors. 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 effect.

10 On the other hand, the appellants' remedy, if an order is granted, is limited to possession. Simple possession under the statutes does not confer any interest in the beneficial ownership of the aircraft. I do not think the appellants' further claim to the airborne equivalent of a maritime lien is well founded, nor do they have any "implied"

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power to sell the aircraft once detained. They get what the statute says they get — a right to apply for a judicial order to seize and detain the aircraft until payment — no more, and no less.

11 For the reasons that follow, I would allow the appeals in part, dismiss the respondents' cross-appeals, and return the seizure and detention applications to the respective motions judges to be dealt with in accordance with this judgment.

I. Facts

12 In 1992, the *Airports Act* privatized airports formerly owned and operated by the federal government. In 1996, *CANSCA* implemented the same objective in relation to Canada's civil air navigation services. Thus NAV Canada was incorporated as a non-profit corporation for the purpose of developing, operating and maintaining the civil air navigation system; see *House of Commons Debates*, vol. 133, 2nd Sess., 35th Parl., March 25, 1996, at p. 1153. *CANSCA* implemented the transfer of what was Transport Canada's civil air navigation services to NAV Canada and established the commercial and economic regulatory arrangements for the continued operation of those services; see *House of Commons Debates*, vol. 134, 2nd Sess., 35th Parl., May 15, 1996, at p. 2821.

A. Canada 3000

13 On November 8, 2001, Canada 3000 applied for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The effect of an initial court order made on the same day stayed all proceedings by creditors pending the filing of a plan of arrangement. Although the stay contemplated the continuation of operations, some five hours later the airlines' management issued a press release declaring that the airlines had ceased operations. The next day, November 9, a further order was issued grounding the fleet and providing for the return of aircraft operated by the airlines to Canada.

14 On November 9, 2001, NAV Canada applied to the Ontario Superior Court of Justice under s. 56(1) of *CANSCA* for an authorization to seize and detain certain aircraft operated by Canada 3000. The Greater Toronto Airport Authority ("GTAA") applied for relief against Canada 3000 but did not at that time seek leave of the court to seize and detain any aircraft.

15 On November 10, 2001, the directors and officers of Canada 3000 resigned. The next day the Canada 3000 companies were put into bankruptcy. At that time, the Canada 3000 companies owed approximately $7.4 million to NAV Canada, $13 million on to the GTAA, and $8.35 million to the other Canadian airport authorities. On November 12, the GTAA moved to seize and detain aircraft under s. 9 of the *Airports Act* and on November 23, the other airport authorities applied for similar relief.

16 The detention remedy sought by the authorities was in relation to 38 aircraft operated by the Canada 3000 companies and collectively worth approximately US $1.1 billion. Despite the existence of the legal titleholders, all of the aircraft were registered in the name of Canada 3000 as owner under the *Aeronautics Act*. Canada 3000 held leases with the various respondents in respect of 36 aircraft. The lessors retained legal title to the aircraft. At the time of the *CCAA* application, rental payments under the leases were significantly in arrears.

17 The termination provisions varied somewhat from lease to lease. Under some, the leases came to an end and the lessors became entitled to repossession upon the granting of the *CCAA* order, under others by the cessation of operations, and under the rest by the assignment in bankruptcy. The *CCAA* stay operated, in effect, as an interim bar to repossession (see s. 11.31 *CCAA*). At the time the detention remedy was sought, the aircraft sought to be seized were grounded at the Canadian airports listed in the style of cause of the various proceedings.

18 On December 3, 2001, after the aircraft had been grounded for close to a month, the motions judge approved

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the terms of their release on the posting of security for 110 percent of the amounts alleged to be owed. The motions judge then heard the seizure and detention motions through December and into January 2002, and dismissed them on May 7, 2002. The airport authorities and NAV Canada appealed and on January 20, 2004, the Ontario Court of Appeal dismissed their appeal.

B. Inter-Canadian

19 Inter-Canadian operated its fleet of aircraft under leasing agreements with the legal titleholders but it too was the registered owner under the *Aeronautics Act*. On November 27, 1999, Inter-Canadian ceased operations and laid off 90 percent of its employees. At that point, it had accumulated unpaid charges totalling approximately $5 million owing to NAV Canada and to the airport authorities.

20 Through early December 1999 the airport authorities and NAV Canada moved to seize and detain a number of the aircraft. This was authorized by four orders made by the Quebec Superior Court between December 8 and 17. Before the seizure motions were launched, however, one of the respondents, Renaissance Leasing, had purported to terminate its lease with Inter-Canadian. The aircraft nevertheless remained on the tarmac at Dorval airport.

21 On January 5, 2000, Inter-Canadian filed a notice of intention to make a proposal to its creditors pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3. The airline's creditors rejected its proposal in March and the company was deemed retroactively to have made an assignment in bankruptcy as of January 5. Faced with the legal titleholders' claims that they were entitled to repossession of the aircraft, the trustee in bankruptcy applied to the Superior Court for directions.

22 On July 7, 2000 the Superior Court allowed a motion to release the aircraft in exchange for security set at 150 percent of the claims of the airport authorities and NAV Canada. On November 9, 2000, Tremblay J., having heard the application on its merits, confirmed the validity of the detention and also held the legal titleholders liable for the amounts owing. His ruling was overturned by a majority decision of the Quebec Court of Appeal, which held that the lessors' right to repossession took priority and that the legal titleholders were entitled to the return of their aircraft free and clear of the unpaid charges.

II. Judicial History

A. Canada 3000

(1) Ontario Superior Court of Justice (Ground J.)

23 The motions judge concluded that the legal titleholders were not jointly and severally liable for the charges owed to NAV Canada under s. 55 of *CANSCA*. They were not "owners" within the meaning of the Act because none of the aircraft were registered in their name. Nor were any of the titleholders in possession of the aircraft when the charges were incurred. In his view, "the word 'owner' in [*CANSCA*] should not be interpreted to include persons who do not have custody or control of the aircraft, do not operate the aircraft, and do not make use of the air navigation services in respect of which the navigation charges are levied": (2002), 33 C.B.R. (4th) 184, at para. 52.

24 Further, the motions judge concluded that the seizure and detention remedies found in *CANSCA* and the *Airports Act* did not create a lien or security interest that ranked in priority to the ownership or perfected security rights of third parties. He preferred the analogy of a *Mareva* injunction:

> I am not persuaded, however, that the legislation granting such detention rights should be interpreted as creating rights against third parties having ownership or perfected security interests in the aircraft such that they, in effect, become liable for the debts of third parties and must extinguish those debts before they can enforce their

> contractual rights to repossess the aircraft or enter into possession of the aircraft to realize on their security. [para. 43]

25 Accordingly, he dismissed the claims of NAV Canada and the airport authorities.

(2) Ontario Court of Appeal

(a) Cronk J.A., for the Majority

26 Cronk J.A. agreed with the motions judge that the titleholders were not jointly and severally liable under s. 55 of *CANSCA*. A restrictive definition of "owner" excluding legal titleholders was consistent with the user-pay model established by *CANSCA*, the broader regulatory system and the relevant legislative history, all of which demonstrated Parliament's intent to limit liability to "persons having legal custody and control [and persons] otherwise in possession of the aircraft": (2004), 69 O.R. (3d) 1 (Ont. C.A.), at para. 118.

27 Cronk J.A. also agreed that the seizure and detention provisions in *CANSCA* and the *Airports Act* do not give the authorities priority over the rights of the titleholders to repossess the aircraft:

> I conclude that the remedies under the Detention Provisions, if granted, do not create rights in the Aircraft that rank in priority to the interests in the Aircraft of the Lessors, the legal titleholders to the Aircraft, in the face of a claim for repossession and recovery of the Aircraft by the Lessors.... The Detention Provisions are intended to apply to aircraft of persons having legal custody and control or who are otherwise in possession of the aircraft. [para. 190]

28 In the view of the majority, even if the aircraft had been properly detained, the engines attached to the aircraft and leased to Canada 3000 by two of the respondents could be removed by their respective owners. The appeal of the various authorities was dismissed.

(b) Juriansz J. (ad hoc), Dissenting

29 Juriansz J. (*ad hoc*, now J.A.) would have allowed the appeal in respect of the detention remedies. In his view, these remedies focus on the aircraft and not the persons liable to pay. As long as the aircraft is owned or operated by a person liable to pay then it may be the subject of an application to seize and detain it. The fact that other persons may have property interests in the aircraft is of no consequence:

> The remedy is "in addition to any other remedy available for the collection" of the outstanding charges. The remedy is not confined to collecting of outstanding charges from persons liable for the charges. The remedy is not directed to persons at all, but rather to "aircraft", and permits the Authorities, under court supervision, to seize, to detain and to refuse to release the aircraft until somebody has satisfied the outstanding charges. [para. 255]

Juriansz J. also held that the detention provisions apply to the leased engines since they were affixed to the aircraft that were subject to the detention remedy.

B. Inter-Canadian

(1) Superior Court of Quebec (Tremblay J.)

30 The motions judge held the titleholders to be jointly and severally liable for the unpaid charges due to NAV

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Canada under s. 55 of *CANSCA*. *CANSCA* and the *Airports Act* provide for a right to retain the aircraft operated by a party that has not paid its charges. The motions judge relied on arts. 1592 and 1593 of the *Civil Code of Québec*, S.Q. 1991, c. 64, and determined that the authorities' right of retention of the aircraft took priority over the lessors' interests: [2002] R.J.Q. 2935.

31 Accordingly, by order dated November 9, 2000, the motions judge confirmed the validity of the seizures, and declared the respondents liable to pay the overdue charges.

(2) Quebec Court of Appeal

(a) Pelletier and Morissette JJ.A., for the Majority

32 Pelletier and Morissette JJ.A. reversed the motions judge's decision and absolved the legal titleholders from liability for unpaid service charges to NAV Canada under s. 55 of *CANSCA*. In their view, limiting the definition of "owner" to the enumerated categories in s. 55(2) was the only interpretation consistent with both the English and French versions of the statute and the statutory context. They noted that NAV Canada's interaction is primarily with the user of the aircraft, not the legal titleholders. They concluded, at (2004), 247 D.L.R. (4th) 503, para. 106, that

> [TRANSLATION] ... these aircraft are in no way liable for the debts of Inter-Canadian for the simple reason that they do not belong to this debtor.

33 Moreover, in their view, neither the airport authorities nor NAV Canada had any right to an order to seize and detain the aircraft in priority to the rights of the legal titleholders. They rejected the motions judge's resort to the *Civil Code*.

(b) Nuss J.A., Dissenting

34 Nuss J.A. concluded that the intention and purpose of the statutory provisions would be defeated if the legal titleholders could obtain release of the aircraft without payment of the charges. However, he limited the liability of a legal titleholder to an obligation to pay the charges incurred in the operation of aircraft of which it is the titleholder:

> ...the titleholder, to obtain release of its seized aircraft must only pay all the charges, in the use of the airport, incurred (and unpaid) by the operator in the operation of any aircraft owned by the same titleholder. [Emphasis added; para. 145.]

III. Statutory Provisions

35 The statutory provisions are reproduced in the relevant paragraphs of the reasons.

IV. Analysis

36 This case is from first to last an exercise in statutory interpretation, and the issues of interpretation are, as always, closely tied to context. The notion that a statute is to be interpreted in light of the problem it was intended to address is as old at least as the 16th century; see *Heydon's Case* (1584), 3 Co. Rep. 7a, 76 E.R. 637 (Eng. K.B.). In a more modern and elaborate formulation, it is said that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

37 As this Court noted in 1915, part of the context is "the condition of things existent at the time of the enact-

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ment": *Grand Trunk Railway v. Hepworth Silica Pressed Brick Co.* (1915), 51 S.C.R. 81 (S.C.C.), at p. 88. At the time the measures in question here were enacted, airline insolvencies and bankruptcies had become a fact of life throughout the airline industry. Many of the planes flown in and out of and across Canada were leased to, and flown by, airlines in, or close to, bankruptcy protection. Under the interpretation offered by the respondents and the majority decisions of the Courts of Appeal, the detention remedy would be opposable to everybody but the titleholder, whose aircraft is often the only asset to survive the financial wreckage. Parliament would be taken to have intended a remedy that is least effective when it is most needed. It is more likely that Parliament fully appreciated that in dealing with aircraft flown in and out of jurisdictions under complex leasing arrangements, the only effective collection scheme is to render the aircraft themselves available for seizure, and thereafter to let those interested in them, including legal titleholders, registered owners, sublessors and operators, to resolve their dispute about where the money is to come from to pay the debts due to the service providers. I should add that I agree with Juriansz J. that the legal titleholders are not without benefit from the services provided, although the benefit is indirect. Without the day to day flight operations the legal titleholders would have no business. They lease the aircraft intending them to be used in the very activities for which the services are provided. By and large, the legal titleholders are sophisticated corporations. They are knowledgeable about the ways of the industry in which they have chosen to participate.

38 Part of the important context is the commercial reality of the marketplace where a statute is intended to function. Here the privatized appellants provide services on the basis of a cost-based tariff fixed by regulation. Prior to *CANSCA* and the *Airports Act*, civil air navigation and airport services were provided by the federal government. Central to the statutory scheme is the fact that these service providers are self-funded and intended to be financially viable and independent; see *CANSCA* ss. 7-8; *House of Commons Debates* (March 25, 1996, at pp. 1152-54). The privatized service providers do not possess the financial resources of the Crown. The statutory remedies are clearly intended to promote financial viability within a risky business environment and to make privatization attractive and practicable to potential investors.

39 Another important commercial fact is that not only are NAV Canada and the airport authorities required to provide services according to a cost-based tariff, but they cannot withhold services from even an obviously failing airline. Pursuant to the lease agreement between Transport Canada and the Airport Authorities, the airports cannot limit the access of aircraft to their facilities except in cases of bad weather or emergency conditions; see *Ottawa Macdonald-Cartier International Airport Ground Lease*, s. 8.10.02. Similarly, NAV Canada is obligated under s. 9 of *CANSCA* to provide all users with its civil air navigation services. This reflects the obligation undertaken by Canada under international agreements; see e.g. *Air Transport Agreement Between the Government of Canada and the Government of the United States*, February 24, 1995 ("*USA-Canada Open-Skies Agreement*"), Annex I, s.1.

40 With these preliminary comments on context (and in particular the vitally important commercial context in which these statutes were designed to operate), I turn to the two major questions raised by the appeals. Firstly are the legal titleholders liable for the debt incurred by the registered owners and operators of the failed airlines to the service providers? Secondly, even if they are not so liable, are the aircraft to which they hold title subject on the facts of this case to judicially issued seizure and detention orders to answer for the unpaid user charges incurred by Canada 3000 and Inter-Canadian?

A. Are the Legal Titleholders Jointly and Severally Liable to NAV Canada under Section 55 of CANSCA for Outstanding Civil Air Navigation Charges?

41 In my view, on a purposeful interpretation of s. 55, the answer is no. I agree with Ground J. and with the unanimous view of both Courts of Appeal that the legal titleholders are not personally liable for the unpaid charges. Section 55 provides:

> 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.

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(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.

42 The appellants contend that the word "owner" in s. 55(1) should be given its ordinary meaning to include the legal titleholders. Who, more than they, should be considered an "owner"? The legal titleholders respond that it would be absurd to make them jointly and severally liable for civil air navigation charges related to air operations in which they did not participate, any more than the owner of a rented car should be liable for charges incurred by a renter in using a toll bridge. They point out that the practical effect of NAV Canada's argument would be mischievous. In this case, for example, Canada 3000 leased a number of aircraft from International Lease Financing Corporation ("ILFC") based in California, one of the largest aircraft leasing companies in the world. If NAV Canada's interpretation of s. 55 is correct, it would mean that a seizure and detention order issued in respect of Canada 3000's unpaid user charges could in theory attach not only to the ILFC aircraft leased to Canada 3000, but also to any other aircraft to which ILFC holds title, including aircraft leased to other airlines (e.g. Lufthansa, British Airways or United Airlines). Thus the wreckage created by Canada 3000's collapse could spread disruption widely and perhaps unjustifiably trigger a further crisis in other airlines.

43 It seems clear from the statutes and the legislative record that Parliament intended to create a "user-pay" scheme for civil air navigation services, and that the only "users" of the civil air navigation services within the contemplation of the Act are the airlines, not the legal titleholders.

(1) The Meaning of "Owner"

44 If s. 55(1) were read in isolation, the ordinary and grammatical meaning of "owner" would include the legal titleholder. However, this Court held, in *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), that

...one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations....

...It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and *thereafter* to determine if "the words are ambiguous ...". [First emphasis added; second emphasis in original; paras. 29-30.]

45 Accordingly, to paraphrase the Court's decision in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26 (S.C.C.), it is necessary to suspend judgment on the precise scope of the word "owner" in s. 55(1) and first to examine the "contextual" elements of the Driedger approach.

(2) Statutory Context of Section 55

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46 Understandably, the appellants lay great emphasis on the fact that s. 55(2) is introduced by the words

> In subsection (1), "owner", in respect of an aircraft, includes ...

followed by a list of four subsections. In the French text, on the other hand, the introductory words are

> Pour l'application du paragraph (1), "propriétaire", relativement à un aéronef, s'entend...

There was, as might be expected, much argument over the words "includes" and "*s'entend*" in s. 55(2). NAV Canada argues that "includes" expands the definition of owner beyond the enumerated groups and that its ordinary meaning encompasses titleholders. The legal titleholders respond that the sense of "*s'entend*" in the French text is usually conveyed by the English word "means", which generally precedes a definition to be construed as exhaustive, and which would therefore exclude them from personal liability.

47 The English word "includes" may also, depending on the context, precede a list that exhausts the definition; see, e.g. *Dilworth v. Commissioner of Stamps*, [1899] A.C. 99 (New Zealand P.C.), at pp.105-6; *R. v. Loblaw Groceterias Co. (Man.) Ltd.* (1960), [1961] S.C.R. 138 (S.C.C.).

48 In this case, in my view there are three significant reasons for adopting a restrictive interpretation of the word "includes" in s. 55(2), and thereby excluding the legal titleholders from liability under s. 55(1).

49 Firstly, it *is* significant that the French version signals a closed list; see Uniform Law Conference of Canada, *Drafting Conventions of the Uniform Law Conference of Canada*, s. 21(4). The shared meaning is not conclusive when such an interpretation would be contrary to the purpose and intent of the statute, but it is preferred; see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), at pp. 1070-72; *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269, 2002 SCC 62 (S.C.C.), at para. 56; and R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 79-90. Further, where one of the linguistic versions is broader than the other, the common meaning favours the more restricted or limited meaning; see *Schreiber; R. v. Dubois*, [1935] S.C.R. 378 (S.C.C.). As the English version is ambiguous, indicating that the list could be exhaustive or expansive depending on the context, the fact that the relatively clear French version signals that "owner" is restricted to the persons listed in s. 55(2) is a factor weighing against NAV Canada's expansive interpretation.

50 Secondly, I conclude (as did the Courts of Appeal) that interpreting the list enumerated in s. 55(2) as exhaustive of ownership for the purposes of s. 55(1) is consistent with the regulatory scheme as a whole and its legislative history, outlined below. In restricting "owner" to those in possession and legal custody and control of the aircraft, s. 55(2) is brought into conformity with the meaning that the word "owner" carries throughout the interlocking statutes that regulate aeronautics. For example under the *Canadian Aviation Regulations*, SOR/96-433 ("*CARs*"), only a person who has legal custody and control may be a registered owner. Sections 55(2)(*b*)-(*d*) all explicitly state that the "owner" must be in possession of the aircraft. Also of significance is s. 55(2)(*d*), which includes as owner someone "in possession of the aircraft under a bona fide lease". No reference is made therein to the lessor. Parliament put its mind to aircraft leasing agreements and decided that the person in possession of the aircraft is the owner for the purposes of user charges.

51 Thirdly, exclusion of legal titleholders is consistent with Parliament's manifest intent to limit the scope of liability to "users" of NAV Canada's civil air navigation services. Section 32 of *CANSCA* authorizes NAV Canada to impose charges only on a "user", which s. 2(1) of the Act defines as "an aircraft operator." Part III of *CANSCA* lays out detailed mechanisms through which NAV Canada may impose fees. All of its provisions contemplate that it is the user who will be charged. Section 36(3)(*a*)(i) states that notice of changes to existing charges and notice of new charges must be sent to representative user organizations. Section 37(4) states that NAV Canada must advise representative user organizations once a new charge has been approved. Section 44 limits the right to appeal charges to

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"any user, group of users or representative organization of users".

52 In contrast, titleholders are not provided with notice of rates or accounts of the charges that their aircraft accumulate. In this case, the respondents in the Canada 3000 case were only notified of the $7.4 million owing to NAV Canada the day before the airline filed for protection under the *CCAA*. Thus Cronk J.A. observed that

> [] the charges scheme of the *CANSCA* does not protect aircraft lessors and secured creditors from the possible imposition by NAV Canada of improper or arbitrary navigation charges precisely because it is not envisaged that such persons will have any liability for such charges. [para. 101]

53 In summary, in my view, the statutory context supports the exclusion of the legal titleholders from the definition of owner under s. 55 *CANSCA*.

(3) The Broader Legislative Framework

54 As stated, aeronautics in Canada is governed by a complex web of statutes, regulations and international conventions. *CANSCA* and the *Airports Act* are part of this broader legislative framework. In *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56 (S.C.C.), the Court emphasized, at para. 52, "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". See also *Bell ExpressVu*, at para. 27.

55 The policy and practice throughout the federal regulatory scheme is to use the term "owner" to refer to the person in legal custody and control of the aircraft, not the legal titleholder. The *CAR*s, for example, define owner as "the person who has legal custody and control of the aircraft" (s. 101.01(1)). The *Aeronautics Act* refers only to "registered owners" and, under s. 4.4(5), only the operator or *registered* owner may face liability for charges imposed under that Act. Section 3(1) defines a registered owner as the person to whom a certificate of registration has been issued and the *CAR*s make clear that an aircraft may only be registered by an owner who, again, must have legal custody and control of the aircraft; see ss. 202.15-202.17. Section 2(2) of *CANSCA* itself states that "[u]nless a contrary intention appears, words and expressions used in this Act have the same meaning as in subsection 3(1) of the *Aeronautics Act*." I appreciate that arguments are available to counter these points but in my view the legal titleholders have the better side of the debate.

56 Internationally, the *Convention on International Civil Aviation*, December 7, 1944, Can. T.S. 1944 No. 36 (the "*Chicago Convention*"), does not require legal title to correspond with registered ownership. Article 19 states that registration shall be in accordance with the laws of the contracting State. It is common ground that, by virtue of ss. 202.15, 202.16 and 202.17 of the *CAR*s, an aircraft may only be registered in the Canadian Civil Aircraft Register by the "owner" of the aircraft as that term is defined under s. 101.01(1) of the *CAR*s, and that that person is the entity having legal custody and control of the aircraft. Thus an airline operating aircraft in Canada under a long-term lease is named on the Certificate of Registration as "owner" of the aircraft, notwithstanding that title is actually held by the lessor; see D. H. Bunker, *Canadian Aviation Finance Legislation* (1989), p. 764. We have been given no reason why the privatization legislation should be held to depart so strikingly from Canadian regulatory practice.

(4) Legislative History

57 Though of limited weight, Hansard evidence can assist in determining the background and purpose of legislation; *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 35; *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.), at p. 484. In this case, it confirms Parliament's apparent intent to exclude legal titleholders from personal liability for air navigation charges. The legislative history and the statute itself make it clear that Parliament did not intend *CANSCA* to replace or override the existing regulatory framework but rather to fit cohesively within it. In introducing *CANSCA*, the Minister of Transport stated that the *Aeronautics Act*, which establishes the essential

2006 CarswellQue 4890, 2006 SCC 24, J.E. 2006-1215, 20 C.B.R. (5th) 1, 349 N.R. 1, 80 O.R. (3d) 558 (note), 212 O.A.C. 338, 269 D.L.R. (4th) 79, [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66

regulatory framework to maintain safety in the aviation industry, "will always take precedence over the commercialization legislation" (*House of Commons Debates*, March 25, 1996, at p 1154). In the Ontario Court of Appeal, Cronk J.A. highlighted a number of other instances where government spokespersons emphasized to Members of Parliament that *CANSCA* was to fit within the existing regulatory framework which generally favours the narrow meaning of "owner"; see, e.g. *House of Commons Debates*, May 15, 1996, at p. 2834; May 29,1996, at p. 3144; June 4, 1996, at pp. 3394 and 3410; and *Debates of the Senate*, June 10, 1996, at pp. 588-89.

58 In 1985, during passage of the *Aeronautics Act*, a concern was raised in Parliament that liability under s. 4.4(5) (that Act's liability provision) could extend to legal titleholders. In response, the Government inserted the term "registered owner". The Parliamentary Secretary to the Minister of Transport specifically stated that the change was made to ensure that liability did not extend to those who had a security or other financial interest in the aircraft; *House of Commons Debates*, vol. IV, 1st Sess., 33rd Parl., June 20, 1985, pp. 6065-66.

59 In 1996, the Government considered Bill C-20 (which became *CANSCA*) as it transferred the operation of the civil navigation system from Transport Canada to NAV Canada. The Clause by Clause Analysis brief presented to the Senate Committee explained that s. 55 is based on the wording of the equivalent section of the *Aeronautics Act* which, as stated, restricts "owner" to registered owner; see "Clause by Clause Analysis for the *Civil Air Navigation Services Commercialization Act*", as presented to the Senate Committee on Transport and Communications, at pp. 51-52. However, the textual discrepancy noted above was not addressed.

(5) Conclusion on the Section 55 Issue

60 A purposive interpretation of s. 55 that takes into account the foregoing considerations compels rejection of the position urged by NAV Canada. Moreover, and importantly, the narrow interpretation of "owner" in s. 55(1) conforms with common sense. It would be a severe disruption to the functioning of the airline industry if, as a result of Canada 3000's failure to pay its charges, NAV Canada could seize and detain an aircraft operated by, for example, Air Canada. There is no reason to think Parliament intended to let the damage caused by a failed airline expand beyond that airline's fleet of aircraft.

61 Accordingly, applying *Driedger's* contextual approach to s. 55(1) of *CANSCA*, I agree with the Courts of Appeal that the titleholders of the aircraft are not jointly and severally liable for the charges due to NAV Canada. They are not "owners" within the meaning of that section.

B. The Detention Remedy

62 If the legal titleholders are not directly liable for the charges due to the service providers, they argue that it would be unfair and contradictory to hold their aircraft hostage for the payment. Section 56 of *CANSCA* and s. 9 of the *Airports Act* should be interpreted consistently with s. 55(1) of *CANSCA*, the legal titleholders argue, and their right to repossess the aircraft on termination of the lease should take priority over the statutory remedy.

63 On the other hand, Nuss J.A., dissenting in the Quebec Court of Appeal, put the contrary position:

> 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 avail. [para. 126]

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I believe that Nuss J.A. is correct on this point.

64 The relevant provisions, which authorize applications to a superior court judge of the province in which any aircraft owned or operated by the person liable to pay the charge or amount is situated, are expressed in the two statutes in similar terms.

65 Section 56 of *CANSCA* provides:

> 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.

66 Section 9 of the *Airports Act*, under which the airport authorities bring their seizure and detention applications, is to the same effect.

> 9. (1) [Seizure and detention for fees and charges] 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.
>
> (2) [Application may be made *ex parte*] 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.

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> (3) [Release on payment] 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.
>
> (4) [Release on security] 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.
>
> (5) [Same meaning] Words and expressions used in this section and section 10 have the same meaning as in the *Aeronautics Act*.

67 According to these provisions, the airport authorities or NAV Canada (upon obtaining a court order) may take possession of an aircraft and detain it. The aircraft must be either "owned" or "operated" by a person who is liable to pay. Either is a sufficient basis for an application.

68 The key difference between the joint and several liability provisions in s. 55 of *CANSCA* and the detention remedy provided for in s. 56 of *CANSCA* and s. 9 of the *Airports Act* is that the seizure and detention remedy lies against the aircraft. Whereas s. 55 identifies a group of *persons* who are made legally liable for the amounts owing, the detention remedy has a different focus. It provides for a right to possess aircraft until the debt is paid or security provided.

69 The legal titleholders argue that the claim of NAV Canada and the airport authorities to detain the aircraft must yield to the their right under their respective leases to repossession. They liken the seizure and detention remedies to a *Mareva* injunction, in which the assets are frozen while various parties work out their respective entitlements; see *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.). However, in my view, there is no need to resort to analogies, especially loose analogies (e.g. *Mareva* injunctions are interlocutory, whereas the detention remedy is available whether or not a judgment for the collection of the charge or amount has been obtained. Moreover, *Mareva* injunctions are directed at persons (*Aetna Financial Services*, at pp. 25-26), whereas the seizure and detention remedy targets the aircraft itself).

70 The *CARs*, adopted pursuant to the *Aeronautics Act*, provide that an "operator" in respect of an aircraft "means the person that has possession of the aircraft as owner, lessee or otherwise" (s. 101.01(1)). 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. 55(1) of *CANSCA*. However, as its possession post-dates the charges, no personal liability is incurred on that account.)

71 It is difficult to endorse the indignation of the legal titleholders with respect to detention of their aircraft until payment is made for debts due to the service providers. They are sophisticated corporate players well versed in the industry in which they have chosen to invest. The detention remedies do not affect their ultimate title. Lenders who have done their due diligence will recognize that detention remedies have deep roots in the transport business. In *The Emilie Millon*, [1905] 2 K.B. 817 (Eng. C.A.) ("*Mersey Docks*"), for example, the English Court of Appeal, King's Bench Division, examined a statute that stipulated that the Mersey Docks and Harbour Board could cause a ship to be detained until all harbour and tonnage payments had been made despite the fact that the ownership of the ship did not correspond to the debtor who had incurred the charges. The ruling in that case reflects the traditional scope of this type of remedy (at p. 821):

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> The Mersey Docks and Harbour Board have a right by statute to detain the vessel until the dock tonnage rates and harbour rates are paid. That is an express statutory right, and the board have nothing to do with any sale of the vessel to a purchaser. That is a matter which only concerns those who are interested in the vessel. It does not concern the board. The board are entitled to detain the vessel, whoever is the owner, until the rates are paid. The order appealed against deprives them of that right, and without their consent purports to give them an option to try and make some claim to a lien upon or right against the fund in priority to other claimants. The board have no such lien or right. If this vessel had been allowed to leave the dock, the board would have been left to make a futile claim against the fund in court. [Emphasis added.]

This type of provision is not uncommon in the airline business, see e.g. decisions under a differently worded UK Act such as *Channel Airways v. Manchester City Council*, [1974] 1 Lloyd's Rep. 456 (Eng. Q.B.), at p. 461, in which it was held that the *Manchester Corporation Act* "mean[t] what it sa[id]", and that the city could detain aircraft in respect of which charges had been incurred until those charges had been paid. The legal titleholders face this problem on the other side of the Atlantic. It is a risk they manage there. No reason was given as to why they cannot manage it here.

72 The legal titleholders are in a better position to protect themselves against this type of loss than are the airport authorities and NAV Canada. The legal titleholders can select which airlines they are prepared to deal with and negotiate appropriate security arrangements as part of their lease transactions with the airlines. In the case of aircraft at issue in these appeals, many if not all of the leases provided for substantial security deposits. For example, the total amount posted by Canada 3000 to the ILFC as security deposits for airport fees and charges was approximately $15,305,500. It is unnecessary to catalogue all of the possible security arrangements, but these deposits demonstrate a legal titleholder's ability to negotiate protection at a time when the airline is solvent to cover the amounts in overdue charges that the airline may eventually be required to pay to the statutory service providers.

73 I agree with Cronk J.A. (at para. 133) that the detention remedy under the statutes is subject to several constraints: (i) the remedy is not automatic and requires prior court authorization; (ii) the remedy is discretionary and may be subject to such terms as the court considers necessary; (iii) under s. 9(3) of the *Airports Act* and s. 56(3)(*c*) of *CANSCA*, the court also has a discretion to limit the duration of the remedy by requiring the applicable authority to release a detained aircraft from detention prior to payment of the amount with respect to which the seizure was made; (iv) in any event, an authority that obtains an order under the detention provisions is required to release a detained aircraft upon payment of the outstanding amount or charges in respect of which the seizure was made or upon the provision of acceptable security therefor (ss. 9(3) and (4) of the *Airports Act* and ss. 56(1) and (3) of *CANSCA*); and (v) an order is not available under the detention provisions if the aircraft in respect of which the order is sought is exempt from seizure and detention under provincial law (s. 10(1) of the *Airports Act* and s. 57(1) of *CANSCA*) or, in the case of the *Airports Act*, under a regulation made by the Governor in Council (s. 10(2)).

74 On the other hand, the conclusion of Juriansz J., dissenting, was correct that "the wording of the Detention Provisions makes apparent that 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 legislation. 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 to seize and detain it. 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 consequence" (para. 239).

75 I turn, then, to a number of additional arguments raised on both sides which, in my view, with respect, unnecessarily complicate a straightforward task of statutory interpretation.

(1) Whether or Not a Lien Existed

76 In the Ontario case, there was considerable debate about whether the detention remedy created a lien. How-

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ever, as the English Court of Appeal commented in *Mersey Docks*, there was no need for the port authority "to ... make some claim to a lien" (p. 821). Nor is it necessary here. In this case, as in *Mersey Docks*, the remedy is purely a creature of statute. Whether or not a lien could be said to arise by operation of law is perhaps of theoretical interest but it has no practical bearing on the result in these appeals.

(2) Effect of the Bankruptcy Proceedings

77 The intervention of bankruptcy proceedings in both Quebec and Ontario created procedural complications. For present purposes, it is sufficient to note that the detention remedies in Quebec were applied for well before the assignment in bankruptcy. In Ontario, the detention remedies were applied for while the *CCAA* stay was in effect and Canada 3000 remained the 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 titleholder). 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 date.

(3) Resort to the Civil Code of Québec

78 In the Superior Court of Quebec, Tremblay J. held that the seizure and detention provisions create a right similar to that found in arts. 1592 and 1593 of the *Civil Code of Québec*. However, with respect, there is no need to make reference to provincial law or, more specifically, to the *Civil Code*, and to do so here is inappropriate. Section 56 of *CANSCA* and s. 9 of the *Airports Act* specifically state that the remedy is to be "in addition to any other remedy", which includes remedies under provincial law.

79 The *Aeronautics Act*, the *Airports Act* and *CANSCA* are federal statutes that create a unified aeronautics regime. Parliament endeavoured to create a comprehensive code applicable across the country and not to vary from one province to another. This uniformity is especially vital since aircraft are highly mobile and move easily across jurisdictions.

80 NAV Canada also relied on ss. 8.1 and 8.2 of the *Interpretation Act*, R.S.C. 1985, c. I-21, to urge that s. 56 of *CANSCA* provides for a *civiliste* right of retention. However, neither section applies in this case. Section 8.1 states that

> ...if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

If it were *necessary* to resort to provincial law, then the provincial law to be used is that of the province in which the provision is being applied: *People's Department Stores Ltd. (1992) Inc., Re*, [2004] 3 S.C.R. 461, 2004 SCC 68 (S.C.C.). Here, for reasons stated, resort to provincial law is not necessary.

81 Section 8.2 of the *Interpretation Act* states that

> when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec.

82 The issue here is not one of conflicting terminology. The language used in relation to the detention remedy is perfectly apt to make Parliament's intention clear bilingually and bijuridically. In short, resort to the *Civil Code* was neither necessary nor appropriate.

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(4) Existence of a Power of Sale

83 The appellants argue that the existence of a seizure and detention implies (in their favour) a power of sale. No such power is contained in *CANSCA* or the *Airports Act*. Nor is it necessarily implied in the creation of a power to seize and detain. The only claim that the authorities have under federal aeronautics law is the claim to possession of the aircraft until their user charges are paid.

(5) Presumption Against Interference With Private Rights

84 The Ontario motions judge applied a narrow approach to the Detention Remedy on the basis that it invades what would otherwise be the proprietary rights of the legal titleholders. Reference was made to *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), where it was held that the legislation at issue in that case did not impose a charge in the nature of a lien because of the absence of clear and unambiguous language. However, only if a provision is ambiguous (in that after full consideration of the context, multiple interpretations of the words arise that are equally consistent with Parliamentary intent), is it permissible to resort to interpretive presumptions such as "strict construction". The applicable principle is not "strict construction" but s. 12 of the *Interpretation Act*, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects"; see *Bell ExpressVu*, at para. 28:

> Other principles of interpretation — such as the strict construction of penal statutes and the "*Charter* values" presumption — only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115, *per* Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at p. 413; , [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46....

In my view, there is no ambiguity in the statutory language creating the detention remedy and thus resort to "strict construction" is not called for.

(6) Limitation of Debts on an Aircraft by Aircraft Basis

85 The titleholders argue that it would be extremely unfair that one titleholder's aircraft, however recently leased, may ultimately be held hostage for all of the unpaid user charges of the airline that flew it. They contend that if (which they deny) the titleholders must pay charges in order to recover an aircraft, they should only be required to pay the charges incurred by the individual aircraft sought to be released, as opposed to the charges outstanding in relation to the whole fleet of the defaulting airline.

86 However, the statute says that an aircraft operated by the person liable to pay the amount can be seized and, absent further court order, need not be released until the entire amount owed by that operator has been paid. This point is made clearly by the release provisions in s. 9(3) of the *Airports Act* and s. 56(3) of *CANSCA*. The authorities must only release the aircraft if "the amount in respect of which the seizure was made is paid". Since s. 9(1) and s. 56(1) do not distinguish between the amounts accumulated by specific aircraft operated by a defaulting owner or operator, it seems clear that the amount in respect of which the seizure was made is the entire amount owed by that registered owner or operator.

(7) Limitation of Seizure to Exclude Engines

87 Two of the respondents, RRPF Engine Leasing Ltd. and Flight Logistics Inc. (the "engine lessors"), leased to Canada 3000 the engines attached to two of the aircraft which, when seized, were airworthy. The engine lessors argue that they should be entitled to repossess their engines because seizure of the aircraft is not seizure of the engines.

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They cite Laskin J. (as he then was) in *Firestone Tire & Rubber Co. v. Industrial Acceptance Corp.* (1970), [1971] S.C.R. 357 (S.C.C.), for the proposition that the doctrine of accession does not apply to a removable and identifiable object such as the engines.

88 In my view, the engines are part of the aircraft for present purposes. Engines and equipment such as onboard computers fall under the definition of "aeronautical product" in the *Aeronautics Act* (s. 3(1)). If the engines could be removed, third-party lessors could cannibalize any "aircraft propeller or aircraft appliance or part or the component parts of any of those things, including any computer system and software"; see *Aeronautics Act*, s. 3(1).

89 *Firestone Tire* is not of assistance here. In that case, a truck was repossessed under a conditional sales contract. The vendor in possession of the seized truck sought to retain the tires mounted on the truck as against the claim of the unpaid conditional seller of the tires. Laskin J. was concerned about the windfall one creditor might receive when repossessing the property of another unpaid creditor for which he "has given no value" (p. 359). Here, no beneficial interest is implicated. The engines are attached to the aircraft in respect of which charges were incurred and that are the subject of the detention. The Act does not envisage the dismantling of the aircraft (and thus of its value as a security) on the tarmac.

(8) Effect of Sub-Leases

90 The respondents Ansett Worldwide Aviation, U.S.A. and MSA V leased three aircraft to Canada 3000, two of which, in turn, had been leased by those respondents from other persons under head leases. These sub-lessors stand in no better position than the legal titleholders, and the aircraft in which they have a leasehold interest were subject to seizure.

C. The Important Role of the Motions Judge

91 The detention remedy does not create any rights unless, and until, a court order is made authorizing the seizure and detention of an aircraft. Instead, the provisions create potential remedies, available at the discretion of the court and subject to such conditions as the court considers necessary, as Cronk J.A. noted, at para. 134.

92 Much of the potential unfairness which the titleholders envisage in the operation of the detention remedy can be addressed by the motions judge. Section 56(3)(*c*) of *CANSCA* states that NAV Canada must release the aircraft "if an order of the court directs the Corporation to do so". Similarly, s. 9(3) of the *Airports Act* states that an airport authority need not release the aircraft until the charges are paid, "except where otherwise directed by an order of a court". 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. In this way, what may otherwise be portrayed as a draconian remedy can be reduced to a fair and proportionate judicial response to the airline collapse.

D. Interest

93 The *Airports Act* explicitly authorizes the airport authorities to charge interest on the overdue amounts. Section 9(1) defines the amount on account of which the seizure was made as "the amount of any landing fees, general terminal fees or other charges related to the use of an airport, and interest thereon". While *CANSCA* makes no explicit mention of interest, ss. 32-35 lay out a broad authority for NAV Canada to set and charge its fees. A procedure has been established under s. 35(1)(*a*), whereby the Minister of Transport approves the charges imposed by NAV

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Canada. The Minister has approved a regulation imposing interest. Notice was provided to airline operators (although not the legal titleholders) and no judicial review of this regulation was sought.

94 The time value of money is universally accepted in ordinary commercial practice; see *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601, 2002 SCC 43 (S.C.C.). There is no reason for this principle to be excluded in the case of privatized aeronautics services, and it is not surprising that NAV Canada has been permitted to incorporate interest on unpaid charges into its charging scheme.

95 The question then turns to how long the interest can run. The airport authorities and NAV Canada have possession of the aircraft until the charge or amount in respect of which the seizure was made is paid. It seems to me that this debt must be understood in real terms and must include the time value of money.

96 Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the *Bankruptcy and Insolvency Act*.

97 A particular issue is raised in the Quebec appeals regarding proper notice of the interest charges. This is an issue to be dealt with by the motions judge when these matters are returned for further consideration and disposition.

V. Disposition

98 For these reasons, I would allow the appeals and cross-appeals in part, as follows:

1. I would dismiss the appeals of NAV Canada seeking to hold the respondents liable in their personal/corporate capacity;

2. I would allow the appeals of NAV Canada and the airport authorities of the dismissal of their seizure and detention applications and remit those applications to the respective motions judges to be dealt with in accordance with these reasons;

3. I would set aside the orders requiring NAV Canada and the airport authorities to reimburse the respondents for the aircraft detention costs;

4. I would allow the appeals of NAV Canada and the GTAA of the ruling that the engine lessors are entitled to repossess the leased engines.

5. Interest on overdue charges continues to run to the first of the date of payment, the posting of security or bankruptcy.

In other respects, the appeals and cross-appeals will be dismissed. Aéroports de Montréal, St. John's International Airport Authority Inc. and Charlottetown Airport Authority Inc. are entitled to their costs in the Quebec appeals. All other parties shall bear their own costs.

Appeals allowed in part and cross-appeals dismissed.

2006 CarswellQue 4890, 2006 SCC 24, J.E. 2006-1215, 20 C.B.R. (5th) 1, 349 N.R. 1, 80 O.R. (3d) 558 (note), 212 O.A.C. 338, 269 D.L.R. (4th) 79, [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66

Pourvois accueillis en partie et pourvois incidents rejetés.

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TAB B

2009 CarswellAlta 1427, 2009 ABCA 306, [2009] A.W.L.D. 3954, [2009] A.W.L.D. 3955, 12 Alta. L.R. (5th) 1, [2009] 12 W.W.R. 417, 460 A.R. 341, 462 W.A.C. 341, 311 D.L.R. (4th) 624

2009 CarswellAlta 1427, 2009 ABCA 306, [2009] A.W.L.D. 3954, [2009] A.W.L.D. 3955, 12 Alta. L.R. (5th) 1, [2009] 12 W.W.R. 417, 460 A.R. 341, 462 W.A.C. 341, 311 D.L.R. (4th) 624

Calgary Airport Authority v. Zoom Airlines Inc.

Calgary Airport Authority, Halifax International Airport Authority and Vancouver International Airport Authority (Appellants / Plaintiffs / Applicants / Respondents) and Zoom Airlines Incorporated (Not a Party to the Appeal / Defendant) and AerCap Group Services Inc. (Respondent / Respondent / Applicant)

Alberta Court of Appeal

Ronald Berger, Clifton O'Brien JJ.A., Carolyn Phillips J. (ad hoc)

Heard: June 4, 2009
Judgment: September 23, 2009
Docket: Calgary Appeal 0801-0266-AC

Counsel: G.A. Befus, S. Torscher for Appellant, Calgary Airport Authority

B.R. Crump, D. De Groot for Respondent, AerCap Group Services Inc.

Subject: Public; Civil Practice and Procedure

Transportation --- Aviation and aeronautics — Interpretation of aeronautics legislation — Miscellaneous legislation

Airline leased aircraft from A Inc., but was listed as registered owner with Transport Canada — Airline was in financial difficulty and A Inc. terminated lease for aircraft — Agent for A Inc. took possession of aircraft — Unaware of agent's actions, airport authority later on same day obtained ex parte order pursuant to s. 9 of Airports Act, seizing and detaining aircraft on basis of unpaid airport fees — Airline filed notice of intention of Bankruptcy and Insolvency Act — A Inc.'s application to set aside order was granted — Chambers judge found that airline was not owner or operator of aircraft when order was obtained — Authority appealed — Appeal dismissed — Chambers judge did not err in failing to apply definition of "registered owner" in Aeronautics Act, given that Canadian Aviation Regulations provided definitions for "owner" and "operator" — Section 9 of Airports Act used same words and expressions as in Aeronautics Act, and so Regulations under that Act should be referred to — If Parliament had intended s. 9 of Airports Act to apply to "registered owners", then it would have used that phrase — Chambers judge's finding that airline was no longer owner of aircraft was well-supported and without any palpable and overriding error.

Transportation --- Aviation and aeronautics — Airports and landing areas

Airline leased aircraft from A Inc., but was listed as registered owner with Transport Canada — Airline was in financial difficulty and A Inc. terminated lease for aircraft — Agent for A Inc. took possession of aircraft — Unaware of agent's actions, airport authority later on same day obtained ex parte order pursuant to s. 9 of Airports Act, seizing and detaining aircraft on basis of unpaid airport fees — Airline filed notice of intention of Bankruptcy and Insolvency Act — Chambers judge found that airline was not owner or operator of aircraft when order was obtained — A

2009 CarswellAlta 1427, 2009 ABCA 306, [2009] A.W.L.D. 3954, [2009] A.W.L.D. 3955, 12 Alta. L.R. (5th) 1, [2009] 12 W.W.R. 417, 460 A.R. 341, 462 W.A.C. 341, 311 D.L.R. (4th) 624

Inc.'s application to set aside order was granted — Authority appealed — Appeal dismissed — Chambers judge did not err in failing to apply definition of "registered owner" in Aeronautics Act, given that Canadian Aviation Regulations provided definitions for "owner" and "operator" — Section 9 of Airports Act used same words and expressions as in Aeronautics Act, and so Regulations under that Act should be referred to for definitions of "owner" and "operator" — Chambers judge's finding that airline was no longer owner of aircraft was well-supported and without any palpable and overriding error — Once agent for A Inc. entered aircraft and took log books and certificates, A Inc. had legal custody and control of aircraft and was its owner with complete responsibility for its operation and maintenance — Precedent made exception to detention remedy where titleholders repossessed aircraft before issuance of detention order, and exception was not limited to proceedings involving Companies Creditors Arrangements Act — Chambers judge did not err in using priority analysis, but merely used word priority to refer to fact that A Inc.'s repossession occurred before detention order.

A Inc. leased its aircraft to an airline, which was listed as the registered owner of the aircraft with Transport Canada. The airline ran into financial difficulties, and A Inc. terminated the lease. An agent for A Inc. took possession of the aircraft at 2:30 p.m. Unaware of the agent's action and on the basis of airport fees owed by the airline, the airport authority obtained at 4:00 p.m. an ex parte order pursuant to s. 9 of the Airports Act to seize and detain the aircraft. A Inc.'s application to set aside that order was granted, on the basis that the airline was no longer the owner or operator of the aircraft, since the transfer of legal custody of the aircraft to A Inc. effectively cancelled the airline's certificate of registration and took priority over the detention order. The authority appealed.

Held: The appeal was dismissed.

Per Phillips J. (ad hoc) and O'Brien J.A.: The detention order against the airline was obtained on the basis that the aircraft was owned or operated by the airline who owed fees to the authority. In interpreting the meaning of "owned or operated" in s. 9 of the Airports Act, the chambers judge did not err by failing to apply the definition of a "registered owner" in s. 3(1) of the Aeronautics Act, given that the Canadian Aviation Regulations provided definitions for "owner" and "operator". Section 9 of the Airports Act uses the same words and expressions as in the Aeronautics Act, and so the Regulations under the Aeronautics Act should be referred to for those definitions. If Parliament had intended s. 9 of the Airports Act to apply to "registered owners", then that phrase would have been used. The chambers judge's finding that the airline was no longer the owner of the aircraft was well supported, without any palpable and overriding error. Once the agent for A Inc. entered the aircraft and took the log books and certificates of airworthiness and registration, the airline transferred legal custody and control to A Inc., who became the aircraft's owner with complete responsibility for the operation and maintenance of the aircraft.

The Supreme Court of Canada made an exception to the airport authorities' detention remedy in cases where the title holders repossessed the aircraft prior to the issuance of an order under s. 9 of the Airports Act. The fact that the precedent establishing that exception involved proceedings under the Companies' Creditors Arrangement Act (CCAA) did not prevent the application of that exception here. Having repossessed the aircraft, A Inc. was its owner and fell within the exception contemplated by the Court. The suggestion that this exception created a race to repossess the aircraft overstated the situation, since if the authority had taken the precaution of obtaining prior security, no such race could occur. The chambers judge did not err in using a priority analysis, but merely used the word priority to refer to the fact that A Inc.'s repossession occurred before the detention order was issued. Appellate intervention was not warranted.

Per Berger J.A. (dissenting): The chambers judge noted that the Supreme Court was moving towards giving the airport authority some sort of super priority or priority for its debts owed. In view of that comment, her statement that A Inc.'s repossession took priority over the detention remedy order indicated that she mistakenly undertook a ranking of personal property claims.

The exception to the detention remedy created by the Supreme Court of Canada must be considered in the context of that precedent, most particularly the CCAA filing. The legal effect of a CCAA order has particular legal ramifica-

tions, opening up a broad jurisdiction to restructure the insolvent airline's affairs and creating that exception left a CCAA court free to fashion the appropriate remedy in the particular circumstances. Since the airline here made no CCAA filing, the exception was inapplicable despite the arguable disconnect between registered ownership and ownership based on custody and control. However, on review of the evidence and particularly the fact that the agent stood by during the authority's seizure and did not inform either the authority or the air-side handlers that the aircraft had already been repossessed, it could not be said that A Inc. was in complete or exclusive control of the aircraft. When A Inc.'s agent complied with the authority's direction to move the aircraft to a specified parking site, that amounted to a surrender of custody and control over the aircraft, relinquishing possession in favour of the detention order and seizure by the authority.

Cases considered by *Carolyn Phillips J., Clifton O'Brien J.A.*:

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — followed

NAV Canada c. Wilmington Trust Co. (2006), 2006 CarswellQue 4890, 2006 CarswellQue 4891, 2006 SCC 24, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.)* 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc., (Bankrupt), Re)* 349 N.R. 1, (sub nom. *Canada 3000 Inc., Re)* [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc. (Bankrupt), Re)* 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re)* 269 D.L.R. (4th) 79 (S.C.C.) — considered

Cases considered by *Ronald Berger J.A.* (dissenting):

Canada 3000 Inc., Re (2004), 2004 CarswellOnt 149, 183 O.A.C. 201, 235 D.L.R. (4th) 618, 3 C.B.R. (5th) 207, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.)* 69 O.R. (3d) 1 (Ont. C.A.) — considered

NAV Canada c. Wilmington Trust Co. (2006), 2006 CarswellQue 4890, 2006 CarswellQue 4891, 2006 SCC 24, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.)* 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc., (Bankrupt), Re)* 349 N.R. 1, (sub nom. *Canada 3000 Inc., Re)* [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc. (Bankrupt), Re)* 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re)* 269 D.L.R. (4th) 79 (S.C.C.) — considered

Statutes considered by *Carolyn Phillips J., Clifton O'Brien J.A.*:

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

Generally — referred to

s. 3(1) "registered owner" — considered

Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5

Generally — referred to

s. 9 — considered

s. 9(5) — considered

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

Generally — referred to

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

Generally — referred to

s. 55(2) "owner" — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11.31 [en. 2005, c. 3, s. 16] — referred to

Statutes considered by *Ronald Berger J.A.* (dissenting):

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

Generally — referred to

Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5

Generally — referred to

s. 9 — referred to

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

Generally — referred to

s. 2(1) "user" — considered

s. 32 — considered

s. 55(2) "owner" — considered

s. 56 — referred to

s. 56(1) — referred to

s. 56(2) — referred to

s. 56(3) — referred to

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Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Regulations considered by *Carolyn Phillips J., Clifton O'Brien J.A.*:

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

Canadian Aviation Regulations, SOR/96-433

Generally — referred to

s. 101.01 — referred to

s. 101.01(1) "operator" — considered

s. 101.01(1) "owner" — referred to

s. 202.35 — considered

s. 202.35(2) — considered

s. 202.35(3) — referred to

s. 202.36(1) — considered

Regulations considered by *Ronald Berger J.A.* (dissenting):

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

Canadian Aviation Regulations, SOR/96-433

Generally — referred to

s. 101.01 — referred to

s. 202.35 — considered

s. 202.35(3) — referred to

APPEAL by airport authority from decision setting aside detention order it obtained under s. 9 of *Airports Act*.

***Carolyn Phillips J., Clifton O'Brien J.A.*:**

I. Introduction

1 The Calgary Airport Authority (Authority) appeals the decision of Kent J., dated September 4, 2008, ordering

that the lessor's (AerCap Group Services Inc. ((AerCap)) repossession of an aircraft was in priority to her earlier order (which was vacated and set aside) authorizing the Authority to seize and detain the aircraft for unpaid airport fees (detention remedy), pursuant to section 9 of the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 (*Airports Act*).

II. Facts

2 Zoom Airlines Incorporated (Zoom) leased a Boeing 767 aircraft with the call letters GZUM (GZUM) from AerCap, a service provider of Eden Irish Aircraft Leasing MSN 27135 Limited. Although AerCap held legal title to GZUM, as the lessor, Zoom was listed as the registered owner of GZUM with Transport Canada, in compliance with the *Aeronautics Act*, R.S.C. 1985, c. A-2 and the *Canadian Aviation Regulations*, SOR 96/433 (*CARs*).

3 In August 2008, Zoom was in financial difficulty. It owed $347,982.95 in airport fees to the Authority and was in default of its lease payments of US$832,073.63 to AerCap. On August 25, 2008, at 3:05 pm 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 GZUM.

4 On August 26, 2008, at 5:02 pm MDT, AerCap gave Zoom, Zoom's insurer, and Transport Canada written notice of lease termination for GZUM, via e-mail. Under the terms of the lease, AerCap was entitled to take possession of the aircraft upon termination, and to require Zoom to cease flying GZUM immediately and leave it parked at its, then, current location.

5 On August 27, 2008, at about 2:00 p.m. MDT, Zoom flew GZUM into the Calgary airport, as the aircraft had departed from Paris before Zoom received the termination e-mail. Earlier that day, through a series of e-mailed messages, Zoom 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. Zoom acknowledged to AerCap that the aircraft would be grounded in Calgary and indicated that it would see that the aircraft's records would be made available to AerCap and that Zoom would apply an "all stop" when the aircraft arrived.

6 AerCap retained Skyservice Airlines Inc. (Skyservice) as agent to repossess GZUM upon arrival in Calgary. At approximately 2:23 p.m. MDT, on August 27, 2008, Barry Kendrick of Skyservice boarded the aircraft and informed the pilot he was taking possession of the aircraft. At the time, the passengers were still on board. 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 2:30 p.m. MDT. (It should be noted that there is nothing in the record to indicate that AerCap had any knowledge of Zoom's outstanding indebtedness for airport fees to the Authority at the time GZUM was repossessed .)

7 That same day, at about 4:00 p.m. MDT, unaware of Skyservices's actions, the Authority obtained from Kent J. an *ex parte* order (detention order) seizing and detaining GZUM pursuant to section 9 of the *Airports Act*. Section 9 provides:

> (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.

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> (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.
>
> (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.
>
> (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.
>
> (5) Words and expressions used in this section and section 10 have the same meaning as in the *Aeronautics Act*.

8 At approximately 4:30 pm MDT, on August 27, 2008, Skyservice surrendered the certificate of airworthiness and the certificate of registration to Transport Canada, advising that the lease of GZUM to Zoom had been terminated.

9 At about 5:00 p.m. MDT, on August 27, 2008, Zoom filed a notice of intention under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

10 On September 2, 2008 Transport Canada issued a temporary certificate of registration to Skyservice for GZUM, and listed Skyservice as its registered owner. The delay was due to Transport Canada determining that the bankruptcy proposal notice did not affect the issuance of a new certificate.

11 On August 29, 2008, AerCap sought to set aside the order. The hearing continued on September 2, 2008.

The Decision Below

12 The chambers judge considered the meaning of "registered owner," as defined in the *Aeronautics Act* at section 3(1), which provides:

> "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;

She also considered section 202.35 of *CAR*s, which provides:

> (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.

2009 CarswellAlta 1427, 2009 ABCA 306, [2009] A.W.L.D. 3954, [2009] A.W.L.D. 3955, 12 Alta. L.R. (5th) 1, [2009] 12 W.W.R. 417, 460 A.R. 341, 462 W.A.C. 341, 311 D.L.R. (4th) 624

> (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.

13 Finally, the chambers judge referred to *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.) where Binnie J., for the court, discussed the detention remedy under the *Airports Act*.

14 In applying this law, the chambers judge noted that the Authority obtained the detention order against Zoom on the basis that Zoom was an owner or operator who owed fees to the Authority. However, Zoom transferred legal custody or control of GZUM to AerCap around 2:30 p.m. MDT on August 27, 2008, when Skyservice, as agent for AerCap, entered GZUM. This effectively cancelled Zoom's certificate of registration. She pointed out that although the certificate of registration was not changed until September 2, the legal custody of GZUM was relinquished or transferred at the time the relevant books were turned over by the pilot to Skyservice, acting as agent for AerCap.

15 She explained the detention remedy, as discussed in *Canada 3000*, essentially attaches the airport authority debt to the aircraft, not to the owner of the aircraft. In her view, *Canada 3000* was heading towards giving airport authorities a super priority for their debts, with one exception, as Binnie J. described at para. 70:

> The *CARs*, adopted pursuant to the *Aeronautics Act*, provide that an "operator" in respect of an aircraft "means the person that has possession of the aircraft as owner, lessee or otherwise" (s. 101.01(1)). 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* [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (*CCAA)*] application on November 8, 2001) and Inter-Canadian. (Once a titleholder reclaims possession, it becomes an operator in possession within s. 55(1) of *CANSCA*[*Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 (*CANSCA*)]. However, as its possession post-dates the charges, no personal liability is incurred on that account.)
>
> [Emphasis in original.]

16 The chambers judge emphasized the phrase "except any aircraft already repossessed by the titleholder prior to the CCAA", and stated: "That phrase says what it says." In this case, she held that AerCap repossessed the aircraft by 2:30 p.m. MDT, almost two hours before her detention order granted to the Authority. Therefore, the repossession took priority over the detention order in favor of the Authority, and she granted an order to set aside and vacate the detention order.

III. Issues

1 Did Zoom own or operate GZUM at the time of the detention order?

2 Was the detention remedy under section 9 of the *Airports Act* available to the Authority?

IV. Standard of Review

17 Both the Authority and AerCap agree that to the extent that this appeal deals with a question of law regarding the interpretation of statutes and case law the standard of correctness applies, in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) at para. 8. However, AerCap submits that the issue of whether

2009 CarswellAlta 1427, 2009 ABCA 306, [2009] A.W.L.D. 3954, [2009] A.W.L.D. 3955, 12 Alta. L.R. (5th) 1, [2009] 12 W.W.R. 417, 460 A.R. 341, 462 W.A.C. 341, 311 D.L.R. (4th) 624

AerCap had legal custody and control over GZUM at 2:30 pm MDT is a question of mixed fact and law that is reviewable only for a palpable and overriding error: *Housen* at para. 36.

V. Analysis

1. Did Zoom Own or Operate GZUM at the Time of the Order?

18 The Authority submits that the chambers judge failed to apply the definition of "registered owner" under s. 3(1) of the *Aeronautics Act*, which provides that a "registered owner" is "the person to whom a certificate of registration has been issued". The Authority argues that as long as the aircraft is registered in the name of the airline, it is still owned by the airline, and the airline is liable for the airport fees. As a result, because Zoom was still the registered owner of GZUM, at the time the detention order was granted, Zoom still "owned or operated" GZUM for the purposes of the detention remedy under section 9 of the *Airports Act*.

19 In addition, the Authority contends that while AerCap may have established some indicia of possession, it was not in complete control of GZUM at the time of the detention order because it was not entered in the Canadian Civil Aircraft Register and had no Certificate of Registration. Therefore, section 9 under the *Airports Act* still applied to Zoom.

20 The Authority notes that the definitions of "owner" and "operator" under the *CAR*s conflict with the definition of "registered owner" in the *Aeronautics Act*. Section 3(1) of the *Aeronautics Act* provides that a "registered owner" is the person to whom the Minister issues a certificate of registration for an aircraft, while the *CAR*s, at section 101.01, provide the following definitions:

> "operator", in respect of an aircraft, means the person that has possession of the aircraft as owner, lessee or otherwise; (utilisateur)
>
> "owner", in respect of an aircraft, means the person who has legal custody and control of the aircraft; (propriétaire).

21 The Authority argues that the *CAR*s are of limited interpretative value because they were enacted under the *Aeronautics Act*, four years after the enactment of the *Airports Act*, and were introduced for very specific purposes. It submits that *Canada 3000* supports the interpretation that the "registered owner" as defined in the *Aeronautics Act* is what is contemplated in the phrase "owned...by the person liable" in section 9 of the *Airports Act*.

22 More specifically, the Authority argues that the use of the term "registered owner", as distinct from "owner", can include circumstances where the "registered owner" is not "the person who has legal custody and control of the aircraft". The Authority points out that was the case on the facts of the *Canada 3000* decision itself. At the time the applications were brought for a detention remedy by the airport authorities, the aircraft of Canada 3000 had been grounded by an order of the Court, Canada 3000 had formally ceased operations, an assignment had been made in bankruptcy, and the board of directors of Canada 3000 had resigned. Many of the aircraft leases had terminated under their own conditions. The trustee had disclaimed any interest by Canada 3000. Yet, the aircraft registered to Canada 3000 remained subject to the detention remedy because Canada 3000 continued to be the "registered owner" and was, in every sense of the word, a bare registrant. In short, the Authority submits that the term "owned ... by a person liable" in section 9 means no more and no less than "registered ... to a person liable". It argues that, like the situation in *Canada 3000*, Zoom was a bare registrant, as long as GZUM was still registered to Zoom, and was the person liable when the detention order was obtained.

23 AerCap, on the other hand, submits that in *Canada 3000* the court held that prior repossession of an aircraft, in terms of "operatorship" and "ownership" of the aircraft, would prevent section 9 of the *Airports Act* from apply-

ing. It points to para. 67, where Binnie J. stated of section 9:

> According to these provisions, the airport authorities or NAV Canada (upon obtaining a court order) may take possession of an aircraft and detain it. The aircraft must be either "owned" or "operated" by a person who is liable to pay. Either is a sufficient basis for an application.

24 Further, AerCap contends that the chambers judge did not err in making reference to the *CAR*s to define "registered owner", as there is nothing in the *Aeronautics Act* to indicate to whom the Minister can issue a certificate of registration.

25 In addition to section 202.35, AerCap further points to section 202.36(1) of the *CAR*s, which provides:

> 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.

26 Thus, it submits that the loss of legal custody and control lead to a loss of owner status, including registered ownership. In this case, AerCap argues that once Skyservice took physical possession of the aircraft it became GZUM's operator. Further, once Skyservice took responsibility for the operation and maintenance of the aircraft, pursuant to *CAR*s' section 202.35(2), it took legal custody and control over GZUM and section 202.36(1) deemed it to be the registered owner. AerCap contends that the reflection of this on the registry list on September 2, 2008 was simply an administrative step. Therefore, given that Zoom was no longer the "owner" or "operator" of GZUM, section 9 of the *Airports Act* could not apply. That is not to say, however, that once this transfer of legal custody and control over GZUM occurred, AerCap was not responsible for ongoing airport services. On this, AerCap points out that it admitted, on questioning from the chambers justice, that it was liable for ongoing airport services incurred as a result of its possession and legal custody and control of the aircraft, and that the chambers justice later ordered AerCap to pay these related fees. Interestingly, the Authority did not oppose that position, and accepted payment from AerCap willingly.

27 We are of the view that in interpreting the meaning of the words "owned or operated" under section 9 of the *Airports Act*, the chambers judge did not err in failing to apply the definition of "registered owner" from section 3(1) of the *Aeronautics Act*, given that the *CAR*s provided definitions for "owner" and "operator" under section 101.01. This is especially so in keeping with the modern principle of statutory interpretation, which Binnie J. reiterated in *Canada 3000*, at para. 36, as: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (citing E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths,1983) at p. 87).

28 It should also be pointed out that keeping these statutory principles in mind, Binnie J. in *Canada 3000*, used the *CARs* as an interpretative aid at paras. 50, 55, and 70, when determining the meaning of "owner" for the joint and several liability provision under section 55(2) of the *CANSCA*, as well as determining the meaning of "operator" for the detention remedy under section 9 of the *Airports Act*.

29 In particular, Binnie J. went on to look at the broader legislative framework, to assist in determining the meaning of "owner" under s. 55(2) of *CANSCA* at paras. 55-56:

> The policy and practice throughout the federal regulatory scheme is to use the term "owner" to refer to the person in legal custody and control of the aircraft, not the legal titleholder. The *CAR*s, for example, define owner as "the person who has legal custody and control of the aircraft" (s. 101.01(1)). The *Aeronautics Act* refers only to "registered owners" and, under s. 4.4(5), only the operator or *registered* owner may face liability for charges imposed under that Act. Section 3(1) defines a registered owner as the person to whom a certificate of registra-

> tion has been issued and the *CAR*s make clear that an aircraft may only be registered by an owner who, again, must have legal custody and control of the aircraft; see ss. 202.15-202.17. Section 2(2) of *CANSCA* itself states that "[u]nless a contrary intention appears, words and expressions used in this Act have the same meaning as in subsection 3(1) of the *Aeronautics Act*." [Emphasis in original.]
>
> . . . . .
>
> It is common ground that, by virtue of ss. 202.15, 202.16 and 202.17 of the *CAR*s, an aircraft may only be registered in the Canadian Civil Aircraft Register by the "owner" of the aircraft as that term is defined under s. 101.01(1) of the *CAR*s, and that that person is the entity having legal custody and control of the aircraft.

30 Following Binnie J.'s approach in *Canada 3000*, the definition of "owner" and "operator" set out in section 101.01 of the *CAR*s provides a statutory context and legislative framework for section 9 of the *Airports Act*, in accordance with the modern principles of statutory interpretation. Similarly, section 9(5) of the *Airports Act* uses the same meaning for words and expressions as in the *Aeronautics Act*. Given that the *Aeronautics Act* only provides a definition for "registered owner", the *CAR*s, which are regulations under the *Aeronautics Act*, should be referred to for the definition of "owner" and "operator". If the definition of "registered owner" were intended to apply in section 9 of the *Airports Act*, then, using the presumption of consistent expression, Parliament would have used the same words to give the same meaning, by qualifying "owned" in section 9 of the *Airports Act* with "registered". In addition, Binnie J.'s emphasis on the term "registered" when it preceded "owner" at paras. 55 and 70 in the *Canada 3000* decision, suggests that different meanings are intended for "registered owner" and "owner", and that the latter is a broader definition, which the former is indicia of. Further, the definition of "owner" under the *CAR*s fills the legislative gap, and explains to whom a certificate of registration can be issued.

31 In applying the definition of "owner" and "operator" under section 101.01 of the *CAR*s to section 9 of the *Airports Act*, the chambers judge's finding that Zoom was no longer the owner of GZUM is well supported. We find no palpable and overriding error that would warrant appellate intervention on that point. 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 *CAR*s. This cancelled Zoom's registered ownership status and allowed AerCap to became 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 *CAR*s. Further, AerCap became the operator of GZUM, when it was repossessed through Skyservice. Therefore, at the time of the detention order, Zoom no longer "owned or operated" GZUM.

2. Was the detention remedy under s. 9 of the Airports Act available to the Authority?

32 The Authority submits that the chambers judge erred in undertaking a priority analysis, because the Supreme Court in *Canada 3000* rejected this approach and held that the detention remedy was still effective despite the repossession interests of lessors. Further, the Authority argues that the Supreme Court in *Canada 3000* did not provide an exception to the detention remedy by permitting a lessor to exercise its rights of repossession. It points to para. 63 of *Canada 3000*where Binnie J. stated:

> On the other hand, Nuss J.A., dissenting in the Quebec Court of Appeal, put the contrary position:
>
> > 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 avail. [para. 126]

I believe that Nuss J.A. is correct on this point.

33 The Authority submits that the detention remedy is not a race to repossess the aircraft; rather, it takes the position that the owner of an aircraft is an owner until the public act of deregistration occurs. It further submits that the phrase "except any aircraft already repossessed by the titleholder prior to the CCAA application" limits the exception to situations where a CCAA order has been issued, which is not applicable in this case.

34 AerCap submits that the fact that *Canada 3000* involved CCAA proceedings was irrelevant because the lessors sought to repossess the aircrafts after the CCAA stay was imposed and after the authorities applied for seizure orders. According to the terms of the aircraft leases, the aircraft leases were deemed to be terminated as of the date of the CCAA order. However, the aircraft lessors took no active steps to repossess the aircraft, and any such steps would have been stayed by the CCAA order. As a result, Canada 3000 and Inter-Canadian, the lessees who owed debts, remained in possession and legal custody and control of the aircraft.

35 Based on our reading of para. 70 of the *Canada 3000* decision, we 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 Act*. Despite the Authority's submissions, the fact that *Canada 3000* involved CCAA proceedings does not prevent the application of the exception to this case. The significance of the CCAA proceedings in *Canada 3000* was that once Canada 3000 applied for protection under the CCAA, on November 8, 2001, all proceedings by creditors were stayed which operated as an interim bar to the lessor's repossession rights pursuant to section 11.31 of the CCAA. Therefore, the effect of the CCAA protection was that it precluded lessors from repossessing the aircraft under the terms of the lease before the detention order was granted.

36 What distinguishes this case from *Canada 3000* is that both Canada 3000 and Inter-Canadian, the lessees and debtors, still owned their aircraft at the time the detention order was granted. More particularly, with respect to Canada 3000, the lessors had sought to reclaim possession of the aircraft after the CCAA stay had been imposed and after the airport authorities had applied for seizure orders. In this case, at the time of the detention order, unlike in *Canada 3000*, AerCap had already taken active steps to obtain legal control and custody. In fact, it had repossessed GZUM and was, therefore, its owner, thus falling into the exception contemplated by Binnie J. at para. 70.

37 The Authority raises concerns, on the basis of policy, that by holding AerCap's termination of the lease changed the ownership of GZUM, and precluded the Authority's detention remedy from operating, the court has created a race to repossess the aircraft. This suggestion overstates the situation. No race will take place if the Authority has taken the precaution of obtaining prior security. Failing that, the Authority will be aware that its detention claim will be limited if a lessor has repossessed the aircraft prior to an order authorizing its seizure and detainment. The statute does not require that the lessor provide notice to the Authority prior to repossessing the aircraft. Here, AerCap was required to pay the fees and charges of the Authority in connection with the aircraft's landing on August 27, 2008. However, the Authority was not entitled to detain the aircraft for prior fees and charges incurred by Zoom before that date.

38 The Authority submits the chambers judge erred in using a priority analysis. Although the chambers judge used the term "priority" in her judgment, it is clear upon closer examination that she did not use a priority analysis, or a ranking of debts, when coming to her conclusion. The chambers judge merely determined that Binnie J., in *Canada 3000* at para. 70, was describing an exception to the operation of the detention remedy when an aircraft has already been repossessed by a lessor. She held that the case before her fell into this exception. By using the word "priority" in her decision, the chambers judge was only referring to the fact that AerCap's repossession took place before the detention order, and that the detention remedy, therefore, could not operate as the requirement that the

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aircraft be "owned or operated by the person liable to pay," under section 9 of the *Airports Act*, was not met.

39 Furthermore, we note the Authority could have availed itself of the remedies set out in paras. 5-6 (see pages A 30-31 from the Extracts of Key Evidence) of the Agreement for the use of facilities, equipment, systems, information and services, had it entered into such an Agreement with Zoom and obtained security from it prior to commencing its operation as an aircraft carrier in Canada. For whatever reason, the Authority did not obtain any security from Zoom prior to its use of the Calgary airport facilities and services.

VI. Conclusion

40 In conclusion, we find that appellate intervention is not warranted. Using the modern principle of statutory interpretation, the *CAR*s definitions for "owner" and "operator" apply to interpret the phrase "owned or operated" under section 9 of the *Airports Act*. As a result, Zoom no longer "owned or operated" GZUM at the time of the detention order, because it had already transferred legal custody and control over to AerCap when Skyservice, as agent, repossessed and took responsibility for GZUM , with Zoom's acknowledgment. This was the finding of the chambers judge upon the evidence before her. We are not persuaded that she made any palpable and overriding error in making this finding of mixed fact and law.

41 Given that Zoom no longer owned or operated GZUM at the time of the detention order, the detention remedy sought by the Authority at that time (under section 9 of the *Airports Act*) was not available. The repossession of GZUM made AerCap its owner with the result that the exception to the application of the detention remedy, described in *Canada 3000*, applied.

42 For all of the foregoing reasons, the appeal is dismissed.

***Ronald Berger J.A.* (dissenting):**

43 I have read in draft form the reasons for judgment of the majority. I respectfully dissent from their view of the matter.

44 The issue in the present appeal is whether the purported repossession of the subject aircraft by the lessor invalidates the detention order granted by Kent J.

45 The central dispute in *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.) was whether legal titleholders are jointly and severally liable for outstanding civil air navigation charges incurred by the registered owners and operators of two failed airlines. The Court held that since the legal titleholders are not "owners" within the meaning of s. 55 of the *Civil Air Navigation Services Commercialization Act*, S.C. 1966, c. 20 ("*CANSCA*"), the legal titleholders are not liable. The Court added that although the legal titleholders are not directly liable for the charges due to the service providers, NAV Canada and the airport authorities were entitled to orders detaining the aircraft pursuant to s. 56 of *CANSCA* and s. 9 of the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c.5 ("*Airports Act*").

46 The following principles emerge from the *Canada 3000* case:

> 1. The ***Aeronautics Act***, R.S.C. 1985, c. A-2, the ***Airports Act*** and ***CANSCA*** are Federal Statues that create a united aeronautics regime.
>
> 2. Parliament put its mind to aircraft leasing agreements and decided that the person in possession of the aircraft is the owner for the purposes of user charges.

3. Section 32 of ***CANSCA*** authorizes NAV Canada to impose charges only on a "user" which s. 2(1) of the Act defines as "an aircraft operator".

4. The Court made clear that the legislative regime's use of the word "owner" is throughout a reference to the person in legal custody and control of the aircraft, not the legal titleholder.

5. Exclusion of legal titleholders is consistent with Parliament's manifest intent to limit the scope of liability to "users" of NAV Canada's Civil Air Navigation Services.

6. In restricting "owner" to those in possession and legal custody and control of the aircraft, s. 55(2) of ***CANSCA*** is brought into conformity with the meaning of the word "owner" throughout the interlocking Statues that regulate aeronautics. Paragraph 55 of ***Canada 3000*** reads as follows:

> The policy and practice throughout the federal regulatory scheme is to use the term 'owner' to refer to the person in legal custody and control of the aircraft, not the legal titleholder. The *CARs* [Canadian Aviation Regulations, SOR 96/433], for example, define owner as 'the person who has legal custody and control of the aircraft' (s. 101.01(1)). The *Aeronautics Act* refers only to 'registered owners' and, under s. 4.4(5), only the operator or *registered* owner may face liability for charges imposed under that Act. Section 3(1) defines a registered owner as the person to whom a certificate of registration has been issued and the *CARs* make clear that an aircraft may only be registered by an owner who, again, must have legal custody and control of the aircraft; see ss. 202.15 to 202.17. Section 2(2) of *CANSCA* itself states that '[u]nless a contrary intention appears, words and expressions used in this Act have the same meaning as in subsection 3(1) of the *Aeronautics Act*.' I appreciate that arguments are available to counter these points but in my view the legal titleholders have the better side of the debate.
>
> [emphasis in original]

7. The factual underpinnings in the inter-Canadian case were different from those in Canada 3000. In regard to the former, the detent ion remedies were applied for well before the assignment in bankruptcy. In the latter, the detention remedies were applied for while the CCAA stay was in effect and Canada 3000 remained the registered owner of the aircraft. The Court held that the aircraft were legitimate targets of the detention remedies because 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 date.

47 In the result, the Court has made clear that ss. 56(1), (2) and (3) of *CANSCA* and s. 9 of the *Airports Act* permits an airport authority to take possession of an aircraft and detain it. The aircraft must be either "owned" or "operated" by a person who is liable to pay. Either is a sufficient basis for an application.

48 While I do not quarrel with the factual matrix recited in the majority judgment, the following time line and factual underpinnings, in my view, are of particular significance:

• On August 26, 2008, AerCap terminated its lease with Zoom by delivering an aircraft lease termination to Zoom with copies to Transport Canada Aviation and Zoom's insurance broker.

Extracts of key evidence A63, Donald Gray Affidavit #1, para. 8.

• At 1.00 p.m. on August 27, 2008, Barry Kendrick, a Skyservice Airlines employee, received confirmation that AerCap had retained Skyservice to repossess GZUM. He was instructed to "embark the Aircraft and ... to seize

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... its Certificate of Airworthiness, Certificate of Registration, and all log books."

Extracts of Key Evidence A143, Statement of Barry Kendrick, para. 3.

• When the aircraft arrived at the gate at 2.13 p.m. on August 27, 2008, Mr. Kendrick made his way to the flight deck and asked the First Officer to leave so that he could talk to the Captain privately. He advised the Captain that the aircraft would not be released for service as it was being repossessed by Skyservice as agent for the lessor. Mr. Kendrick collected the Certificate of Air Worthiness, Certificate of Registration and technical log books.

Extracts of Key Evidence A143, Statement of Barry Kendrick, para. 4.

• The Captain was not aware of the planned repossession, nor was the Calgary Airport Authority.

Extracts of Key Evidence A143, Statement of Barry Kendrick, para. 5.

Robin Eng, Director of Accounting Services for the Calgary Airport Authority, deposed that maintenance personnel such as Mr. Kendrick routinely board the aircraft upon arrival at the gate.

Extracts of Key Evidence A179, Robin Eng Affidavit No. 2, para. 5

• The detention order was granted by Kent J. at 4.15 p.m.

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• Immediately after the detention order was signed by Kent J., Servisair, who regularly acted as ground handlers for Zoom, contacted the Control Tower to get taxi instructions for a remote parking location. Servisair towed the aircraft while the Skyservice engineer "rode the brakes".

Extracts of Key Evidence A144, Statement of Barry Kendrick, para. 8

• Between the hours of 5.20 and 6.00 p.m., Scott Klemetski, Bailiff, seized GZUM acting on behalf of the Calgary Airport Authority in reliance upon Kent J.'s detention order.

Extracts of Key Evidence A55, Bailiff's Report Addendum.

The Bailiff posted the Notice of Seizure in a conspicuous place on the aircraft.

• The Calgary Airport Authority, as the Notice of Seizure reveals, seized the aircraft "and all Aircraft logbooks, Radios, Manuals, Instrumentation, and All Aircraft Attachments, Engines or parts removed from the Aircraft."

Extract of Key Evidence A56

• *Between the hours of 5.30 and 6.00 p.m., the Calgary Airport Authority instructed Servisair Inc. to push GZUM back from the terminal building and to move the aircraft to parking site 121. Servisair complied.*

Extracts of Key Evidence A178, Robin Eng Affidavit #2, paras. 2(a) and (b) and 3; Statement of Barry Kendrick, Extracts of Key Evidence A143-A145.

• The Technical Log Books were returned to the aircraft and remained on the flight deck, all with the concurrence of Mr. Kendrick, the Sheriff and the Calgary Airport Authority.

Extracts of Key Evidence A144, Statement of Barry Kendrick, para. 11.

• To this point in time, Mr. Kendrick did not reveal that he had earlier purported to repossess the aircraft in his capacity as agent for AerCap.

Extracts of Key Evidence A179, Robin Eng Affidavit #2, para. 4.

In chambers on September 2, 2008, counsel for CAA explained Mr. Eng's evidence in his supplementary affidavit as follows:

"What Mr. Eng is recounting there is that they had a period of time of interaction, and at no time during that time did Mr. Kendrick ever indicate that he was acting for Aercap, or as an agent of Aercap, or that Aercap had repossessed the aircraft"

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Counsel for AerCap took no issue with that and replied as follows:

"Why would we give advance notice of any sort that we're in the process of seizing it? I mean, unfortunately, Canada 3000 has created this race to repossess. We didn't know the events were unfolding at the courthouse, as they did on Wednesday the 27th, nor did my friend know what we were doing. But you're moving as quickly as you can to repossess the aircraft, and, obviously, we're not going to give advance notice to anyone that that's what we're doing."

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49 Mindful of the foregoing, I respectfully disagree with my colleague's interpretation of the thrust of Binnie J.'s statement of the law in para. 70 of *Canada 3000*. It reads as follows:

The *CARs*, adopted pursuant to the *Aeronautics Act*, provide that an 'operator' in respect of an aircraft 'means the person that has possession of the aircraft as owner, lessee or otherwise' (s. 101.01(1)). 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.

[emphasis underlined]

50 The chambers judge saw her task as one of interpreting the words of Binne J. At p. 7 of her reasons she stated:

My reading of the Canada 3000 judgment, except for one paragraph, is that the Supreme Court of Canada, after balancing the obligations of the airport authority with the ability of titleholders to manage risk came down on the side of the airport authority. It appears that the Court was heading towards giving the airport authority some

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> sort of super priority or priority for its debts owed.
>
> [emphasis added]

51 In her ultimate conclusion she found:

> In this case, AerCap had repossessed the plane by 2:30, one-and-a-half hours, almost two hours before my order. That, in my view, takes priority over my detention remedy order.
>
> [emphasis added]

52 In so holding, the chambers judge mistakenly undertook a ranking of personal property claims. Recall that the Supreme Court of Canada in *Canada 3000* specifically rejected the proposition that the right of repossession enjoys "priority" over the detention remedy.

53 The Ontario Court of Appeal had stated in *Canada 3000 Inc., Re* (2004), 183 O.A.C. 201, 235 D.L.R. (4th) 618 (Ont. C.A.) at para. 157:

> In other words, even if the remedy envisaged by the Detention Provisions is granted by court order, thereby entitling the applicable authority to seize and detain aircraft that are the subject of the order, a claim by the legal titleholders to the detained aircraft may bring that detention right to an end. I believe that the contextual and purposive considerations applicable to the Detention Provisions establish that the seizure and detention remedies, if granted and exercised, do not create a right concerning the Aircraft ranking in priority to the interests of the Lessors in the Aircraft in the face of a claim by them for repossession and recovery of the Aircraft.

The Supreme Court overruled the Ontario Court of Appeal on this very point.

54 The focus by the chambers judge on the few bracketed words of Binnie J. in para. 70 of the decision and her interpretation of them, was, in my view, an error.

55 The emphasized portion of the Court's reasons must be considered in the context of the particular facts in *Canada 3000*. None of the lessors had taken any steps to repossess aircraft in either case prior to the commencement of insolvency proceedings. In the Inter-Canadian proceeding, the Authorities had applied for a detention remedy before the registered owner filed a notice of intention to make a proposal in bankruptcy. In contrast, the Authorities only applied for the detention remedy against the Canada 3000 aircraft after a *CCAA* order had been granted. The reference in the bracketed portion to the date of the *CCAA* order limits the exception to the unique legal situation that arises upon the issuance of a *CCAA* order. If Binnie J.'s objective had been to set up the conditions for a "foot race" as advocated by the Respondent, he could have stated: "except any aircraft already repossessed by the titleholder prior to the application for a detention remedy". He did not.

56 The particular legal ramifications that arise where a repossession occurs prior to a *CCAA* order explain why it was necessary for the Supreme Court to create this exception. The legal effect of the *CCAA* order can be viewed from two perspectives: one of legal process and the other of property rights. As a matter of process, an intervening *CCAA* order opens a broad jurisdiction in a *CCAA* court to restructure the affairs of an insolvent airline. For those situations, it is understandable that the Supreme Court would not want to create an automatic rule whereby a detention remedy exercised after a *CCAA* order is made would affect a repossession of the aircraft by the titleholder before *CCAA* proceedings were brought. The inclusion of the bracketed portion has left a *CCAA* court free to fashion the appropriate remedy based on the particular circumstances that come before it.

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57 In the instant appeal, there was no *CCAA* filing by Zoom. For that reason alone the bracketed portion of Binnie J.'s reasons in para. 70 is inapplicable to the present case.

58 I acknowledge that on the facts of the instant appeal, an arguable disconnect emerges between the registered ownership and ownership premised upon "custody and control". It is trite that when the aircraft was in flight from Paris it remained in the "custody and control" of Zoom. When the aircraft landed, insofar as the Calgary Airport Authority was concerned, there had been no change in ownership in any respect. That is to say, the Register continued to show Zoom as the registered owner and as far as the Authority was concerned, Zoom was still operating the aircraft and, accordingly, was in "custody and control" of it. That did not change when the aircraft arrived in Calgary. In fact, the lessor and its appointed agent took great pains to keep the Calgary Airport Authority in the dark. Skyservice and its employee Barry Kendrick failed to notify the Authority, although there was ample opportunity to do so, that Skyservice had acted as agent for the lessor and had repossessed the aircraft on its behalf. Indeed, after the Bailiff had seized the aircraft on behalf of the Authority, Mr. Kendrick stood mute regarding his role as agent for the lessor. Moreover, the air-side handlers that were servicing the aircraft were not informed that it had been repossessed by the lessor. Indeed, the aircraft was moved on the tarmac on the basis that Zoom was still in "custody and control" of it. I respectfully disagree with my colleagues' assertion that AerCap became the owner of GZUM by taking "complete responsibility for the operation and maintenance of the aircraft" pursuant to ss. 101.01 and 202.35(3) of *CARs.* It cannot be said that the lessor was in complete or in exclusive control of the aircraft.

59 For the purposes of s. 9, there is no gap during which an aircraft is exempt from the detention remedy on the basis that the registered owner has lost some part of its custody and control while a new registered owner has yet to announce itself. Registration of the named "owner" of an aircraft in the Canadian Civil Aviation Register requires no relationship between the beneficial ownership and the registered ownership.[FN1] For the purposes of the detention remedy, an aircraft continues to be "owned" by the airline that is liable for the airport fees so long as it is registered in the name of the airline and maintains a measure of operational control over it - albeit on the tarmac. That status is unaffected by the private assertion on the part of a lessor of its purported right of repossession.

60 Of particular significance is that Skyservice (Mr. Kendrick) complied with the Calgary Airport Authority's direction to move the aircraft from the terminal to parking site 121. As agent for the lessor, that amounted, in my view, to a surrender of custody and control over the aircraft in favour of the Authority. That is to say, possession of the aircraft was relinquished by the lessor's lawful agent in favour of the detention order and seizure by the Calgary Airport Authority.

61 In addition to the foregoing, it seems to me that the practicalities also mitigate in favour of the Appellant's position. Were it otherwise, private acts and contractual arrangements entered into by a lessor without the knowledge of airport authorities, would have the effect of removing aircraft from the reach of the detention remedy and would erode the legislative choice to allow for detention pursuant to s. 9. Airport authorities across the country would be obliged to discount the efficacy of registration and would be bound to engage in never-ending inquiries to determine whether a lessor had terminated the lease of an aircraft in transit from one City to another so as to facilitate a precipitous repossession of the aircraft without notice to the authority. Simply put, if the majority opinion carries the day, the race to repossession/detention would exacerbate the efficient operations and movement of aircraft at airports across the country.

62 For these reasons, I would allow the appeal and restore the detention order of Kent J.

Appeal dismissed.

FN1 Donald H. Bunker, "Canadian Aviation Finance Legislation", 1989, McGill University, Montreal, p. 764 [Authorities, Tab 3]. Also see the "Form of Confirmation" found in the leasing documents attached to Gray Affidavit #1, Exhibit 2 [Extracts of Key Evidence, page A108]

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TAB C

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Billings Family Enterprises Ltd. v. Canada (Minister of Transport)

Billings Family Enterprises Ltd., Applicant and The Minister of Transport, Respondent

The Attorney General of Canada, Applicant and Brant Paul Billings, Respondent

The Attorney General of Canada, Applicant and Challenger Inspections (2006) Ltd. formerly Billings Family Enterprises Ltd., Respondent

Federal Court

S. Harrington J.

Heard: November 15-16, 2007
Judgment: January 7, 2008
Docket: T-2272-06, T-2295-06, T-2297-06

Counsel: Mr. Steven C. Postman, for Applicant

Mr. Leslie G. Dellow, for Respondent

Subject: Public; Civil Practice and Procedure

Transportation --- Aviation and aeronautics — Offences under aeronautics legislation — Miscellaneous

Minister of Transport ("minister") determined that B Ltd. was registered owner of two helicopters and authorized 10 flights when maintenance inspection of tail rotor pitch control bearing was overdue — B Ltd. brought application for judicial review of finding that it had legal custody and control of helicopters — Minister imposed penalty of $5,000 for each of 10 flights which was reduced on review to $4,000, and further reduced on appeal to $500, and minister brought application for judicial review of $500 penalty — Application by B Ltd. with respect to maintenance inspection was dismissed since minister showed that two helicopters were in legal custody and control of B Ltd. — Application by minister with respect to maintenance inspection penalty was granted and matter was referred back to appeal panel for re-determination since only one inspection was missed — Minister imposed penalty of $5,000 on B Ltd. for operating air transport service on each of six flights without holding required air operator certificate which was quashed on review and then reinstated on appeal, and B Ltd. brought application for judicial review of that decision — Application by B Ltd. with respect to operating air transport service was granted with respect to one flight and dismissed with respect to five flights, and $5,000 penalty with respect to each of five flights remained in place — Minister established that B Ltd. was registered owner of helicopters and evidence showed that

B Ltd. operated commercial air service except with respect to one flight where log book showed passenger was member of flight crew — Minister determined that B who was controlling mind behind B Ltd. operated air transport service on three occasions without holding air operator certificate which was upheld on review and dismissed on appeal, and minister brought application for judicial review of that decision — Application by minister with respect to B was dismissed since B was employee, did not have custody and control of helicopters in his own name, and was not personally operating air transport service.

Transportation --- Aviation and aeronautics — Practice and procedure — Judicial review

Minister of Transport ("minister") determined that B Ltd. was registered owner of two helicopters and authorized 10 flights when maintenance inspection of tail rotor pitch control bearing was overdue — B Ltd. brought application for judicial review of finding that it had legal custody and control of helicopters — Minister imposed penalty of $5,000 for each of 10 flights which was reduced on review to $4,000, and further reduced on appeal to $500, and minister brought application for judicial review of $500 penalty — Application by B Ltd. with respect to maintenance inspection was dismissed since minister showed that two helicopters were in legal custody and control of B Ltd. — Application by minister with respect to maintenance inspection penalty was granted and matter was referred back to appeal panel for re-determination since only one inspection was missed — Minister imposed penalty of $5,000 on B Ltd. for operating air transport service on each of six flights without holding required air operator certificate which was quashed on review and then reinstated on appeal, and B Ltd. brought application for judicial review of that decision — Application by B Ltd. with respect to operating air transport service was granted with respect to one flight and dismissed with respect to five flights, and $5,000 penalty with respect to each of five flights remained in place — Minister established that B Ltd. was registered owner of helicopters and evidence showed that B Ltd. operated commercial air service except with respect to one flight where log book showed passenger was member of flight crew — Minister determined that B who was controlling mind behind B Ltd. operated air transport service on three occasions without holding air operator certificate which was upheld on review and dismissed on appeal, and minister brought application for judicial review of that decision — Application by minister with respect to B was dismissed since B was employee, did not have custody and control of helicopters in his own name, and was not personally operating air transport service.

Cases considered by *S. Harrington J.*:

Air Nunavut Ltd. v. Canada (Minister of Transport) (2000), 24 Admin. L.R. (3d) 267, 2000 CarswellNat 1479, 187 F.T.R. 16, [2001] 1 F.C. 138, 2000 CarswellNat 3285 (Fed. T.D.) — considered

Asiatic Petroleum Co. v. Lennard's Carrying Co. (1915), [1914-15] All E.R. Rep. 280, 13 Asp. Mar. Law Cas. 81, 31 T.L.R. 294, [1915] A.C. 705 (U.K. H.L.) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — followed

C.U.P.E. v. Ontario (Minister of Labour) (2003), 2003 CarswellOnt 1803, 2003 SCC 29, 2003 CarswellOnt 1770, 2003 C.L.L.C. 220-040, [2003] 1 S.C.R. 539, (sub nom. *Canadian Union of Public Employees v. Ontario (Minister of Labour)*) 173 O.A.C. 38, (sub nom. *Canadian Union of Public Employees v. Ontario (Minister of Labour)*) 66 O.R. (3d) 735 (note), 226 D.L.R. (4th) 193, (sub nom. *Canadian Union of Public Employees v. Ontario (Minister of Labour)*) 304 N.R. 76, 50 Admin. L.R. (3d) 1 (S.C.C.) — referred to

Canada (Attorney General) v. Woods (2002), 2002 CarswellNat 3466, 2002 CFPI 928, 223 F.T.R. 298, 2002 FCT 928, 2002 CarswellNat 2492 (Fed. T.D.) — considered

Canada (Attorney General) v. Yukon (2006), 2006 CarswellNat 3584, 2006 FC 1326, 2006 CF 1326, 2006 CarswellNat 5351 (F.C.) — considered

Canada (Minister of Transport) v. Wyer (1988), 1988 CarswellNat 1272 (Can. Civ. Aviation Trib.) — considered

Kosmopoulos v. Constitution Insurance Co. of Canada (1987), 22 C.C.L.I. 296, [1987] 1 S.C.R. 2, (sub nom. *Constitution Insurance Co. of Canada v. Kosmopoulos)* 34 D.L.R. (4th) 208, 74 N.R. 360, 21 O.A.C. 4, (sub nom. *Kosmopoulos v. Constitution Insurance Co.)* 36 B.L.R. 233, 1987 CarswellOnt 132, [1987] I.L.R. 1-2147, 1987 CarswellOnt 1054 (S.C.C.) — referred to

Main Rehabilitation Co. v. R. (2004), 2004 FCA 403, (sub nom. *Main Rehabilitation Co. v. Minister of National Revenue)* 329 N.R. 248, 2004 D.T.C. 6763, 2004 CarswellNat 4401, [2005] 1 C.T.C. 212, 2004 CarswellNat 5011, 2004 CAF 403, 247 D.L.R. (4th) 597 (F.C.A.) — considered

Maple Lodge Farms Ltd. v. Canada (1982), [1982] 2 S.C.R. 2, 1982 CarswellNat 484, 1982 CarswellNat 484F, 44 N.R. 354, 137 D.L.R. (3d) 558 (S.C.C.) — referred to

NAV Canada c. Wilmington Trust Co. (2006), 2006 CarswellQue 4890, 2006 CarswellQue 4891, 2006 SCC 24, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.)* 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc., (Bankrupt), Re)* 349 N.R. 1, (sub nom. *Canada 300 Inc., Re)* [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc. (Bankrupt), Re)* 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re)* 269 D.L.R. (4th) 79 (S.C.C.) — considered

Paul v. British Columbia (Forest Appeals Commission) (2003), 2003 CarswellBC 2432, 2003 CarswellBC 2433, 2003 SCC 55, 5 Admin. L.R. (4th) 161, 111 C.R.R. (2d) 292, 18 B.C.L.R. (4th) 207, [2003] 2 S.C.R. 585, 231 D.L.R. (4th) 449, [2003] 11 W.W.R. 1, [2003] 4 C.N.L.R. 25, 3 C.E.L.R. (3d) 161 (S.C.C.) — considered

Prassad v. Canada (Minister of Employment & Immigration) (1989), 93 N.R. 81, 57 D.L.R. (4th) 663, [1989] 1 S.C.R. 560, 36 Admin. L.R. 72, 7 Imm. L.R. (2d) 253, 1989 CarswellNat 128, 1989 CarswellNat 693, [1989] 3 W.W.R. 289 (S.C.C.) — considered

Q. v. College of Physicians & Surgeons (British Columbia) (2003), 2003 SCC 19, 2003 CarswellBC 713, 2003 CarswellBC 743, 11 B.C.L.R. (4th) 1, 223 D.L.R. (4th) 599, 48 Admin. L.R. (3d) 1, (sub nom. *Dr. Q., Re)* 302 N.R. 34, [2003] 5 W.W.R. 1, (sub nom. *Dr. Q. v. College of Physicians & Surgeons of British Columbia)* [2003] 1 S.C.R. 226, (sub nom. *Dr. Q., Re)* 179 B.C.A.C. 170, (sub nom. *Dr. Q., Re)* 295 W.A.C. 170 (S.C.C.) — considered

R. v. Wholesale Travel Group Inc. (1991), 1991 CarswellOnt 117, 4 O.R. (3d) 799 (note), 1991 CarswellOnt 1029, 67 C.C.C. (3d) 193, 130 N.R. 1, 38 C.P.R. (3d) 451, 8 C.R. (4th) 145, 49 O.A.C. 161, 7 C.R.R. (2d) 36, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161 (S.C.C.) — distinguished

Salomon v. Salomon & Co. (1896), [1897] A.C. 22, [1895-99] All E.R. Rep. 33, 66 L.J. Ch. 35, 13 T.L.R. 46, 45 W.R. 193 (U.K. H.L.) — referred to

Sierra Fox Inc. v. Canada (Federal Minister of Transport) (2007), 2007 FC 129, 2007 CarswellNat 249, 2007 CarswellNat 3841, 2007 CF 129 (F.C.) — considered

Statutes considered:

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

Generally — referred to

s. 3(1) "commercial air service" — considered

s. 3(1) "hire or reward" — considered

s. 3(1) "registered owner" — considered

s. 4.2 [en. R.S.C. 1985, c. 33 (1st Supp.), s. 1] — referred to

s. 7.3(1)(g)(ii) [en. R.S.C. 1985, c. 33 (1st Supp.), s. 1] — referred to

s. 7.6(1) [en. R.S.C. 1985, c. 33 (1st Supp.), s. 1] — considered

ss. 7.7-8.2 — considered

s. 8 — referred to

s. 8.1(3) [en. R.S.C. 1985, c. 33 (1st Supp.), s. 1] — considered

s. 8.4(3) [en. R.S.C. 1985, c. 33 (1st Supp.), s. 1] — considered

s. 27 — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 7 — considered

Federal Courts Act, R.S.C. 1985, c. F-7

Generally — referred to

s. 18 — referred to

Transportation Appeal Tribunal of Canada Act, S.C. 2001, c. 29

Generally — referred to

Regulations considered:

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

Canadian Aviation Regulations, SOR/96-433

Generally — referred to

s. 101.01(1) "air transport service" — considered

s. 101.01(1) "passenger" — considered

s. 202.35 — referred to

s. 202.35(2) — considered

s. 605 — considered

s. 605.84 — referred to

s. 605.84(1)(c)(i) — considered

s. 700.02(1) — considered

s. 703.07 — considered

APPLICATIONS by Minister of Transport for judicial review of various decisions; CROSS-APPLICATIONS by air transport company for judicial review of various decisions.

***S. Harrington J.*:**

1 These three intertwined judicial reviews concern one man, two helicopters, three corporations and nineteen alleged contraventions of the *Canadian Aviation Regulations* under the *Aeronautics Act*. It is common ground that 13 of the 19 contraventions occurred. The defence on those 13 belongs more to corporate law than it does to aeronautics. The defence is that the contraventions were committed by someone else, a related corporation which, for the flights in question, was operating the helicopters which were then in its possession, legal custody and control. This defence succeeded for the individual who was an officer and director as well as the alter ego of the corporations. It did not succeed for the corporation which was listed as the registered owner of the helicopters. There are three groups of alleged contraventions which must be segregated, and analyzed.

Airworthiness Directive

2 The Minister of Transport was of the view that Billings Family Enterprises Ltd. (BFEL), the registered owner of the two helicopters, authorized 10 flights while the helicopters were in its "legal custody and control", at a time when a required maintenance inspection of a tail rotor pitch control bearing was overdue, the whole in contravention of section 605.84 of the *Canadian Aviation Regulations* (CARs). He imposed a penalty of $5,000 for each of the 10 flights. On review, the Transportation Appeal Tribunal of Canada (TATC) agreed that it was BFEL, now known as Challenger Inspections (2006) Ltd., which committed the contraventions, but reduced the penalty to $4,000 for each of the 10 flights. On appeal therefrom, the TATC's three-person Appeal Panel upheld the finding on the contraventions, but further reduced the penalty to $500 for each of the 10 flights.

3 This has led to two judicial reviews. In T-2272-06, BFEL seeks to set aside the finding that it was in legal custody and control of the two helicopters. In T-2297-06, the Minister seeks judicial review of the $500 penalty. He submits that the $4,000 penalty for each of the 10 flights should be reinstated.

Air Transport Service/BFEL

4 The Minister was further of the view that BFEL operated an air transport service on six occasions without holding the air operator certificate required by CAR 700.02. He imposed a penalty of $5,000 for each of the six flights.

5 On first review, which took the form of a hearing *de novo*, the TATC quashed the Minister's decision on the ground that it was not BFEL which operated the air transport service. However, the TATC's Appeal Panel maintained the Minister's appeal and reinstated his decision both on liability and penalty.

6 BFEL seeks a judicial review under court docket number T-2272-06. It denies it was operating an air transport service. In the alternative, its position is that nobody was operating an air transport service on the flights in question. In any event, it submits the penalty is too high.

Air Transport Service/Brant Paul Billings

7 Finally, the Minister took the position that Brant Paul Billings, the man behind BFEL, had personally on three occasions operated an air transport service without holding the required air operator certificate. His pilot's licence was suspended for 14 days for each of the three contraventions. On review, the Minister's decision was upheld. Mr. Billings appealed that decision and succeeded before the TATC's Appeal Panel, which dismissed the charges against him. The Minister seeks a judicial review of that decision under docket T-2295-06.

8 Mr. Billings and BFEL complain about the conduct of the review hearing. Certificates were allowed in as evidence without their being given an opportunity to cross-examine the maker thereof, and the member failed to take proper account of a motion made at the close of the Minister's case to dismiss on the grounds of no evidence. They add that their liberty rights under section 7 of the Charter were violated.

The Corporate Structure

9 The tactics of the parties were driven to some extent by their perception of the burden of proof, and so the record is not as complete as it could have been. Records from the British Columbia registry were filed with respect to the three "Challenger" corporations.

10 The registered owner of the two helicopters is now known as Challenger Inspections (2006) Ltd. To avoid confusion, I will refer to it under its name at the time the events in question took place in 2004; Billings Family Enterprise Ltd. or BFEL. Brant Paul Billings is the president and a director thereof. The British Columbia registry does not give shareholding details.

11 The second company is Challenger Helicopters Ltd. Mr. Billings is also the president and director of that corporation. The third is Challenger Inspections Ltd. Mr. Billings is its president, secretary and director.

12 Mr. Billings, who was considered to be an honest and forthright witness, readily called the companies his own. Of course he was speaking as a layman, not as a corporate lawyer. There is no doubt, however, that he was the directing mind behind the three corporations.

13 As Viscount Haldane said in *Asiatic Petroleum Co. v. Lennard's Carrying Co.*, [1915] A.C. 705 (U.K. H.L.) at page 713

> My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

14 Nevertheless, a corporation is a person in law, distinct from its officers, directors and shareholders (*Salomon v. Salomon & Co.* (1896), [1897] A.C. 22 (U.K. H.L.), *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2, 34 D.L.R. (4th) 208 (S.C.C.)).

15 The defence of BFEL and Mr. Billings is that at the relevant times the two helicopters were in the legal custody, possession and control, and operated by Challenger Inspections Ltd. It was Challenger Inspections Ltd. which issued commercial invoices and which received payment. Although it is a separate and distinct corporation, in some correspondence it stated it was a division of Challenger Helicopters Ltd. Challenger Helicopters Ltd. in turn advertized itself as being specialized in oil field aviation. The helicopters were simply one way of getting to remote well sites. Land vehicles were also used. Be that as it may, neither Challenger Inspections Ltd. nor Challenger Helicopters Ltd. was charged with the contraventions in issue.

Offences under the Aeronautics Act

16 The Minister considers that BFEL contravened subsection 605.84 (1)(*c*)(i), and that on separate occasions both BFEL and Mr. Billing contravened subsection 700.02 (1) of the CARs issued pursuant to the *Aeronautics Act*.

17 Paragraph 605.84(1)(*c*) of the CARs provides:

> **605.84** (1) [...] no person shall conduct a take-off or permit a takeoff to be conducted in an aircraft that is in the legal custody and control of the person [...], unless the aircraft
>
> *(c)* [...] meets the requirements of any notices that are equivalent to airworthiness directives and that are issued by
>
> (i) the competent authority of the foreign state that, at the time the notice was issued, is responsible for the type certification of the aircraft, engine, propeller or appliance [...]
>
> **605.84 (1)** [...] il est interdit à toute personne d'effectuer [...] le décollage d'un aéronef dont elle a la garde et la responsabilité légales ou de permettre à toute personne d'effectuer le décollage d'un tel aéronef, à moins que l'aéronef ne réponde aux conditions suivantes:
>
> [...]
>
> il est conforme aux exigences relatives aux avis qui sont des équivalents des consignes de navigabilité, le cas échéant, et qui sont délivrés par:
>
> (i) l'autorité compétente de l'État étranger qui était, au moment où les avis ont été délivrés, responsable de la délivrance du certificat de type de l'aéronef, des moteurs, des hélices ou des appareillages [...]

18 Subsection 700.02(1) of the CARs reads:

> **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.

700.02 (1) Il est interdit d'exploiter un service de transport aérien à moins d'être titulaire d'un certificat d'exploitation aérienne qui autorise l'exploitation d'un tel service et de se conformer à ses dispositions.

19 Section 605 is in the division of the CARs dealing with aircraft maintenance requirements. In essence, the person with legal custody and control of the helicopters is prohibited from permitting a take-off when a maintenance inspection is overdue.

20 The two helicopters were American built. There was a requirement of Air Direction 2003- 04-04 issued by the (U.S.) Federal Aviation Administration which applied to Robinson R22 Helicopters, one of the two helicopter models in question. In order to detect possible corrosion of a tail rotor pitch control bearing, an inspection was to be carried out within 20 hours time-in-service and thereafter at intervals not to exceed 300 hours time-in-service or 12 months, whichever came first. At the time of the contraventions more than 12 months, but less than 300 hours in-service, had elapsed since the last inspection. When finally carried out, the inspection revealed no corrosion.

21 Turning to the air transport service contraventions, CAR 700.02(1), subsection 101.01(1) of the CARs defines "air transport service" as meaning "a commercial air service that is operated for the purpose of transporting persons, personal belongings, baggage, goods or cargo in an aircraft between two points". According to subsection 3(1) of the *Aeronautics Act*, "commercial air service" is defined as meaning "any use of aircraft for hire or reward", and "hire or reward" is defined as meaning "any payment, consideration, gratuity or benefit, directly or indirectly charged, demanded, received or collected by any person for the use of an aircraft".

22 CAR 703.07 deals with the issuance of Air Operator Certificates. Among other things, the applicant must demonstrate to the Minister the ability to maintain an adequate organizational structure, an operational control system, meet the *Commercial Air Service Standards* for the operation and have in place an appropriate training program. The applicant must have legal custody and control of at least one aircraft of each category of aircraft that is to be operated.

23 The Act establishes various offences, some of which are indictable (s. 7.3(1)(ii)). However the contraventions in this case are of a different order all together. They are strict liability administrative infractions, with the burden of proof falling upon the Minister on the balance of probabilities. However, the person charged with the contravention is not a compellable witness. Subsection 7.6(1) of the Act permits the Governor in Council, by regulation, to treat certain regulations as a "designated provision" the contravention of which may be dealt with in accordance with the procedures set out in subsections 7.7 to 8.2. CAR 605.84 (1)(*c*)(i) and CAR 700.02 (1) are designated provisions.

24 The "designated provision" procedure has four phases. Initially, if the Minister believes on reasonable grounds that a person contravened a designated provision he may decide to assess a penalty. The person affected may seek a review by a member of the Transportation Appeal Tribunal of Canada (TATC), which was established under the *Transportation Appeal Tribunal of Canada Act*, R.S. 2001, c. 29. As aforesaid, the review is a hearing *de novo* with the burden of proof resting with the Minister. Thereafter either the Minister or the person may appeal to a three-person appeal panel of the TATC. Leaving aside medical issues, which are not relevant here, the member, and the review panel (members sometimes sit in first instance and sometimes in appeal), must have expertise in the transportation sector involved. The reviewing member and the three members of the appeal panel were all pilots, and lawyers. The norm, which was followed in this case, is that the appeal is on the record which was before the reviewing member. Thereafter the appeal decision is subject to judicial review by this Court in accordance with section 18 and following of the *Federal Courts Act*. An appeal from the decision on judicial review may be taken to the Court of Appeal.

Standard of Review

25 Two issues arise. The first is the deference this Court owes the Appeal Panel of the TATC. The second is the deference, if any, the Appeal Panel owed its member who reviewed the Minister's decision. As stated by Chief Justice McLachlin in *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19, [2003] 1 S.C.R. 226 (S.C.C.) at paragraphs 22 and 26:

> 22. To determine standard of review on the pragmatic and functional approach, it is not enough for a reviewing court to interpret an isolated statutory provision relating to judicial review. Nor is it sufficient merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor. Rather, the pragmatic and functional approach calls upon the court to weigh a series of factors in an effort to discern whether a particular issue before the administrative body should receive exacting review by a court, undergo "significant searching or testing" ([*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748], at para. 57), or be left to the near exclusive determination of the decision-maker. These various postures of deference correspond, respectively, to the standards of correctness, reasonableness *simpliciter*, and patent unreasonableness.
>
> [...]
>
> 26. In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors — the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question — law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law. [...]

26 There have been decisions of this Court dealing with the TATC, or one of its predecessors, the Civil Aviation Tribunal, but most either deal with issues of law on which the standard of review is correctness or procedural fairness which is beyond the scope of the functional and pragmatic approach (See: *Air Nunavut Ltd. v. Canada (Minister of Transport)*, [2001] 1 F.C. 138, [2000] F.C.J. No. 1115 (Fed. T.D.); *Canada (Attorney General) v. Woods*, 2002 FCT 928, [2002] F.C.J. No. 1267 (Fed. T.D.); *Canada (Attorney General) v. Yukon*, 2006 FC 1326, [2006] F.C.J. No. 1671 (F.C.); and *Sierra Fox Inc. v. Canada (Federal Minister of Transport)*, 2007 FC 129, [2007] F.C.J. No. 166 (F.C.)). Nevertheless, these cases are helpful in putting the legislation in context.

27 One must take into account both the relevant provisions of the *Aeronautics Act*, as well as the *Transportation Appeal Tribunal of Canada Act* as well as the pertinent regulations. The decision of the Appeal Panel is final, without right of appeal, but subject to judicial review. The Tribunal has greater expertise than the Court with respect to aeronautics in general, and air safety in particular. Safety is paramount in this case. One of the Minister's responsibilities under section 4.2 of the Act is to "investigate matters concerning aviation safety". In my view, Parliament intended that upholdings of fact of the Appeal Panel not be disturbed unless patently unreasonable, that mixed questions of fact and law are to be reviewed on a reasonableness *simpliciter* standard and no deference is owed on questions of law.

28 As to the deference the Appeal Panel owed the member, Mr. Ogilvie, who first reviewed the Minister's decision, *Q.* is again helpful. In that case, the relevant legislation authorized an appeal from a decision of the Inquiry Committee of the College of Physicians and Surgeons of British Columbia to the British Columbia Supreme Court. Drawing on paragraph 18 thereof, I hold the findings of fact or credibility made by Mr. Ogilvie were entitled to considerable deference. The Appeal Panel was entitled to its own view of the law.

29 The issue of deference, according to the Minister, lies in the Appeal Panel's apparent willingness to consider *de novo* the amount of the penalty imposed on BFEL for operating an air transport service. I am of the view that the TATC Appeal Panel was explicitly authorized by Statute to advance its own opinion as subsection 8.1(3) of the

Aeronautics Act provides that the Appeal Panel "...may dispose of the appeal by dismissing it or allowing and, in allowing the appeal, the panel may substitute its decision for the determination appealed against."

30 Indeed, I think this position is consistent with what was said by the Supreme Court in *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585 (S.C.C.) at paragraphs 43 and 44. That was an appeal within an administrative scheme to a specialized appeal panel, a panel one would think would be expected to use the expertise its members were required to have.

The Case against Mr. Billings — Air Transport Service: T-2295-06

31 To repeat, CAR 700.02(1) reads:

> 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.
>
> Il est interdit d'exploiter un service de transport aérien à moins d'être titulaire d'un certificat d'exploitation aérienne qui autorise l'exploitation d'un tel service et de se conformer à ses dispositions.

32 Although Mr. Billings was the pilot in charge of the helicopters for the three flights in question, it is not in that capacity that he was charged with the contravention. The reviewing member of the TATC, Mr. Ogilvie, its vice-chair, was of the view that although the payments were demanded and received by Challenger Inspections Ltd., Mr. Billings was the sole owner and operator thereof and therefore personally fell within the definition of "hire or reward".

33 The Appeal Panel did not share that legal opinion. As Mr. Billings was not the owner of the helicopters and did not have custody and control in his own name, notwithstanding he was the pilot, he in effect was acting as an employee. As a pilot and employee, there was no requirement that he be personally licensed to operate an air transport service.

34 The role of the registered owner is quite contentious in the Billings Family Enterprise matters. However, whether the operator was BFEL or Challenger Helicopters Ltd. or Challenger Inspection Ltd., the result is the same as far as the case against Mr. Billings is concerned. Although he undoubtedly indirectly benefited from the service, be it as a director, officer or shareholder of whichever corporation or corporations were operating the service, as well as through his employment as pilot on the flights in question, he was not personally operating an air transport service. The corporations were not a mere front, or sham. The Appeal Panel of the TATC was correct. This judicial review shall be dismissed.

35 If anyone knew the corporate structure it was Mr. Billings. Perhaps he could have been charged under subsection 8.4 (3) of the Act which provides:

> **8.4** (3) The pilot-in-command 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 the offence was committed without the consent of the pilot-incommand and, where found to have committed the offence, the pilot-in-command is liable to the penalty provided as punishment therefor.
>
> **8.4** (3) Lorsqu'une personne peut être poursuivie en raison d'une infraction à la présente partie ou à ses textes d'application relative à un aéronef, le commandant de bord de celui-ci peut être poursuivi et encourir la peine prévue, à moins que l'infraction n'ait été commise sans le consentement du commandant.

However, he was not.

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36 It now becomes necessary to determine whether BFEL, or either of the two Challenger corporations, or indeed if all three were operating an air transport service. Distinctions have to be drawn among different concepts: registered ownership of as opposed to legal title to the helicopters; ownership as opposed to legal custody and control; and operation of an air transport service as opposed to operation of the helicopters themselves.

37 BFEL holds title to and is the registered owner of the two helicopters. In aeronautics, where many aircraft are leased, the two concepts are quite distinct. Section 3 of the Act identifies a "registered owner" as a "...person to whom a certificate of registration for the aircraft has been issued by the Minister". The registered owner may or may not have title to the aircraft, but is supposed to have legal custody and control thereof (See: CAR 202.35). This distinction is borne out by the decision of the Supreme Court in *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.)) particularly at paragraph 55.

38 It is the registered owner of the aircraft who receives Air Directives and other matters pertaining to the safe operation and maintenance of the aircraft. In this case, Mr. Billings received Air Directives in his capacity as a director of BFEL.

39 CAR 202.35 (2) requires the registered owner of a Canadian aircraft who transfers any part of the legal custody and control of the aircraft to notify the Minister in writing within seven days thereof. The then current Certificate of Registration is cancelled. No such notice is in the record.

40 Having undertaken a contextual and purposive analysis of the Act and the CARs, particularly the safety aspects thereof, as required by such cases as *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), I conclude that even if BFEL had transferred custody and control to either of the Challenger companies it does not lie in its mouth to say so. The transfer was not legal as no notification was given. It cannot invoke its own breach of one regulation to avoid liability under another.

41 However, should I have misinterpreted the Act and the CARs, I am of the view that the evidence as a whole shows that the Minister discharged the burden of proof. Once it was established that BFEL was the registered owner of the helicopters, the burden shifted to it. The only evidence in the record is that invoices were issued by Challenger Inspections Ltd., called at times a division of Challenger Helicopters Ltd., and that the latter advertised in trade journals. No evidence whatsoever was led as to the contractual arrangements which may, or may not, have been in place among the three corporations. This was information within the exclusive knowledge of Mr. Billings, and the corporations. It was not information within the knowledge of the Minister, who is entitled to rely upon public records. Speculation is not called for. This is not to say that "Challenger" could not also have been charged.

42 Counsel for BFEL argued that the evidence that no air operator certificate was in place was insufficient. Certificates had been issued by the Secretary of the Department of Transport pursuant to section 27 of the *Aeronautics Act* stating that during the period between 1 January 2004 and 31 August 2004 no AOC was issued either to Brant Paul Billings or to Billings Family Enterprises Ltd. authorizing the operation of an air transport service. These certificates are deficient in that they do not preclude the possibility that a certificate may have been issued prior to 1 January 2004, or that certificates may have been issued to either of the two Challenger corporations. However, Mr. Ogilvie, who was upheld in his finding that BFEL operated an air transport service without an AOC in place, was alert to the shortcomings of the certificates, and did not rely upon them. I am satisfied that it was reasonably open to Mr. Ogilvie to make the findings he did. Mr. Billings testified with respect to a safety audit from one of the customers. It was not patently unreasonable for Mr. Ogilvie to conclude that neither Mr. Billings nor BFEL nor either Challenger corporation held an AOC: