

## SKYSERVICE DECISION AFFIRMED IN CANADA BY THE ONTARIO COURT OF APPEAL

On April 6, 2011, the Ontario Superior Court of Justice released its decision in the priority disputes between the lessors and aviation authorities resulting from the Skyservice receivership. The Court, in interpreting and applying the decisions in *Canada 3000* and *Zoom*, raised the bar for lessors to defeat the seizure and detention rights of the aviation authorities in Canada. In that decision it was held that the facts in *Skyservice* could not be distinguished from *Canada 3000* and that no repossession of the aircraft had occurred prior to the receivership order (as was the case in *Zoom*). Thus, it was held that, absent a completed repossession, priority will go to the aviation authorities.

Some of the lessors, represented by Blakes, appealed the lower Court decision to the Ontario Court of Appeal. The appeal was dismissed by the Ontario Court of Appeal on May 2, 2012, with costs.

Various arguments were put forth by the appellant lessors, including:

- the application judge erred in holding that Skyservice “owned and operated” aircraft for the purposes of the statutes granting the aviation authorities the seizure and detention rights
- the *Canada 3000* case is distinguishable from the facts in *Skyservice*
- the principles in *Zoom* assist them, namely that steps to terminate the lease (without complete physical repossession) put them within the *Canada 3000* exception
- various other sub-issues relating to the timing and content of the aviation authorities’ applications

The Ontario Court of Appeal, in dismissing each argument put forth by the appellant lessors, held, *inter alia*, that:

- the exception in *Canada 3000*, namely that the detention remedy is not available against “any aircraft already repossessed by the titleholder prior to the CCAA application”, was not available to the lessors in *Skyservice* since they had not fully repossessed the aircraft and *Skyservice* continued to be the “owner” or “operator” of the aircraft as the registered owner under the Canadian Civil Aircraft Register
- the specific and unusual facts relating to receivership in *Skyservice* did not affect whether Skyservice “owned or operated” the aircraft as that meaning was intended under the applicable statutes and, as such, the aviation authorities had the right to bring the detention and seizure applications
- the other arguments relating to the timing and content of the aviation authorities’ applications were misguided as the aviation authorities fell within the requirements of the statutes to bring such applications and *de facto* notice was given to all the lessors

As such, a lessor must not only have terminated the lease, but must also obtain physical

repossession of the aircraft and, possibly even, apply for and obtain the deregistration of the aircraft from Transport Canada to defeat the claims of the aviation authorities in Canada. This means that lessors must be preemptive in their actions – not only must they be swift to terminate the lease but they must take immediate steps to repossess their aircraft before any stay is imposed in an insolvency or restructuring proceeding and prior to any detention applications by the aviation authorities.

The only measure lessors can take to combat the difficulties in defeating such claims is to take substantial security deposits and maintenance reserves from the lessees, which in today's North American marketplace may be a difficult sell to the airlines.

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