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## **Supreme Court Resolves Aviation Remedy Issues**

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On June 9 2006 the Supreme Court of Canada allowed in part the appeals by NAV Canada and various airport authorities from two decisions (one by the Ontario Court of Appeal, the other by the Quebec Court of Appeal) dealing with the rights of NAV Canada and airport authorities against the lessors of aircraft concerning unpaid charges incurred by the operators of the aircraft. The Supreme Court's decision (2006 SCC 24) resolves important priority and remedy issues for the aviation industry, in which many airlines lease the vast majority of the aircraft they operate and airline insolvencies have continued to occur.

### **Facts**

The Ontario case arose out of the financial collapse of Canada 3000 Airlines Limited and its related companies, which operated a fleet of aircraft leased from various parties that retained legal title to the aircraft. After Canada 3000 obtained protection under the Companies' Creditors Arrangement Act, NAV Canada, which was owed approximately C\$7.4 million in unpaid charges for services it had provided to Canada 3000, applied under the Civil Air Navigation Services Commercialization Act (CANSCA) to seize and detain certain aircraft in the possession of Canada 3000. Canada 3000 was subsequently assigned into bankruptcy, resulting in the lessors of the aircraft becoming entitled under their leases to repossess the aircraft. Various airport authorities, which together were owed approximately C\$21 million for various airport charges, applied for an order authorizing the seizure and detention of the aircraft pursuant to the Airport Transfer (Miscellaneous Matters) Act.

The Quebec case, which related to 10 separate claims made by the lessors of aircraft operated by Inter-Canadian (1991) Inc, arose out of similar circumstances.

The key issues were the same in both the Ontario and Quebec cases and, in both cases, the aircraft lessors prevailed at the initial appeal stage.

### **Supreme Court Decision**

There were two main issues in the appeals. The first was whether the aircraft lessors are 'owners' of the aircraft for the purposes of Section 55 of CANSCA, which provides for the joint and several liability of the owner and the operator of an aircraft for unpaid air navigation charges. Justice Binnie, writing for a unanimous Supreme Court, agreed with the unanimous conclusions of the Ontario and Quebec appeal courts that the lessors are not 'owners' for the purposes of the section, which means that the aircraft lessors were not personally liable to NAV Canada for the unpaid charges incurred by the airlines that leased and operated the aircraft. The Airport Transfer

Act contains no provision comparable to Section 55 of CANSCA and the airport authorities conceded that the aircraft lessors were not personally liable to them for the unpaid charges.

The second key issue concerned the interpretation of the sections of CANSCA and the Airport Transfer Act entitling NAV Canada and the airport authorities to apply for a court order permitting them to seize and detain aircraft for unpaid charges and fees. The issue was whether any seizure and detention order that might be made would have priority over the rights of the aircraft lessors to repossess their aircraft upon default by the operating airlines under their leases.

The court, reversing the majority of both the Ontario and Quebec appeal courts on this issue, held that seizure and detention orders, once obtained by NAV Canada and the airport authorities, were effective against aircraft lessors. The court reasoned that, if aircraft lessors were able to obtain the release of seized aircraft without paying the outstanding charges, the recourse provided to NAV Canada and airport authorities under the seizure and detention provisions would be unavailable when it was most needed (ie, when the aircraft operator became insolvent). In the court's view the more reasonable interpretation of the seizure and detention provisions is that they provide for a right to seize and detain aircraft until the unpaid charges are paid or sufficient security is provided, regardless of who owns the aircraft.

In practical terms, this means that an aircraft lessor that wants the release of its detained aircraft will have to pay the outstanding charges in respect of which the aircraft has been seized. In this regard, the court held that, subject to a court order providing otherwise, any particular detained aircraft need not be released until the entire amount owed by the defaulting operator is paid. The likely practical implication of this ruling seems to be that a court making a seizure and detention order can, and will be expected to, exercise its discretion to place terms on the order in order to avoid burdening one aircraft lessor with the entire amount owing by an insolvent airline where that result would be unfair. However, how and when a court should achieve that result is not addressed in the Supreme Court's decision and will have to be worked out in subsequent cases.

With respect to the issue of interest on the unpaid charges, the court held that NAV Canada and airport authorities are entitled to charge and seize and detain aircraft in respect of both their unpaid fees and interest thereon. It held that interest runs to the earliest of the date of payment, the posting of appropriate security or the bankruptcy of the operator. The court also held that the remedy under a seizure and detention order is limited to possession - that is, such an order does not give NAV Canada and airport authorities the power to sell the detained aircraft to recover payment.

## **Comment**

The Supreme Court's decision allocates the risk of loss arising from the charges incurred but unpaid by an insolvent aircraft operator to the aircraft lessors rather than to NAV Canada and airport authorities. Therefore, aircraft lessors should take this risk into account when entering into aircraft leases. As noted by the court, aircraft lessors may manage this risk by carefully selecting lessee airlines and negotiating appropriate security arrangements when leasing aircraft to them.

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