

focus

on Aviation



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The Supreme Court of Canada Grants Leave to Appeal in Two Cases Involving Aircraft Leased to Failed Airlines

On May 19, 2005, the Supreme Court of Canada granted leave to appeal two decisions, one by the Ontario Court of Appeal and the other by the Québec Court of Appeal, concerning the rights of NAV Canada and airport authorities against the lessors of aircraft relating to unpaid charges incurred by the operators of the aircraft.

These cases raise very important priority and remedy issues for the aviation industry, given that many airlines lease the vast majority of the aircraft they operate and the fact that airline insolvencies continue to occur. These issues will be definitively settled in Canada when the Supreme Court decides these appeals, likely in 2006 or 2007.

FMC represents some of the aircraft lessors involved in the Ontario case and has been actively involved in this litigation.

THE ONTARIO CASE: CANADA 3000

The Ontario case arose out of the financial collapse of Canada 3000 Airlines Limited and its related companies (collectively, "Canada 3000"), 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 \$7.4 million in unpaid charges for services it provided to Canada 3000, applied under the *Civil Air Navigation Services Commercialization Act* (the "CANSCA") to seize certain aircraft in the possession of Canada 3000. Canada 3000 was subsequently assigned into bankruptcy, and this resulted in the lessors of the aircraft becoming entitled under their leases to repossess the aircraft. Various airport authorities, which together were owed approximately \$21 million for various airport charges, then applied for an order authorizing the seizure and detention of the aircraft pursuant to the *Airport Transfer (Miscellaneous Matters) Act* (the "Airports Act").

The seizure applications of NAV Canada and the airport authorities were dismissed by Ground J. of the Superior Court of Justice, and this decision was upheld on appeal by a majority of the Ontario Court of Appeal. There are two main issues in the Ontario case. The first issue is whether or not the aircraft lessors are "owners" of the aircraft for the purposes of section 55 of the CANSCA, which provides for the joint

and several liability of an “owner” and an “operator” of an aircraft for unpaid air navigation charges. All three members of the Court of Appeal agreed with Ground J. that the lessors are not “owners” for the purposes of the section, because, in the context of the section, that word refers to persons who are operating the aircraft or who are the registered owners of the aircraft and thus have legal custody and control of the aircraft (or both). The aircraft lessors neither operated nor had legal custody and control of the leased aircraft.

The second issue concerns the interpretation of the sections of the CANSCA and the Airports Act entitling NAV Canada and airport authorities to apply for a court order permitting them to seize and detain an aircraft for unpaid charges and fees, and in particular, whether those seizure and detention provisions create rights on the part of NAV Canada and airport authorities that rank in priority to the pre-existing property rights of the lessors, who hold legal title to the aircraft. Cronk J.A., writing on behalf of herself and Abella J.A., agreed with Ground J. that the seizure and detention provisions do not create a statutory lien in favour of the airport authorities and NAV Canada that ranks prior to the property interests of the titleholder lessors.

Juriansz J. (ad hoc) (as he then was), dissented on this issue. He reasoned that, since the seizure and detention provisions make the operation of aircraft by a lessee a sufficient basis for an application to seize and detain aircraft, those provisions clearly contemplate that aircraft may be seized and detained without regard to the property interests of persons who, like the lessors in this case, are neither the registered owners nor the operators of the aircraft. Therefore, notwithstanding such property interests, once the airport authorities or NAV Canada properly seize and detain aircraft, they do not have to release the aircraft, unless otherwise directed by the court, until their outstanding charges are paid or satisfactory security is posted.

THE QUÉBEC CASE: INTER-CANADIAN

The Québec case, which related to ten separate claims made by the lessors of aircraft operated by Inter-Canadian (1991) Inc., arose out of similar factual circumstances to those in the Canada 3000 case. In that case, NAV Canada and the airport authorities prevailed at first, but this result was reversed by the Québec Court of Appeal. The appeal

decision, which dealt with the same two main issues as decided by the Ontario Court of Appeal, was also divided along essentially the same lines as the decision of that Court, with Pelletier and Morissette JJ.A. forming the majority and Nuss J.A. dissenting on the seizure and detention issue.

The citations for the two decisions discussed above are: *Greater Toronto Airports Authority v. International Lease Finance Corp.* (2004), 69 O.R. (3d) 1 (C.A.); and *NAV Canada v. Wilmington Trust Co.* (2004), 247 D.L.R. (4th) 503 (Qué. C.A.).

FMC'S AVIATION LAW GROUP

The lawyers in Fraser Milner Casgrain's Aviation Law Group have expertise and experience in all aspects of aviation law. Our clients include domestic and international airlines, aircraft lessors and manufacturers, financial institutions, and members of the aviation insurance industry.

Lawyers in our Aviation Law Group regularly assist clients in connection with: domestic, transborder and international leasing and financing structures, aviation insolvency matters, general aviation commercial issues, aviation regulatory matters including registration and deregistration, and dealing with Transport Canada, the Canadian Transportation Agency and other relevant governmental departments, agencies and international air groups, international trade, aviation insurance and policy coverage issues, litigation arising from aviation accidents, product liability, commercial disputes, fraudulent transactions and priority issues.

CONTACTS

A complete list of our Aviation Law Group contacts is attached.

This newsletter is designed to supply brief details of recent judicial decisions, legislative or other initiatives of interest and some commentary. The summaries and comments provided are, of necessity, brief and should not be relied on as legal advice. We encourage you to contact any of the lawyers listed in this newsletter for further details or advice in the context of a particular situation.

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