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| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| PLAINTIFF | **THIRD EYE CAPITAL CORPORATION** |
| DEFENDANTS | **RANCH ENERGY CORPORATION, OPSMOBIL INC., 1734163 ALBERTA INC., 1859821 ALBERTA INC., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC., AIR DALLAIRE LTD., and K.L. CAPITAL CORP.** |
| DOCUMENT | **SUPPLEMENTAL BRIEF OF ECN AVIATION INC.** |
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Application Scheduled on the Commercial List for the 19th day of December, 2018
before The Honourable Madam Justice B. E. C. Romaine

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## I. INTRODUCTION

1. This is the Supplemental Brief of ECN Aviation Inc. ("**ECN**") in support of its application filed November 19, 2018. ECN is a secured creditor of one of the debtors in these receivership proceedings, OpsMobil Group Inc. ("**OMGI**"). ECN holds a first-priority security interest over two helicopters which ECN seized from OMGI on May 11, 2018, prior to the commencement of these receivership proceedings or the *Companies' Creditors Arrangement Act* (Canada) proceedings that preceded them.

2. All capitalized terms in this Supplemental Brief that are not defined herein shall bear the meanings given them in the Brief of ECN filed November 19, 2018.

3. ECN's application was originally scheduled to be heard on November 28, 2018. On the afternoon of November 27, 2018, Third Eye delivered to the Court and served upon the Service List nearly 1,500 pages of Affidavit evidence, a Brief, and Authorities. The Court adjourned the application to December 19, 2018.

4. This Supplemental Brief is filed in response to the Seventh Affidavit of Mark Horrox sworn November 27, 2018 (the "**Seventh Horrox Affidavit**") and the Brief of Third Eye filed November 27, 2018, and in response to submissions made by counsel to the Court on November 28, 2018.

## II. STATEMENT OF FACTS

### A. <u>ECN Evidence</u>

5. ECN repeats and relies upon the Statement of Facts as set out in the Affidavit of Algis Vaitonis of ECN sworn November 18, 2018 and the Affidavit of Service of Allison Endersby affirmed November 21, 2018.[1]

> Affidavit of Algis Vaitonis sworn November 18, 2018 (the "**First Vaitonis Affidavit**").

[1] Ms. Endersby' Affidavit of Service addresses service of a Notice of Disposition of Collateral upon OMGI and Third Eye on July 6, 2018. In fact, that Affidavit of Service was filed in ECN's own Action against OMGI, rather than in the within receivership proceedings (and served upon the service list at that time), and then was subsequently re-sworn and filed in this Action regarding the receivership proceedings on November 29, 2018.

Affidavit of Service of Allison Endersby affirmed November 21, 2018 and filed November 29, 2018.

6. In addition to the First Vaitonis Affidavit, Mr. Vaitonis also swore an Affidavit on November 25, 2018 in response to written interrogatories asked of him by Third Eye.

Affidavit of Algis Vaitonis sworn November 25, 2018 (the "**Second Vaitonis Affidavit**").

## B. Facts Regarding Third Eye's Claim to the "Power Train"

7. The Second Vaitonis Affidavit sets out that in or about October 2018, Mr. Vaitonis heard from Mark Horrox of Third Eye. Mr. Vaitonis understood from Mr. Horrox that Third Eye claimed "its" engine was in one of the helicopters that ECN had seized.

Second Vaitonis Affidavit, para 12, 2nd para.

8. Eventually, through further conversations with Mr. Horrox, a conversation with Kim Mizera of Airborne Energy Solutions Inc. on November 9, 2018, and correspondence from Third Eye's counsel on November 22, 2018, Mr. Vaitonis came to understand that:

(a) Third Eye's claim was not over an engine, but rather, over a "powertrain" installed in C-GEMU;[2] and

(b) Third Eye claimed it had security over that "powertrain", as the parts that make up the powertrain had been removed from another helicopter described as C-GEMK and installed onto C-GEMU.

Second Vaitonis Affidavit, paragraph 12 and Exhibit 1.

9. It was not until ECN's counsel received a letter from Third Eye's counsel on November 22, 2018 that Third Eye finally identified the specific parts that comprise the so-called "Power Train" over which Third Eye asserts a security (not an ownership) interest. This is despite the fact that Third Eye has been made aware of ECN's seizure and intention

[2] The results of a Google search of "aviation powertrain" all relate to aircraft engines:
https://www.google.ca/search?source=hp&ei=Ad4OXInYMoWYjwSxlKPgCw&q=aviation+powertrain&btnK=Google+Search&oq=aviation+powertrain&gs_l=psy-ab.3..33i160.590.2845..3899...0.0..3.250.3444.0j13j6......0....1..gws-wiz.....0..0j0i131j0i13.BAIeVRSYUa8

to dispose of C-GEMU since July 6, 2018 (and subsequent to that), and raised no objection to the same after being served with a Notice of Disposition of Collateral in relation to C-GEMU on July 6, 2018. Further, ECN's seizure was registered at PPR on May 14, 2018.

First Vaitonis Affidavit, Exhibits "13" page 49, "14" page 50, "24", "25" and "26".

Affidavit of Service of Allison Endersby affirmed November 21, 2018 and filed November 29, 2018.

10. The Seventh Horrox Affidavit includes a number of unsupported statements, editorial commentary, and assumptions, as compared to evidence. Contrary to Third Eye's assertions, there is no evidence that ECN had knowledge at any time prior to Mr. Vaitonis' call with Mr. Mizera on November 9, 2018 that Third Eye had any claim to the parts referenced by Third Eye in its Brief as a "Power Train" alleged to be installed in C-GEMU. Further, there is no evidence that ECN had any knowledge prior to October 2018 that Third Eye had any claim to any parts alleged to be installed in C-GEMU.

Seventh Affidavit of Mark Horrox, sworn November 27, 2018 ("**Seventh Horrox Affidavit**"), paras 20, 24, 30, 31, 33, 34.

11. In fact, whether ECN had knowledge of the "Power Train", as defined in the Seventh Horrox Affidavit, is only relevant if section 38 of the Alberta PPSA applies to Third Eye's claim, which, as is set out below, ECN submits it does not. However, considering the unsupported statements in the Seventh Horrox Affidavit, ECN wishes to clarify the actual evidence.

12. The only <u>evidence</u> before this Court regarding ECN's knowledge prior to November 9, 2018 is as follows:

(a) After Inspection 1 in June, 2017, ECN's focus was on C-FXHP, the cannibalized helicopter, and seeking to have that helicopter reconstituted and made flyable. ECN gave little attention to C-GEMU in its discussions with OMGI, as ECN was pleased to learn (as a result of Inspection 1, the report from which made no mention of parts from C-GEMK), that C-GEMU was being reasonably well-maintained;

(b) Michael Lederman, a former employee of ECN Capital Corp. in the role of Associate, Capital Markets Aviation Finance, instructed Sean Kennedy, ECN's Technical Representative, to conduct Inspection 2, which Mr. Kennedy did on October 11 and 12, 2017;

(c) The report from Inspection 2 includes one line, at point 8, which states "The company has another EC120, C-GEMK, and robs parts from it to service C-GEMU. This appears to be a trend in the company";

(d) Mr. Lederman received the report on Inspection 2 from Mr. Kennedy on October 15, 2017. At or around the time of Inspection 2, the report was viewed by Mr. Lederman. Others at ECN have reviewed the report regarding Inspection 2 since that time, but there is no evidence that anyone other than Mr. Lederman reviewed that report prior to ECN's seizure of C-GEMU and C-FXHP on May 11, 2018 – and there is no evidence that Mr. Lederman or Mr. Kennedy are or were directors, officers or senior employees of ECN;

(e) There is no evidence that any directors, officers or employees of ECN received any information that the "Power Train" from C-GEMK, as Third Eye defines it and over which Third Eye claims to hold security, was installed in C-GEMU, until Mr. Vaitonis was advised of this allegation by Kim Mizera of Airborne Energy Solutions, Inc. ("**AES**") on November 9, 2018.

First Vaitonis Affidavit, Exhibit "17", last page, para 8.

Second Vaitonis Affidavit, paras 10, 12.

13. In paragraph 24 of the Seventh Horrox Affidavit, Mr. Horrox states:

> I am informed that on May 11, 2018, <u>despite knowing that C-GEMU included parts (i.e. the Power Train) on which TEC had a first-ranking security interest</u>, ECN ordered bailiffs from Allied Shortridge Civil Enforcement Agency Inc. to seize the ECN Aircraft, including all component parts of C-GEMU.

There is absolutely no evidence to support the underlined portion of this statement. It is unfounded, unsupported, and should be disregarded.

Seventh Horrox Affidavit, para 24.

14. At paragraph 30 of the Seventh Horrox Affidavit, Mr. Horrox says:

> Subsequently, on November 16, 2018, while continuing discussions with Mr. Algis Vaitonis about this matter[3] Mr. Vaitonis confirmed that he was fully aware of the fact that the Power Train currently installed on C-GEMU had been removed from C-GEMK.

Seventh Horrox Affidavit, para 30.

15. This statement disregards the actual evidence of Mr. Vaitonis that in his October conversations with Mr. Horrox, Mr. Vaitonis thought Mr. Horrox was talking about a helicopter engine,[4] and Mr. Horrox did not correct Mr. Vaitonis. It was not until Mr. Vaitonis' first telephone conversation with Mr. Mizera of AES on November 9, 2018 that Mr. Vaitonis understood that Third Eye's claim was not over the engine installed in C-GEMU, but rather over a "powertrain". There is <u>no</u> evidence that Mr. Vaitonis was aware of this prior to his conversation with Mr. Mizera on November 9, 2018. Third Eye did not actually provide any description of the parts installed on C-GEMU over which it claimed a security interest until a letter to ECN's counsel dated November 22, 2018.

Second Vaitonis Affidavit, page 8.

16. The Seventh Horrox Affidavit states that Mr. Vaitonis "worked at TEC for around five years up until January 2016", and that:

> Consequently, Mr. Vaitonis was employed by TEC when the Credit Agreement and the Omnibus Security Agreement were put in place and is aware of the all-asset liens that customarily make up TEC's collateral packages, and I therefore believe that he reasonably ought to have known, even before the results of his October 2017 inspection reports were in hand, that TEC holds first-ranking security in the Power Train, given that the components therein originated from C-GEMK, which itself was specifically listed as security as an "Aircraft Object" under the Omnibus Security Agreement.

This is blatant speculation. Further, the statement does not even suggest that Mr. Vaitonis knew about the "Credit Agreement and Omnibus Security Agreement" that were put in place with OMGI or OpsMobil Inc., but only that (without any evidence) he is aware of the "customary" Third Eye collateral packages. There is no

[3] Referencing the preceding paragraph of the Seventh Horrox Affidavit that on or around October 5, 2018, Mr. Horrox called Mr. Vaitonis to let him know that "our power train was erroneously installed on C-GEMU".
[4] See note 2.

evidence that Mr. Vaitonis knew, anytime prior to October 2018, that Third Eye claimed that any assets over which Third Eye asserted a secured claim were installed on C-GEMU.

Seventh Horrox Affidavit, para 31.

17. Paragraphs 33 and 34 of the Seventh Horrox Affidavit also constitute unsupported allegations, rather than evidence.

Seventh Horrox Affidavit, paras 33-34.

18. In spite of the fact that Third Eye was directly served with the Notice of Disposition of Collateral regarding C-GEMU and C-FXHP on July 6, 2018, that the seizure was registered at PPR on May 14, 2018, that Third Eye holds security interests over both C-GEMU and C-FXHP (subordinate to the security interests of ECN), and that Third Eye's counsel was made aware of ECN's secured claim and seizure of C-GEMU and C-FXHP on July 9, 2018 and subsequent to that, Third Eye did nothing about its alleged claim over the "Power Train" until it served its nearly 1,500 pages of Affidavit evidence and its Brief and Authorities on November 27, 2018, the afternoon before ECN's application.

Seventh Horrox Affidavit, and Brief and Authorities of Third Eye filed November 27, 2018.

Affidavit of Service of Allison Endersby affirmed November 21, 2018 and filed November 29, 2018.

First Vaitonis Affidavit, paras 11, 36, 37, 39 and Exhibits "13" pages 8 line 77, 49-51, "14" pages 8 line 79, 50-52, "24" and "26".

19. Third Eye's security agreement with the Defendants to this Action (including OMGI and OpsMobil Inc.) is Exhibit "C" to the Affidavit of Mark Horrox filed in the CCAA proceedings in relation to OMGI, OpsMobil Inc. and others (the "**CCAA Proceedings**") on June 26, 2018, and includes the following clause:

> Section 3.9 Dealings by Third Parties
>
> No Person dealing with any of the Secured Creditors or an agent or receiver is required to determine (i) whether the Security Interest granted by any Obligor has become enforceable, (ii) whether the powers which such Person is purporting to exercise have become exercisable, (iii) whether any money remains due to the Secured Creditors by any Obligor, (iv) the necessity or expediency of the stipulations and conditions subject to which any sale or lease is made, (v) the propriety or regularity of any sale or other dealing by any of the Secured Creditors with any Collateral, or (vi) how any money paid to the Secured Creditors has been applied.

Affidavit of Mark Horrox filed June 26, 2018 in the CCAA Proceedings, Exhibit "C", section 3.9.

## C. ECN's Security Over Removed and Replacement Parts of C-FXHP

20. In response to a query from counsel for the Receiver as to what ECN's security extends to, ECN's Security Agreement sets out, at section 2.1, the collateral over which OMGI has granted ECN a security interest. That collateral includes, among other things, "Aircraft" which is defined as "the Aircraft described in Schedule A, including, without limitation, all improvements, additions, replacements and substitutions and includes all present and future Parts, replacement Parts and accessories of any kind whatsoever." Schedule "A" refers to each of C-FXHP and C-GEMU and their respective engines, and also:

> .. all parts, accessories, appliances, appurtenances, components, furnishings, instruments, modules, navigational and communications equipment and all other goods, tangible, personal property and other equipment of whatever nature that may from time to time be incorporated or installed in or attached to the foregoing airframes, engines or auxiliary power unit, as the case may be, and all records, logs, maintenance records, manuals, technical data, training aids, computer software, and other materials relating to the airframes, engines, propellers or auxiliary power unit, as the case may be, and any property substituted for any of the foregoing.
>
> [*emphasis added*]

First Vaitonis Affidavit, Exhibit "7", s 2.1 and Schedule "A".

21. The Security Agreement defines "Engine" to mean:

> (i) each of the engines described in Schedule "A" and all other engines financed with the Airframe in accordance with the Loan Agreement whether or not from time to time installed on the Airframe or removed from the Airframe and installed on any other airframe or aircraft so long as such removed Engine shall remain subject to the Security in accordance with the terms of the Loan Agreement,
>
> (ii) any replacement Engine or any engine which may from time to time be substituted for an Engine, and
>
> (iii) any and all Parts incorporated in, installed on, or attached to, an Engine at the time of delivery hereunder or at any time thereafter, and any and all Parts removed from an Engine so long as such Parts shall remain subject to the Security in accordance with the terms of the Loan Agreement.

First Vaitonis Affidavit, Exhibit "7", page 2.

22. "Parts" is defined in the Security Agreement to mean:

> All appliances, parts, instruments, appurtenances, accessories, furnishings and other equipment of whatever nature (other than complete Engines or engines) <u>which may from time to time be incorporated or installed in or attached to the Airframe or any Engine (and "Part" means any of the foregoing) or, after removal therefrom, so long as such Parts remain subject to the Security in favour of the Secured Party</u>.

First Vaitonis Affidavit, Exhibit "7", page 4.

23. With respect to "Parts" that have been removed from C-FXHP in particular (which, by definition, do not include the C-FXHP Engine), ECN's Security Agreement explicitly extends to "Parts" that have been removed from the Aircraft, <u>so long as such Parts remain subject to the Security in favour of the Secured Party</u> (i.e. ECN).

First Vaitonis Affidavit, Exhibit "7", page 4.

24. The last phrase of that definition ("so long as such Parts remain subject to the Security in favour of the Secured Party") is addressed in ECN's Loan Agreement. In short, if a replacement part which OMGI has title to free and clear and which has at least the same or better value than the original part, then the removed "Part" is no longer subject to

the Security – but immediately upon any replacement part becoming incorporated in or installed in or attached to the Aircraft, then pursuant to the Loan Agreement, the replacement part becomes subject to the Loan Agreement and ECN's security, and is deemed part of the Aircraft:

(i) the definition of "Part" (at page 6), specifically excludes Engines, and

(ii) the Loan Agreement states at page 24, section 1.1.21(ii):

> Any Part at any time removed from the Aircraft shall be subject to the Security until such time as: (a) any replacement shall have been incorporated or installed in or attached to the Aircraft and shall have a value and utility at least equal to that required by the terms of this Agreement with respect to replacements which meet the requirements for replacement parts specified herein, and (b) title thereto shall have passed to Borrower and such parts shall have become subject to this Security free and clear of all Security Interests except for Permitted Encumbrances (immediately upon any replacement part becoming incorporated or installed in or attached to the Aircraft as above provided, such replacement part shall become subject to this Agreement and the Security and be deemed part of the Aircraft for all purposes hereof to the same extent as the Parts originally incorporated or installed in or attached or related to the Aircraft and, without further act), and (iii) such replacement part shall become subject to this Agreement and the Security and be deemed part of the Aircraft for all purposes hereof to the same extent as the Parts originally incorporated or installed in or attached or related to the Aircraft.

As such, all of the "Parts" that have been removed from C-FXHP that are lying in and around the hangar, or in a sea can at the hangar, <u>or installed onto other helicopters</u>, and that have not been replaced in C-FXHP <u>in accordance with the Loan Agreement</u>, are secured in favour of ECN.

First Vaitonis Affidavit, Exhibit "5", page 24, section 10.1.21(ii).

25. ECN's registration of its security at the Alberta PPR also confirms this. In addition to its serial number goods registrations over C-FXHP and C-GEMU (which are also registered at the International Registry in accordance with the Cape Town Convention),

it also includes the following description of the general collateral secured in favour of ECN:

> All of the Debtor's present and future right, title and interest in and to the following property:
>
> ... [includes descriptions of C-FXHP, the C-FXHP Engine, C-GEMU and the engine installed on C-GEMU as set out in ECN's Brief filed November 19, 2018]
>
> (2) all parts, accessories, appliances, appurtenances, components, furnishings, instruments, modules, navigational and communications equipment and all other goods, tangible, personal property and other equipment of whatever nature that may from time to time be incorporated or installed in or attached to the foregoing airframes, engines or auxiliary power units, as the case may be, and all records, logs, maintenance records, manuals, technical data, training aids, computer software, and other materials relating to the airframes, engines, propellers or auxiliary power units, as the case may be, and any property substituted for any of the foregoing;
>
> (3) all Associated Rights (as defined in the Convention on International Interests in Mobile Equipment) relating to the collateral described herein;
>
> (4) all International Interests (as defined in the Convention on International Interests in Mobile Equipment) related to the collateral described herein;

First Vaitonis Affidavit, Exhibit "13" pages 46-47 and Exhibit "14" pages 47-48.

26. ECN's seizure of the Aircraft included seizure of those parts that had been removed from the Aircraft.

First Vaitonis Affidavit, Exhibit "20", pages 6-8.

27. There is no evidence that any parts have been installed <u>onto</u> C-FXHP. The only evidence is that parts have been removed from C-FXHP.

First Vaitonis Affidavit, Exhibit "18" pages 2-4.

28. The Receiver (in its capacity as Receiver, and prior to that, in its capacity as Monitor) has been aware of ECN's secured claim over and its seizure of C-FXHP and C-GEMU

since July 10, 2018. The Receiver has not put forth any evidence suggesting that there are any parts that have been installed onto C-FXHP.

First Vaitonis Affidavit, para 37, Exhibit "25".

29. Pursuant to the Cape Town Convention, a secured creditor in accordance with the Cape Town Convention (which ECN is) is entitled to speedy relief from the Court. Further, the Protocol states:

> No exercise of remedies permitted by the convention or this protocol may be prevented or delayed after the date specified in paragraph 2.

As is set out in ECN's Brief filed November 19, 2018, the "date specified in paragraph 2", as it relates to ECN, was immediately upon the initial stay of proceedings being granted against OMGI on July 4, 2018, where ECN had already seized C-FXHP and C-GEMU prior to that date on May 11, 2018. Further, even if ECN had not seized C-FXHP and C-GEMU prior to the CCAA Proceedings, pursuant to section 2 of Alternative A, Article XI of the Protocol, ECN was entitled to take possession of C-FXHP and C-GEMU sixty days after July 4, 2018. That date has long since passed.

ECN Brief filed November 19, 2018, TAB 1, *International Interests in Mobile Equipment (aircraft equipment) Act,* SC 2005 c 3 (the "***Aircraft Objects Act***"), Schedule 1 (the Convention), Article 13, section 1, and Schedule 2 (the Protocol), Article XI, Alternative A, sections 2 and 9.

30. Finally, Third Eye has asserted that ECN must prove its right to take possession of the parts of C-FXHP. ECN has addressed this below.

## D. CRA Deemed Trust Claim Against OMGI

31. ECN's Brief filed November 19, 2018 references a deemed trust claim of CRA as against OMGI. To address this issue, ECN and CRA have agreed to provisions of a form of Order that contemplates the proceeds of sale of C-FXHP and C-GEMU being held in trust pending payment in full of the deemed trust claim against OMGI by the Receiver, agreement between CRA and ECN, or a further Order of this Court. A copy

of ECN's revised proposed form of Order (revised from the form of Order included with ECN's application filed November 19, 2018), including those provisions, is attached hereto as **Appendix "A".**

Revised proposed form of Order **[Appendix "A"]**.

**E. Garage Keeper's Lien Claim of Rilpa Enterprises Ltd.**

32. Rilpa Enterprises Ltd. has entered into a settlement with ECN. Rilpa Enterprises Ltd. takes no position on ECN's application, including the relief sought by ECN with respect to the C-FXHP Engine.

33. Rilpa Enterprises Ltd. is withdrawing its application with respect to the garage keeper's lien claim that it had asserted (which had been scheduled to be heard on the Commercial List on December 17, 2018).

34. The Cape Town Convention states that "Ownership of or another right or interest in an aircraft engine shall not be affected by its installation on or removal from an aircraft."

ECN Brief filed November 19, 2018, TAB 1, *Aircraft Objects Act, supra*, Schedule 2 (the Protocol), Article XIV, section 3.

## III. DISCUSSION

**A. What Does ECN's Secured Claim and Seizure Extend To?**

35. As set out above, ECN's security interest (as set out in the Loan Agreement, the Security Agreement, and ECN's registration of its security interest at the Alberta PPR) extends to C-FXHP, C-GEMU, the engines for each of those Aircraft, and parts that have been removed from the Aircraft. ECN has also registered its security interest in the Aircraft at the International Registry pursuant to the Cape Town Convention. It has a first-priority security interest over the Aircraft.

First Vaitonis Affidavit, Exhibit "5", Exhibit "7", page 2, page 4, s 2.1 and Schedule "A".

36. ECN's revised proposed form of Order is appended to this Supplemental Brief, along with a blackline to the version included with ECN's Application filed and served

November 19, 2018. The revised proposed form of Order sets out with more specific detail the parts of C-FXHP that have been removed from C-FXHP which ECN seized on May 11, 2018 and seeks to take possession of, so as to market and sell the same.

Revised proposed form of Order **[Appendix "A"]**.

## B. Third Eye's Claim to the "Power Train"

### 1. Creditors' Remedies Pursuant to the Cape Town Convention

37. As set out in ECN's Brief filed November 19, 2018, the Cape Town Convention includes remedies for creditors over aircraft, where those creditors have registered their interests with the International Registry in accordance with the Cape Town Convention. Where the debtor is in insolvency proceedings and the creditor has registered its security interest at the International Registry (as ECN has done), there are additional remedies available pursuant to Article XI, Alternative A, of the Protocol. Canada has adopted Alternative A.

ECN Brief filed November 19, 2018, paras 68-74 and TAB 1, *Aircraft Objects Act, supra*, and TAB 5, page 1.

38. Where ECN seized the Aircraft on May 11, 2018, prior to the granting of the Interim Stay Order on July 4, 2018, ECN is entitled to immediate possession of the Aircraft pursuant to section 2(b) of Article XI, Alternative A of the Protocol, and the Receiver is required to preserve and maintain the Aircraft until ECN is given possession of the Aircraft.

ECN Brief filed November 19, 2018, paras 72-76 and TAB 1, *Aircraft Objects Act, supra,* Schedule 2 (the Protocol), Article XI, Alternative A, sections 2, 5.

39. An example of the proper application of Alternative A is the ongoing CCAA proceedings of Great Slave Helicopters Ltd. In that case, secured creditors of the debtor (including ECN) sought to remove aircraft secured in their favour from the debtor and to dispose of them independently. The Monitor sought a legal opinion on these requests, and permitted the creditors to do so.

Second Report of KSV Kofman Inc. as CCAA Monitor of Great Slave Helicopters Ltd. dated November 16, 2018, paras 7 and 8. **[TAB 1]**

**2. <u>ECN's Registered Interest in C-GEMU Takes Priority to Third Eye's Claim to the "Power Train"</u>**

40. Third Eye asserts that it has a first-priority security interest in the "Power Train" (as that term is defined in the Seventh Horrox Affidavit) installed on C-GEMU, on the basis that the Power Train was removed from C-GEMK (an aircraft over which Third Eye asserts a first-priority secured claim) and installed onto C-GEMU.

41. In its Brief, Third Eye asserts that the "Power Train" is an accession to C-GEMU, and that ECN's secured claim over C-GEMU pursuant to the Cape Town Convention is subject to Third Eye's security over the "Power Train" pursuant to Article 29(7)(a) of the Convention:

> 29(7) This Convention:
>
> (a) does not affect the rights of a person in an item, other than an object, held prior to its installation on an object if under the applicable law those rights continue to exist after the installation;...

Brief of Third Eye filed November 27, 2018, para 10 and TAB 1, *Aircraft Objects Act, supra,* Schedule 1 (the Convention), Article 29(7)(a)).

42. However, Third Eye fails to mention Article 30 of the Convention, which states, in part:

> **Article 30 – Effects of insolvency**
>
> 1. In insolvency proceedings against the debtor an international interest is effective if prior to the commencement of the insolvency proceedings that interest was registered in conformity with this Convention.

ECN Brief filed November 19, 2018, TAB 1, *Aircraft Objects Act, supra,* Schedule 1 (the Convention), Article 30, section 1.

43. More importantly, Third Eye fails to mention Article XI, Alternative A, paragraph 12 of the Protocol, which Canada has adopted and which states:

> No rights or interest, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1), shall have priority in insolvency proceedings over registered interests.

> ECN Brief filed November 19, 2018, TAB 1, *Aircraft Objects Act, supra,* Schedule 2 (the Protocol), Article XI, Alternative A, paragraph 12 and TAB 5, page 1.

44. Third Eye's claim of a right or interest in the "Power Train" installed in C-GEMU is not a non-consensual right or interest. Third Eye's claim is based on OpsMobil Inc. granting Third Eye a security interest in C-GEMU, so Third Eye's right or interest is consensual.

> Seventh Horrox Affidavit, paras 12-13.

45. There is little case law or commentary on the Cape Town Convention, in Canada or internationally. However, case law does confirm that a right or interest created by agreement with a party (including a security agreement) does <u>not</u> constitute a "non-consensual right or interest". As such, Third Eye's claim over the "Power Train" does not constitute a non-consensual right or interest.

> *Belair Holdings Ltd v Etole Holdings Limited and Aviareto Limited,* [2015] IEHC 569 ["***Belair***"], page 2 **[TAB 2]**

> *Awas 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anor*, WP(C) 871/2015 ["***Spicejet***"] at para 18.4. **[TAB 3]**

46. Professor Sir Roy Goode's *Official Commentary* on the Cape Town Convention, which is the authoritative text on the interpretation of the same, states:

> The appellation "non-consensual right or interest", a phrase defined in Article 1(s), denotes a right or interest created by law, not by agreement.

> Professor Sir Roy Goode CBE, QC, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific*

*to Aircraft Equipment, Official Commentary*, 3rd ed (Rome: UNIDROIT, 2013) ["***Official Commentary***"] at 2.33(3).**[TAB 4]**

ECN Brief, TAB 1, *Aircraft Objects Act, supra,* Schedule 1 (the Convention), Article 1(s).

47. As such, pursuant to paragraph 12 of Article XI, Alternative A of the Protocol of the Cape Town Convention, in the context of OMGI's insolvency proceedings, no right or interest of Third Eye has priority over the registered interest of ECN in C-GEMU, which is a first-priority security interest registered at the International Registry pursuant to the Cape Town Convention. In this insolvency context, the *Aircraft Objects Act*, which adopts and gives force and effect to the Cape Town Convention in Canada, applies such that no right or interest of Third Eye has priority in insolvency proceedings over the registered interest of ECN in C-GEMU.

ECN Brief, TAB 1, *Aircraft Objects Act, supra,* Schedule 2 (the Protocol), Article XI, Alternative A, paragraph 12, and TAB 5, page 1.

48. Further, on that basis, Articles 29(1) and (2) of the Convention apply in favour of ECN. Paragraphs 1 and 2 of Article 29 state:

> 29(1) A registered interest has priority over any other interest subsequently registered and over an unregistered interest.
>
> (2) The priority of the first-mentioned interest under the preceding paragraph applies:
>
> (a) even if the first-mentioned interest was acquired or registered with actual knowledge of the other interest; and
>
> (b) even as regards value given by the holder of the first-mentioned interest with such knowledge.

"Unregistered interest" is defined at Article 1, section (mm), which states:

> 1(mm) ***unregistered interest*** means a consensual interest or non-consensual right or interest (other than an interest to which Article 39 applies) which has not been registered, whether or not it is registrable under this Convention;

ECN Brief filed November 19, 2018, TAB 1, *Aircraft Objects Act, supra,* Schedule 1 (the Convention), Article 29(1) and Article 1(mm).

49. As such, pursuant to Article 29(1) and Article 1(mm) of the Convention, ECN's registered interest in C-GEMU has priority over the unregistered interest claimed by Third Eye in the "Power Train", regardless of the fact that Third Eye's interest in the "Power Train" is not registrable under the Convention.

50. The concept that other rights or interests are subordinate to the interests of a creditor with a security interest registered in accordance with the Convention is consistent with such a creditor's right to obtain speedy relief from the Court, and with paragraph 9 of Alternative A which states, in the context of insolvency proceedings, that "No exercise of remedies permitted by the convention or this protocol may be prevented or delayed after the date specified in paragraph 2", which in ECN's case was immediately upon the Interim Stay Order being granted on July 4, 2018. Professor Goode states, with regard to Alternative A in the *Official Commentary*:

> If the insolvency administrator or the debtor fails to give up possession after the creditor has become entitled to it under the above provisions [i.e. paragraphs 2 and 7 of Alternative A] or in any other way fails to fulfil its obligations under Alternative A the creditor can apply for and is entitled to obtain speedily a court order requiring the insolvency administrator or the debtor to give possession of the aircraft object. Alternative A requires strict adherence to the timetable and the court is precluded from granting any extension of time for payment or other performance (Alternative A, paragraph 9).

*Official Commentary, supra* at 3.106. **[TAB 4]**

ECN Brief filed November 19, 2018, TAB 1, *Aircraft Objects Act, supra,* Schedule 1 (the Convention), Article 13, section 1 and Schedule 2 (the Protocol), Article XI, Alternative A, section 9.

51. Regarding paragraph 12 of Alternative A, Professor Goode states as follows:

> The creditor's protection under Alternative A is further strengthened by a provision that no rights or interests, except for non-consensual rights or interests of a category covered by a declaration under Article 39(1),

> are to have priority over registered interests (Alternative A, paragraph 12). That makes explicit what is implicit in Articles 29 and 30(2) of the Convention, namely that rules of insolvency law – for example, those giving priority to various categories of preferential debt such as claims for taxes or unpaid wages – cannot be applied to displace the priority of a registered international interest.
>
> *Official Commentary, supra* at 3.113. **[TAB 4]**

52. Further, the *Practitioners' Guide to the Cape Town Convention and The Aircraft Protocol* states as follows regarding paragraph 12 of Alternative A:

> Alternative A adds a special provision that only those non-consensual rights or interests covered by a declaration under Article 39(1) of the Convention have priority over registered interests in insolvency proceedings.
>
> The Legal Advisory Panel of the Aviation Working Group, *Practitioners' Guide to the Cape Town Convention and The Aircraft Protocol* (Aviation Working Group, September, 2015) ["***The Practitioners' Guide***"] at 130. **[TAB 5]**

53. ECN's interpretation of paragraph 12 of Alternative A of Article XI of the Protocol that any interest of Third Eye in the "Power Train" installed on C-GEMU is subordinate to the registered[5] security interest of ECN over C-GEMU is consistent with the plain meaning of paragraph 12 and the context of that paragraph as discussed by Professor Goode, above. In *Sullivan on the Construction of Statutes*, author Ruth Sullivan referenced two recent examples from the Supreme Court of Canada of application of the "plain meaning" rule of statutory interpretation, noting that where the meaning of the text is plain, it should receive significant weight and, in the circumstances of the case, that plain meaning outweighs other considerations which are less compelling:

> … When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[5] Registered in accordance with the Cape Town Convention.

> ... The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision. Where ambiguity arises, it may be necessary to resort to external factors to resolve the ambiguity.... However, Parliament has clearly stated the requirements for finding adult witnesses with mental disabilities to be competent. Section 16 shows no ambiguity.
>
> Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6th ed. (Markham: LexisNexis, 2014), at §2.36 ["***Sullivan***"], citing *Canada Trustco Mortgage Co v Canada*, [2005] SCJ No 56, [2005] 2 SCR 601 at para 10, and *R v D.A.I.,* [2012] SCJ No 5, [2012] 1 SCR 149 at para 26. **[TAB 6]**

54. The plain meaning of paragraph 12 of Article XI, Alternative A of the Protocol is unambiguous. Further, it is consistent with the context of the Cape Town Convention (and the *Aircraft Objects Act* adopting and giving force and effect to it in Canada, along with the Declarations adopting Alternative A in Canada). The plain meaning of paragraph 12, applied to the facts of this case where OMGI is insolvent, is that the alleged security interest of Third Eye over the "Power Train" in C-GEMU is subordinate to the registered interest of ECN over C-GEMU.

### 3. Article 29(7) does not apply as Third Eye has an "Interest", not a "Right"

55. ECN notes that Article 29(1), as referenced above, states that "A registered interest has priority over any other interest subsequently registered and over an unregistered interest". By contrast, Article 29(7)(a) states that "This Convention does not affect the rights of a person in an item, other than an object, held prior to its installation on an object if under the applicable law those rights continue to exist after the installation." Article 29(1) refers to "interests" whereas Article 29(7)(a) only refers to "rights".

ECN Brief, TAB 1, *Aircraft Objects Act, supra*, Schedule 1 (the Convention), Article 29(1) and (7)(a).

56. Basic principles of statutory interpretation suggest that "rights" and "interests" must bear distinct meanings within the Cape Town Convention. Neither of those terms are defined in the Cape Town Convention; however, the intended distinction is apparent from the definition of "unregistered interest", which is defined in the Convention as follows:

> 1(mm) ***unregistered interest*** means a consensual interest or non-consensual right or interest (other than an interest to which Article 39 applies) which has not been registered, whether or not it is registrable under this Convention;

The fact that an "unregistered interest" is defined to include a "consensual interest" but <u>not</u> a "consensual right", or a "right", suggests that "interest" and "right" bear distinct meanings within the Cape Town Convention.

*Sullivan, supra*, at §8.36. **[TAB 6]**

ECN Brief, TAB 1, *Aircraft Objects Act, supra*, Schedule 1 (the Convention), Article 1(1)(mm).

57. In *The Practitioner's Guide, supra*, in comparing the term "power" to the term "right", as they are used in the Cape Town Convention, the authors suggest that a "right" means authorization.

*The Practitioners' Guide, supra*, p 17. **[TAB 5]**

58. With respect to what an "interest" is, *Black's Law Dictionary* includes a definition of "interest" as "[a] legal share in something, all or part of a legal or equitable claim to or right in property."

*Black's Law Dictionary,* 10$^{th}$ ed., *s.v.* "interest". **[TAB 7]**

59. ECN submits that a security interest, granted by agreement of a debtor to a lender, must constitute an "interest", not a "right". This is supported by the definitions of "security agreement" and "security interest" in the Convention:

> 1(ii) ***security agreement*** means an agreement by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an object to secure the performance of any existing right or future obligation of the chargor or a third person;
>
> (jj) ***security interest*** means an interest created by a security agreement;

ECN Brief, TAB 1, *Aircraft Objects Act, supra*, Schedule 1 (the Convention), Article 1(1)(ii) and (jj).

60. As such, ECN submits that Third Eye's claim over the "Power Train" is based on an "interest", not a "right". Further, on that basis, Article 29(7)(a) of the Convention, which speaks only to "rights" of a person in an item, does not apply to Third Eye's security interest over the "Power Train". As such, section 38 of the PPSA does not apply with respect to the "Power Train".

ECN Brief, TAB 1, *Aircraft Objects Act, supra*, Schedule 1 (the Convention), Article 29(1) and (7)(a).

61. ECN submits that this interpretation of Article 29(7)(a) of the Convention is consistent with the modern principle of statutory interpretation, which requires the words of a statute to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the legislation, the object of the legislation, and the intent of Parliament. In particular, an interpretation of "interests" as distinct from "rights" ensures consistency and avoids contradictions as between Article 29(1) of the Convention (pursuant to which a registered interest has priority over an unregistered interest") and Article 29(7)(a) of the Convention.

*Sullivan, supra*, at §2.1. **[TAB 6]**

ECN Brief, TAB 1, *Aircraft Objects Act, supra*, Schedule 1 (the Convention), Article 29(1) and (7)(a).

62. Where Article 29(7)(a) does not apply to Third Eye's claim over the "Power Train", Third Eye's claim over the "Power Train" is subordinate to ECN's registered interest over C-GEMU, as is confirmed by Article 29(1) of the Convention and paragraph 12 of Article XI, Alternative A of the Protocol.

ECN Brief, TAB 1, *Aircraft Objects Act, supra*, Schedule 1 (the Convention), Article 29(1) and Schedule 2 (the Protocol), Article XI, Alternative A, paragraph 12.

### 4. Third Eye's Security Agreement Regarding Dealings by Third Parties

63. Third Eye's own security agreement with OpsMobil Inc. and (via its amalgamation predecessors) OMGI states:

> Section 3.9 Dealings by Third Parties
>
> No Person dealing with any of the Secured Creditors or an agent or receiver is required to determine (i) whether the Security Interest granted by any Obligor has become enforceable, (ii) whether the powers which such Person is purporting to exercise have become exercisable, (iii) whether any money remains due to the Secured Creditors by any Obligor, (iv) the necessity or expediency of the stipulations and conditions subject to which any sale or lease is made, (v) the propriety or regularity of any sale or other dealing by any of the Secured Creditors with any Collateral, or (vi) how any money paid to the Secured Creditors has been applied.

Affidavit of Mark Horrox filed June 26, 2018 in the CCAA Proceedings, Exhibit "C", section 3.9.

64. Section 3.9 of Third Eye's security agreement indicates that ECN (being a "Person" dealing with OMGI as a "Secured Creditor" <u>and</u> an agent of the receiver of assets of OMGI and of OpsMobil Inc.) is not required to determine any of the points set out in section 3.9, including whether the "Security Interest" (i.e. the security interest granted by OpsMobil Inc. and OMGI in favour of Third Eye) has become enforceable, whether the powers which ECN is purporting to exercise have become exercisable, whether any money remains due by OpsMobil Inc. or OMGI to Third Eye, or the propriety or regularity of any sale or other dealing by Third Eye with any of its collateral.

## C. Application of the Cape Town Convention to the "Parts" of C-FXHP

### 1. Third Eye's Challenge to ECN's Claim to Parts of C-FXHP

65. Third Eye also challenges ECN's claim to the various parts of C-FXHP that have been removed from C-FXHP and, in some cases, installed on other aircraft, as listed in the Notice of Seizure and the revised proposed form of Order. To confirm, these parts have been seized by ECN, by way of its civil enforcement agency.

66. As set out above, Alternative A of Article XI of the Protocol entitles ECN to take immediate possession of C-FXHP, and pursuant to paragraph 12 thereof, no rights or

interests of Third Eye in the parts of C-FXHP have priority over ECN's registered interest, where OMGI is in insolvency proceedings. Further, section 3.9 of Third Eye's security agreement, referenced above, indicates that ECN is not required to determine if the security interest over the "Power Train" granted by OpsMobil Inc. and OMGI in favour of Third Eye has become enforceable.

67. ECN also understands that to the extent that Third Eye makes any claim to the parts of C-FXHP that have been removed from C-FXHP (which is not clear), Third Eye relies upon the registration of its security interests at the Alberta PPR. ECN notes that:

(a) ECN registered its security interest over C-FXHP at the International Registry, and ECN's security interest over C-FXHP takes priority to Third Eye's security interest over C-FXHP as a result;

(b) ECN also registered its security interest over C-FXHP (as a serial number good and as general collateral, including over all parts of C-FXHP, including removed parts) at the Alberta PPR, on March 27, 2014, in priority to Third Eye's security interest over C-FXHP and over the present and after-acquired personal property of OMGI which were perfected by registration at the Alberta PPR on December 11, 2014.

First Vaitonis Affidavit, Exhibits "12" and "13", pages 2, 3, 8 and 47 of 60.

68. Should this Honourable Court determine that the Cape Town Convention does not apply to parts removed from C-FXHP and installed onto other aircraft, then section 38(2) of the PPSA applies, such that ECN's security interest in the parts of C-FXHP which attached before or at the time those goods became accessions to other aircraft has priority over any claim by a person with an interest in the aircraft that those parts were installed or affixed on.

*Personal Property Security Act*, RSA 2000 c P-7, s 38(2). **[TAB 8]**

69. There is no evidence that any of the exceptions in section 38(3) of the PPSA apply in favour of Third Eye:

(a) For all of the following parts removed from C-FXHP and (according to Inspection 3) installed onto other aircraft, Third Eye does not hold a security interest in those aircraft (which are required to be registered as serial number goods) at the Alberta PPR:

(i) Tail Rotor, Part Number ("**P/N**") 350A12-0050-10, Serial Number ("**S/N**") 16765, which was removed on Work Order Number ("**W/O#**") 26627 for service on an aircraft described by Canadian Registration Mark C-FHAP, July 17, 2017;

(ii) Cargo Hook and swing assembly, P/N 210-201-01, S/N 198 (swing assembly) and P/N 528-023-01, S/N 602, which was removed on W/O# 24507 to service an aircraft described by Canadian Registration Mark C-FXED, February 9, 2016;

(iii) Both door struts P/N 350A25-1095-21 removed on WO# 24321 to service an aircraft described by Canadian Registration Mark C-FHCT, October 20, 2016;

(iv) Two Bonding Straps, P/N 350A31-1851-00 removed on WO #26110 to service an aircraft described by Canadian Registration Mark C-FVYI, September 21, 2016;

(v) Anti Vibrator, P/N 350A31-0033-06, S/N M1650 which was removed on WO# 26273 to service an aircraft described by Canadian Registration mark C-FHAP, June 7, 2017;

(vi) Generator Control Unit, P/N 504-2A, S/N 1042, removed on WO# 24095 to service an aircraft described by Canadian registration mark C-FHCT, September 28, 2016; and

(vii) Airspeed Indicator, P/N 38399-490, S/N 1735, removed on WO# 26711 to service an aircraft described by Canadian registration mark C-FHAU, July 31, 2017.

First Vaitonis Affidavit, Exhibit "13", re C-FHAP: pages 8 line 813, 11 line 145, 19 line 91, 22 line 153, 30 line 83, 33 line 146, 41 line 83, 44 line 145; re C-FXED: page 9 line 106, page 11 line 149, page 20 line 115, page 22 line 157, page 31 line 107, page 33 line 150, page 42 line 107, page 44 line 149; re C-FHCT: no registrations; re C-FVYI: no registrations; re C-FHAP: page 8 line 83, page 11 line 145, page 19 line 91, page 22 line 153, page 30 line 83, page 33 line 146; page 41 line 83, page 44 line 145; re C-FHCT: no registrations; re C-FHAU: page 8 line 85, page 11 line 147, page 19 line 93; page 22 line 155.

(b) For all of the following parts removed from C-FXHP, the report from Inspection 3 indicates that these parts have not been installed onto other aircraft and are not accessions:

(i) Hydraulic Pressure Switch, P/N MA124-01 removed on WO# 26683, July 26, 2017, and located as of March 20, 2018 in serviceable stores in Whitecourt, Alberta;

(ii) Vertical Speed Indicator, P/N 38210-490, S/N 1365, removed on WO# 27075 for operational purposes and located as of March 20, 2018 in serviceable stores in Grande Prairie, Alberta;

(iii) Essential Bus Relay, P/N M83536/33-003L, removed on WO# 24482 November 4, 2016 for operational reasons and located as of March 20, 2018 in serviceable stores in Whitecourt, Alberta; and

(iv) Boost pumps, P/N 704A44-5100-40, S/N F81633 and 23281, removed on WO# 24244, one to service an aircraft described by Canadian registration mark C-GHCT, and one located as of March 20, 2018 in serviceable stores in Whitecourt, Alberta.

First Vaitonis Affidavit, Exhibit "18".

(c) For all of the following parts removed from C-FXHP, there is no evidence that section 38(3) of the PPSA applies:

(i) First Aid Kit, P/N FIRST AID KIT, S/N A122-MH22, removed on WO# 24061 to service another aircraft, September 21, 2016; and

(ii) Survival Kit, P/N SK-6, S/N GP0018, removed on WO# 24061 for service on another aircraft, September 21, 2016;

First Vaitonis Affidavit, Exhibit "18".

(d) For all of the following parts removed from C-FXHP, they were removed from C-FXHP to service an aircraft described by Canadian Registration Mark C-FXDM ("**C-FXDM**"). Third Eye acquired and perfected a security interest in C-FXDM on December 11, 2014, which was after ECN acquired and perfected its security interest in those parts (and in C-FXHP) on March 27, 2014. With the exception of the "bonding strap" referenced below where there is no evidence as to when that part was removed from C-FXHP, ECN acquired and perfected its security interest in these parts before the parts became accessions in 2016:

(i) Two forward seat belts, P/N AFG0348026, S/N 00313 and P/N AFG0315387, removed on WO# 24052 to service an aircraft described by Canadian Registration Mark C-FXDM, September 23, 2016;

(ii) Oil Cooler Blower, P/N 9696, S/N 2243, removed on WO# 24562 to service an aircraft described by Canadian registration mark C-FXDM, November 10, 2016;

(iii) Torquemeter, P/N PT-100-GA, S/N 052706-083, removed on WO# 24716 to service an aircraft described by Canadian registration mark C-FXDM, December 5, 2016;

(iv) Bonding Strap, no P/N recorded, removed on WO# 25027 to service an aircraft described by Canadian registration mark C-FXDM.

> First Vaitonis Affidavit, Exhibit "13", page 10 line 128 and page 1 regarding Amendment 14121133817, page 22 line 137 and page 13 regarding Amendment 14121136092, page 32 line 129 and page 24 regarding Amendment 14121135196, and page 43 line 129 and page 35 regarding Amendment 14121134212.

## 2. <u>The C-FXHP Engine</u>

70. Article XIV, paragraph 3 of the Protocol to the Cape Town Convention states:

> 3 Ownership of or another right or interest in an aircraft engine shall not be affected by its installation on or removal from an aircraft.

> ECN Brief, TAB 1, Schedule 2 (the Protocol), Article XIV, paragraph 3.

71. "Aircraft" is defined in Article I, paragraph 2(a) of the Protocol to include helicopters.

> ECN Brief, TAB 1, Schedule 2 (the Protocol), Article I, paragraph 2(a).

72. Professor Goode notes:

> ...an international interest can be taken in an aircraft engine as an independent object and is separately registrable. By contrast an engine installed on a helicopter is not an aircraft engine but an accessory of the helicopter ... and while so installed is not capable of being the subject of a separate international interest under the Convention. The position is otherwise prior to its installation or subsequent to its removal, when constitutes an aircraft engine. This means, first, that when not installed it can become the subject of a registrable international interest and, secondly, that the creditor's pre-installation rights and interests under

> the applicable law (including, in a Contracting State, its rights and interests under the Convention) are not affected by installation of the engine on a helicopter.

Professor Goode also notes the practical approach of registering a prospective international interest in an installed engine which, immediately upon its removal, becomes an international interest, with priority according to the date of that prospective registration. ECN did exactly this: it registered its security interest in the C-FXHP Engine at the International Registry, such that ECN continues to have a first-priority security interest in the C-FXHP Engine despite its removal from C-FXHP.

*Official Commentary, supra* at 3.10. **[TAB 4]**

First Vaitonis Affidavit, Exhibit "11".

73. ECN seeks to take possession of the C-FXHP Engine so as to market and sell the same. ECN has been advised that Intermountain will release the C-FXHP Engine to it upon payment of US $10,000 for the costs incurred by Intermountain in disassembling the C-FXHP Engine.

## IV. RELIEF SOUGHT

74. The Applicant, ECN, respectfully seeks an Order in the proposed form attached hereto as Appendix "A".

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 13th day of December, 2018.

BENNETT JONES LLP

Per: ______________________
Kelsey Meyer
Counsel for the Applicant, ECN Aviation Inc.

## V. APPENDIX

A. Revised Proposed Form of Order

## VI. TABLE OF AUTHORITIES

TAB

# APPENDIX A

| | |
|---|---|
| COURT FILE NO. | 1801-09188 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| PLAINTIFF | **THIRD EYE CAPITAL CORPORATION** |
| DEFENDANTS | **RANCH ENERGY CORPORATION, OPSMOBIL INC., 1734163 ALBERTA INC., 1859821 ALBERTA INC., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC., AIR DALLAIRE LTD., and K.L. CAPITAL CORP.** |
| DOCUMENT | **ORDER** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF THE PARTY FILING THIS DOCUMENT | **BENNETT JONES LLP**<br>Barristers and Solicitors<br>4500 Bankers Hall East<br>855 – 2 Street SW<br>Calgary, AB T2P 4K7<br><br>Attention: Kelsey Meyer<br>Telephone No.: 403-298-3323<br>Fax No.: 403-265-7219<br>Client File No.: 78704.1 |
| **DATE ON WHICH ORDER WAS PRONOUNCED:** | **Wednesday, November 28, 2018** |
| **LOCATION OF HEARING:** | **Calgary Courts Centre**<br>**601 5th Street SW**<br>**Calgary, Alberta T2P 5P7** |
| **NAME OF JUSTICE WHO MADE THIS ORDER:** | **The Honourable Madam Justice B. E. C. Romaine** |

UPON THE APPLICATION of ECN Aviation Inc. ("**ECN**"); AND UPON hearing read the Affidavits of Algis Vaitonis sworn November 18, 2018; AND UPON hearing from counsel for ECN; AND UPON noting that the Service List has been served with this application; AND UPON noting the consent of Canada Revenue Agency ("**CRA**"); IT IS HEREBY ORDERED AND DECLARED THAT:

1. Service of this Application is declared good and sufficient, and the time for notice of this Application is abridged to the time actually given.

2. Subject to a determination of the priority and entitlement of the deemed trust claim of CRA as contemplated in paragraph 8(c) hereof, ECN has a first-priority security interest in the following:

> One (1) 1998 Eurocopter model AS350BA-FX-2 aircraft bearing manufacturer's serial number 3100 and Canadian registration mark C-FXHP

("**C-FXHP**"); and

> One (1) 2000 Eurocopter model EC120B aircraft bearing manufacturer's serial number 1057 and Canadian registration mark C-GEMU, including one (1) Turbomeca model Arrius 2F engine installed on the airframe bearing manufacturer's serial number 34069

("**C-GEMU**"); and all parts, accessories, appliances, appurtenances, components, furnishings, instruments, modules, navigational and communications equipment and all other goods, tangibles, personal property and other equipment of whatever nature that may from time to time be incorporated or installed in or attached to the foregoing airframes, engines or auxiliary power unit, as the case may be, and all records, logs, maintenance records, manuals, technical data, training aids, computer software, and other materials relating to the airframes, engines, propellers or auxiliary power unit, as the case may be, and any property substituted for any of the foregoing; (collectively, the "**Aircraft**"), and for certainty:

(a) including any parts, accessories, appliances, appurtenances, components, furnishings, instruments, modules, navigational and communications equipment and all other goods, tangibles, personal property and other equipment from the Aircraft that have been removed from the Aircraft or installed on other Aircraft;

(b) not including one (1) Lycoming (Honeywell) model LTS101-700D2 engine bearing manufacturer's serial number LE-43005C, the entitlement to which shall be determined by this Honourable Court at an application of Rilpa Enterprises Ltd., currently scheduled to be heard by this Honourable Court on December 17, 2018.

3. ECN was entitled to seize the Aircraft on May 11, 2018, and its seizure of the Aircraft on May 11, 2018 is authorized and valid.

4. ECN is authorized to immediately take possession of the Aircraft.

5. The Receiver, the debtors (being the Respondents to this Action), the bailees of the Aircraft and all other persons and entities are directed to cooperate in permitting ECN to take possession of the Aircraft, including but not limited to all journey log books and component log cards for the Aircraft, forthwith, without delay or disruption.

6. The Aircraft are not subject to the provisions of any of:

(a) the Interim Stay Order filed July 4, 2018 (the "**Interim Stay Order**") in the *Companies' Creditors Arrangement Act* ("**CCAA**") proceedings in relation to the Respondents to this Action, Court File No. 1801-09424 (the "**CCAA Proceedings**");

(b) the Initial Order filed July 6, 2018 in the CCAA proceedings (the "**CCAA Initial Order**");

(c) the Receivership Order filed in this Action on July 19, 2018; or

(d) the Amended Receivership Order filed in this Action on August 7, 2018;

including, but not limited to:

(i) the stays of proceedings imposed by each of the Interim Stay Order, the Initial Order, the Receivership Order and the Amended Receivership Order;

(ii) the Receiver's Charge and the Receiver's Borrowings Charge (each as defined in the Receivership Order); and

(iii) the Interim Lenders' Charge, the Administration Charge and the Directors' Charge (each as defined in the CCAA Initial Order).

7. ECN is authorized to take possession of and market and sell the Aircraft in a commercially reasonable manner, without further Order of this Honourable Court, in accordance with the provisions of the *Personal Property Security Act*, RSA 2000 c P-7 and the *International Interests in Mobile Equipment (aircraft equipment) Act*, SC 2005, c 3.

8. Upon the closing of any sale or sales of the Aircraft, counsel for ECN shall hold the proceeds of sale of the Aircraft in trust, pending:

(a) the Receiver paying in full the deemed trust claim of CRA as against OpsMobil Group Inc. for unremitted source deductions pursuant to subsections 227(4) and (4.1) of the *Income Tax Act*, RSC 1985 c 1 (5$^{th}$ Supp.);

(b) ECN and CRA reaching agreement as to the disposition of the proceeds of sale of the Aircraft; or

(c) a further Order of this Honourable Court determining priority and entitlement to the proceeds of sale of the Aircraft, as between CRA, ECN, and the Receiver with respect to any other claims to the proceeds of sale of the Aircraft.

9. For further certainty:

(a) nothing in paragraph 8(c) of this Order shall change the priority of ECN's security interest over the Aircraft as set out in paragraph 2 hereof, other than an Order of this Honourable Court granting priority to CRA's claim;

(b) paragraph 8 of this Order is without prejudice to all rights of ECN to challenge the validity and priority of any claim by CRA to the proceeds of sale of the Aircraft.

______________________________
**J.C.C.Q.B.A.**

Consented to this ____ day of November, 2018

**Government of Canada, Department of Justice**

Per: ______________________________
Jill Medhurst
Counsel for Canada Revenue Agency

TAB 1

# Second Report of KSV Kofman Inc. as CCAA Monitor of Great Slave Helicopters Ltd.

November 16, 2018

# Contents

**COURT FILE NO.: CV-18-604434-00CL**

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,**
**R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT**
**OF GREAT SLAVE HELICOPTERS LTD.**

**SECOND REPORT OF KSV KOFMAN INC. AS MONITOR**

**November 16, 2018**

# 1.0 Introduction

1. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the "Court") made on September 4, 2018 (the "Initial Order"), Great Slave Helicopters Ltd. (the "Company") was granted protection under the *Companies' Creditors Arrangement Act*, *R.S.C. 1985, c. C-36*, as amended (the "CCAA"), and KSV Kofman Inc. ("KSV") was appointed monitor (the "Monitor"). A copy of the Initial Order is attached as Appendix "A".

2. The principal purpose of these restructuring proceedings is to create a stabilized environment to conduct a Court-approved sale and investment solicitation process ("SISP") for the Company's business and assets.

3. KSV is filing this report ("Report") in its capacity as Monitor.

## 1.1 Purposes of this Report

1. The purposes of this Report are to:

   a) provide background information about the Company and these proceedings;

   b) summarize the results of the SISP carried out by the Monitor in accordance with a Court order made on September 14, 2018 (the "SISP Approval Order");

   c) summarize the terms of an asset purchase agreement dated November 8, 2018 (the "APA") pursuant to which 11088211 Canada Corp. (the "Purchaser") has agreed to purchase substantially all of the Company's business and assets and assume certain liabilities (the "Transaction");

   d) summarize a proposed sale to Delta Helicopters Ltd. ("Delta") of the Company's 1988 Eurocopter 350B2, with a Canadian Registration number C-GJGK (the "Aircraft"), which asset is not being purchased by the Purchaser;

e) report on the Company's cash flow projection for the period November 26, 2018 to December 30, 2018 ("Cash Flow Forecast");

f) discuss the reasons to extend the stay of proceedings from November 23, 2018 to January 18, 2019;

g) detail the fees and disbursements of the Monitor and its counsel, Goodmans LLP ("Goodmans"), from the commencement of these proceedings to October 31, 2018, and seek approval of same; and

h) recommend that this Honourable Court make one or more orders:

   i. approving the APA and the Transaction contemplated therein;

   ii. approving the sale of the Aircraft to Delta;

   iii. authorizing the Company to enter into any other ancillary documents and agreements required to complete the Transaction and/or the sale of the Aircraft to Delta;

   iv. vesting in the Purchaser the Company's right, title and interest in and to the Assets (as defined in the APA), free and clear of all liens, charges, security interests and encumbrances, other than the Permitted Encumbrances;

   v. vesting in Delta the Company's right, title and interest in and to the Aircraft, free and clear of all liens, charges, security interests and encumbrances;

   vi. extending the stay of proceedings from November 23, 2018 to January 18, 2019;

   vii. approving the fees and disbursements of the Monitor and Goodmans from the commencement of these proceedings to October 31, 2018;

   viii. sealing the confidential appendices to this Report on the terms set out below; and

   ix. approving this Report and the Monitor's activities described herein.

## 1.2 Restrictions

1. In preparing this Report, KSV has relied upon the Company's unaudited financial information, including certain of its books and records, and discussions with the Company's management, the Company's counsel and representatives of Clairvest Group Inc. and its affiliates, including certain funds managed by Clairvest Group Inc. ("Clairvest"), the Company's largest secured creditor and indirect shareholder. KSV has not audited, reviewed or otherwise verified the accuracy or completeness of the information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the Chartered Professional Accountants of Canada Handbook.

2. KSV expresses no opinion or other form of assurance with respect to the financial information presented in this Report or relied upon by KSV in preparing this Report. Any party wishing to place reliance on the Company's financial information should perform its own diligence and any reliance placed by any party on the information presented herein shall not be considered sufficient for any purpose whatsoever.

3. An examination of the Cash Flow Forecast as outlined in the Chartered Professional Accountant Canada Handbook has not been performed. Future oriented financial information relied upon in this Report is based upon the Company's assumptions regarding future events; actual results achieved may vary from this information and these variations may be material. KSV expresses no opinion or other form of assurance on whether the Company's forecasted results will be achieved.

### 1.3 Currency

1. All currency references in this Report are to Canadian dollars.

## 2.0 Background

1. The Company is one of Canada's largest onshore helicopter operators. It operates from two main bases located in Yellowknife, Northwest Territories and Calgary, Alberta, as well as from sub-bases throughout Canada (including Inuvik, Norman Wells and Fort Simpson, Northwest Territories; Terrace, Prince Rupert and Kelowna, British Columbia; and Dryden, Ontario).

2. The Company provides mineral and oil and gas exploration support, forest fire suppression, support to government agencies and other services, including environmental surveying, utilities/pipeline patrol, power line construction and telecommunications support.

3. The Company has approximately 200 employees. The Company's employees are not unionized and the Company does not maintain a pension plan.

4. The Initial Order provides a limited stay of proceedings over the Company's parent, 10671541 Canada Inc. ("106"), and two affiliated entities, Air Tindi Ltd. ("ATL") and Discovery Mining Services Ltd. ("DMS") (together, the "Non-Applicants" and with the Company, the "Group") for the purpose of preventing creditor actions against the Non-Applicants due to the Company's insolvency, its filing for CCAA protection and the relief sought and obtained in any orders of the Court made in the CCAA proceedings.

5. Clairvest is the Company's largest secured creditor. As at October 31, 2018, the Company's obligations owing to Clairvest under its secured debentures totalled approximately $70 million. The Company's other secured equipment lenders are ECN Aviation Inc. ("ECN"), which is owed approximately $7.8 million and has a secured interest in eight Company helicopters with subordinate security in all other assets, and Roynat Inc. ("Roynat"), which is owed approximately $4.3 million and has a secured interest in four Company helicopters with subordinate security in all other assets.

6. CIBC is the Group's operating lender. Pursuant to the Initial Order, the Company was authorized to continue to use its consolidated cash management system. CIBC was owed approximately $8.2 million as at November 9, 2018.

7. The affidavit of Alasdair Martin, the Company's President, sworn August 31, 2018, was filed with the Court in support of the Company's application for CCAA protection and provides, *inter alia*, details regarding the Company's background, including the reasons for the commencement of these proceedings. Mr. Martin has also filed an affidavit in support of this motion.

8. Further information regarding these proceedings and the SISP is provided in the Monitor's First Report to Court dated September 11, 2018 (the "First Report"), a copy of which is attached as Appendix "B", without appendices.

9. The Court materials filed in these proceedings are available on the Monitor's website at www.ksvadvisory.com/insolvency-cases/great-slave-helicopters.

## 3.0 SISP

1. The focus from the outset of these proceedings has been to carry out the SISP in a stabilized business environment.

2. The SISP Approval Order was made on September 14, 2018, a copy of which is attached as Appendix "C". The Monitor has carried out the SISP in accordance with the SISP Approval Order. A summary of the SISP is as follows:

    a) immediately following the issuance of the SISP Approval Order, the Company issued a press release concerning the SISP, a copy of which is attached as Appendix "D";

    b) the Monitor prepared an interest solicitation letter that was sent to 218 parties which it identified might be interested in an acquisition of, or investment in, the Company. The letter was also sent to parties that had contacted the Monitor on an unsolicited basis following its appointment;

    c) the Monitor, with the Company's assistance, prepared a confidential information memorandum ("CIM") for this opportunity;

    d) attached to the solicitation letter was a confidentiality agreement (the "CA") and a SISP acknowledgment (the "Acknowledgment") that interested parties were required to sign in order to obtain a copy of the CIM and access to an online data room set up by the Monitor;

    e) over the course of the SISP, the Monitor facilitated diligence requests from interested parties, including by working with management to update the data room with current financial and other information and by arranging site visits and management meetings at the Company's premises in Yellowknife, NWT and/or Springbank, Alberta;

f) offers were required to be submitted to the Monitor by 5:00 pm (Eastern time) on October 17, 2018; and

g) bidders were required to provide a cash deposit equal to 15% of their proposed purchase price at the time they submitted their bids.

3. The acquisition opportunity was also exposed to the market through an article published in Skies Magazine on September 14, 2018. The Monitor understands that Skies Magazine is a leading publication in the aviation industry.

4. Paragraph 4 of the SISP provides the Monitor with the flexibility to extend any deadline for up to two weeks without Court approval. On October 15, 2018, the Monitor, in consultation with the Company and Clairvest, extended the bid deadline from October 17, 2018 to October 31, 2018. Before finalizing the extension, the Monitor also notified CIBC and Roynat. The Monitor then sent a letter to each party that had executed a CA and an Acknowledgement and posted a notice of the extension on its website. Copies of the letter and notice are attached as Appendix "E".

5. As part of the process to extend the bid deadline, on October 15, 2018, the Monitor also sent a letter to interested parties requesting, *inter alia*, that bidders submit on October 17, 2018 an overview of their prospective transaction, including the value range and material conditions. The letter also advised that the Monitor would be placing in the data room an electronic template version of the asset purchase agreement and recommended that interested parties submit their offer in the form of the template, with any changes blacklined against the template. A copy of the Monitor's letter dated October 15, 2018 is attached as Appendix "F".

6. The Monitor provided regular SISP updates to the Company's secured lenders, being Clairvest, Roynat and CIBC.

7. From the outset of the CCAA process, ECN had expressed a desire that the eight helicopters which it had financed not be part of the SISP. ECN had effected registrations in respect of those helicopters in the International Registry of Mobile Assets under the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the "Capetown Convention"), and ECN decided to remove its aircraft and dispose of them independently. After the Monitor received an opinion from Goodmans confirming that the ECN interests were valid, enforceable and first ranking with respect to the eight aircraft, ECN was allowed to take possession of those aircraft on a consensual basis. Accordingly, ECN did not receive updates on the SISP.

8. Similarly, 9333 Helicopters Inc. ("9333") advised the Monitor that it wished to remove its helicopters from the SISP. 9333 had leased three helicopters to the Company, none of which were in regular active service. After the Monitor received an opinion from Goodmans confirming that 9333's interests were valid, enforceable and first ranking in respect of those aircraft, 9333 was allowed to remove their aircraft on a consensual basis.

### 3.1 Capital Canada Ltd.

1. Capital Canada Ltd. ("CCL") had been retained by Clairvest prior to these CCAA proceedings in an effort to identify a purchaser for the Company.

2. Given CCL's prior involvement with the Company, its dealings with prospective going-concern purchasers and its substantial expertise in the aviation sector, on September 28, 2018, the Monitor, in consultation with Clairvest, engaged CCL as its agent to assist it to carry out the SISP. Pursuant to its engagement letter, CCL's fees for its assistance in the SISP are to be paid by 106.

3. The Monitor worked closely with CCL throughout the SISP. CCL's involvement was focused on pursuing going-concern transactions, including to continue its prior dealings with certain prospective purchasers. CCL's experience in the aviation industry was helpful in generating a successful outcome for the SISP.

### 3.2 SISP Results

1. A summary of the SISP results is as follows:

   a) Of the 218 strategic and financial parties approached by the Monitor, 58 parties signed a CA and Acknowledgement and participated in the SISP.

   b) On October 17, 2018, three parties submitted "transaction overview" letters to the Monitor, as requested by the Monitor on October 15, 2018.

   c) On October 31, 2018, 29 offers were submitted to the Monitor, as follows:

| Type | Number of Offers |
|---|---|
| Going-concern | 2 |
| Select assets | 20 |
| Liquidation proposals | 7 |

2. From October 31, 2018 to November 8, 2018, the Monitor, with the assistance of CCL and Goodmans, worked with the Purchaser and its counsel to finalize the terms of the APA. The offer was finalized and accepted on November 8, 2018 and the only material condition in the APA is Court approval.

3. A summary of the offers received is attached as Confidential Appendix "1". The Monitor's rationale for filing this schedule on a confidential basis is set out in Section 4.4 below.

## 4.0 Transaction[1]

1. The key terms and conditions of the APA include the following:

   a) Purchaser: entity incorporated by Pat Campling, an individual with significant experience in the aviation sector.

[1] Defined terms in this section of the Report have the meanings provided to them in the APA.

b) <u>Assets to be purchased</u>: the Company's right, title and interest in, to and under substantially all of its business, assets and contracts, excluding accounts receivable and the Aircraft.

c) <u>Joint Venture Interests</u>: the Purchased Assets include the Company's minority interest in 13 joint venture agreements with Aboriginal groups. The Monitor understands that the Company and the Purchaser are in the process of discussing the Transaction with these joint venture partners, including that it provides for the continuation of helicopter services to remote areas throughout Northern Canada. All of the Company's joint venture partners are being served with the Company's Motion Record. Certain of the joint venture agreements include rights of first refusal that allow the Company's joint venture partner to acquire the Company's interest in the joint venture. It is the Purchaser's hope and intention to simply assume all of the existing obligations of the Company under the various agreements with these joint venture parties, and to not trigger any rights of first refusal mechanisms, but to maintain them going forward, in a fashion which is beneficial for those Aboriginal groups and the communities they serve.

d) <u>Assumed Liabilities</u>: all liabilities and obligations of the Company under the Contracts and in respect of the Transferred Employees. Within two days prior to closing, the Purchaser is required to identify the Transferred Employees and Contracts to be included in the Transaction.

e) <u>Transportation Licenses</u>: the Purchaser intends to have the transportation licences re-issued within 90 days following the Closing Date, during which period the Purchaser will continue to operate. The Company has agreed under the APA to assist the Purchaser for a period of up to 90 days after the Closing Date in its efforts to have transportation licences re-issued.

f) <u>Conditions Precedent</u>: the agreement is consistent with standard insolvency transactions, i.e. to be completed on an "as is, where is" basis with minimal representations, warranties and conditions. As noted, the only remaining material condition is Court approval. While financing is not a condition to the Transaction, Clairvest has agreed to provide a certain amount of new funding to the Purchaser in the event same becomes necessary. The Monitor understands that Clairvest and the Purchaser will have further discussions in this regard.

g) <u>Deposit</u>: in accordance with the SISP, the Purchaser funded a 15% deposit, which is held in the Monitor's trust account.

2. A redacted version of the APA is attached as Appendix "G". An unredacted version is filed as Confidential Appendix "2". The basis for sealing the unredacted version of the APA is provided in Section 4.4 below.

### 4.1 Aircraft Sale to Delta

1. On October 31, 2018, Delta submitted an offer letter for the Aircraft, a redacted copy of which (redacted for sale price only) is attached as Appendix "H". An unredacted version of the offer is filed as Confidential Appendix "3". The basis for sealing the unredacted version of the Delta offer letter is provided in Section 4.4 below.

2. Delta's offer letter contemplates a cash purchase price and is conditional on it receiving clean title to the Aircraft. In accordance with the SISP, Delta funded a 15% deposit, which is being held in the Monitor's trust account.

### 4.2 Recommendation

1. The Monitor believes the Transaction, and the proposed sale to Delta, are appropriate for the following reasons:

    a) the SISP was carried out in accordance with the SISP Approval Order;

    b) in the Monitor's view, the SISP was commercially reasonable, including its timelines, the breadth of the marketing process and the information made available to interested parties, including information in the CIM and the data room;

    c) in respect of the SISP timeline, CCL canvassed the market for several months prior to the commencement of the SISP and KSV, in its capacity as CCAA monitor of Discovery Air Inc. ("DAI"), carried out a Court-approved sale process for DAI's subsidiaries, including the Company, in April and May of 2018. Accordingly, in the Monitor's view, and as evidenced by the number of offers received, the duration of the SISP (roughly 6 weeks) was sufficient to allow interested parties to perform diligence and submit offers;

    d) the value of the Transaction was the highest of the offers received in the SISP;

    e) the value of the Transaction (together with the value of the Excluded Assets and the Aircraft) exceeds, by far, the liquidation value of the Company's business and assets;

    f) the SISP provided all prospective bidders with the opportunity to submit offers for the assets or investment proposals to recapitalize the Company – no investment proposals were submitted;

    g) the Transaction is expected to preserve employment for a substantial number of the Company's employees, whereas the alternative, liquidation, would result in the loss of all employment;

    h) the Transaction provides for the ongoing provision of helicopter services in remote areas of Northern Canada;

    i) Clairvest, the Company's largest economic stakeholder, has agreed to support the Transaction;

    j) CIBC has advised that it is not opposed to the requested relief;

    k) Roynat has been advised of the results of the SISP, including the bids for the four aircraft it financed, and will be served with the Company's motion record together with all of the Company's other secured creditors;

l) the Monitor does not believe that further time spent marketing the Company's business and assets will result in a superior transaction. Should a transaction not be completed imminently, the Company will be forced to discontinue operations as it lacks the liquidity to continue to operate;

m) Delta's offer for the Aircraft was the best offer received for that asset and the offer is unconditional. Based upon an opinion received from Goodmans, Clairvest has priority to the Aircraft and it supports the sale of the Aircraft; and

n) the Monitor is not aware of any party who has advised of any opposition.

2. Based on the foregoing, the Monitor recommends that this Honourable Court approve the Transaction and the sale of the Aircraft to Delta.

### 4.3 Anticipated Timeline to Closing

1. The Transaction contemplates a Closing Date of November 23, 2018 or such other date as the parties may agree in writing. There is no "outside date" and it is the Monitor's understanding that the Purchaser and the Company are working diligently to close the Transaction as soon as possible following Court approval (if granted).

### 4.4 Sealing

1. The Monitor recommends that the unredacted versions of the APA and Delta's offer letter be filed with the Court on a confidential basis and remain sealed until the closings of such transactions, as evidenced by the filing of the Monitor's certificates, as the availability of this information to other parties may negatively impact any future sale process for the Company's business and assets if the Transaction or the Delta sale do not close. The Monitor also recommends that the offer summary be sealed pending further order of the Court given the sensitive nature of the information contained therein. The Monitor does not believe that any stakeholder will be prejudiced if the information is sealed. The redacted versions of the APA and the Delta offer have been redacted for price and financial information only.

## 5.0 Cash Flow Forecast

1. The prior cash flow projection filed with the Court covered the period ended November 25, 2018. The Company has prepared a Cash Flow Forecast for the period ending December 30, 2018. The Cash Flow Forecast and the Company's statutory report on the cash flow prepared pursuant to Section 10(2)(b) of the CCAA is attached as Appendix "I".

2. The Cash Flow Forecast reflects that the Company has sufficient liquidity to continue to operate through the requested extension period without the need for a debtor-in-possession loan facility.

3. The Cash Flow Forecast contemplates normal course operations through December 30, 2018. As noted above, subject to Court approval, it is anticipated that the Transaction will close before December 30, 2018. Once the Transaction closes, the Company's business will be discontinued and its operating costs will be nominal. Any costs of operations to complete a wind-down would be funded from the proceeds of the Transaction or the sale of the Aircraft to Delta.

4. Based on KSV's review of the Cash Flow Forecast, the assumptions appear reasonable. KSV's statutory report on the Cash Flow Forecast is attached as Appendix "J".

# 6.0 Stay Extension

1. The Monitor supports the Company's request for an extension of the stay of proceedings from November 23, 2018 to January 18, 2019 for the following reasons:

   a) the Company is acting in good faith and with due diligence;

   b) the extension will provide the opportunity to complete the SISP;

   c) the Cash Flow Forecast reflects that the Company is projected to have sufficient funding to continue to operate in the normal course through the proposed stay extension period;

   d) Clairvest, being the principal economic stakeholder in these proceedings, supports the stay extension;

   e) CIBC's counsel has advised that CIBC does not oppose the extension; and

   f) no creditor will be materially prejudiced if the extension is granted.

# 7.0 Other Matters

## 7.1 Reimbursement agreement

1. In July, 2018, prior to the commencement of the CCAA proceedings, the Company's aircraft described as Bell 407, C-FNAK, S/N: 3112 was involved in an accident and assessed as a total loss. Clairvest was believed to have a first ranking security interest in this aircraft.

2. Pursuant to a Final Aircraft Hull Statement in Proof of Loss finalized on August 13, 2018, and the corresponding Final Computation of Loss Settlement between the Company and Clairvest, the underwriters on the Company's insurance policy were authorized to pay US$1,750,794 directly to Clairvest as a settlement of all claims or liabilities under the insurance policy.

3. The insurance payments were made directly to Clairvest in October, 2018. When these payments were brought to the Monitor's attention, the Monitor instructed counsel to prepare a Reimbursement Agreement as there had not yet been a distribution motion in these proceedings nor had a security opinion been issued by the Monitor's counsel, Goodmans, at that time.

4. On October 9, 2018, Clairvest, the Company and the Monitor entered into the Reimbursement Agreement, a copy of which is attached as Appendix "K".

5. Goodmans has since rendered an opinion which provides that, among other things and subject to the customary qualifications detailed therein, Clairvest held a first ranking security interest in the subject aircraft. Accordingly, Clairvest is entitled to the insurance proceeds described above.

### 7.2 Chilean Operations

1. As at the date of this Report, the operations of the Company's Chilean subsidiary, Discovery Air Innovations Ltda. ("DA Chile"), are in the process of being discontinued. The Transaction does not include the Company's interest in DA Chile nor any of DA Chile's assets.

2. The Monitor has been advised that the Company is pursuing a transaction for the shares of DA Chile with management of DA Chile. Any transaction involving DA Chile will be the subject of a future motion in these proceedings, should Court approval be required, or will be disclosed by the Monitor in a subsequent report to Court.

## 8.0 Professional Fees

1. The Monitor's fees (excluding disbursements and HST) from the commencement of these proceedings, until October 31, 2018, and those of its legal counsel, Goodmans, for the same period, total approximately $415,556 and $162,544, respectively. The fees of the Monitor and Goodmans also include activities undertaken prior to the date of the Initial Order in connection with preparing for these CCAA proceedings.

2. The detailed invoices in respect of the fees and disbursements of the Monitor and Goodmans are provided in appendices to the affidavits filed by KSV and Goodmans in the accompanying motion materials.

3. The average hourly rates for KSV and Goodmans for the referenced billing periods were $496.33 and $633.45, respectively.

4. The Monitor is of the view that the hourly rates charged by Goodmans are consistent with the rates charged by corporate law firms practicing in the area of corporate insolvency and restructuring in the Toronto market, and that the fees charged are reasonable and appropriate in the circumstances.

## 9.0 Anticipated Next Steps in these Proceedings

1. Subject to Court approval of the Transaction, the Delta sale and the proposed stay extension, it is expected that the next steps in these proceedings will be to:

   a) work with the Purchaser to close the Transaction;

   b) assist to provide transition services to the Purchaser, to the extent required;

   c) complete the Aircraft sale to Delta;

   d) obtain from ECN an update and/or accounting of its marketing efforts to realize on the eight helicopters it repossessed in late October;

   e) facilitate collections of accounts receivable, being an excluded asset from the Transaction; and

   f) finalize an allocation of sale proceeds among the Company's secured creditors, following which a distribution motion will be brought before this Honourable Court.

## 10.0 Conclusion and Recommendation

1. Based on the foregoing, the Monitor respectfully recommends that this Honourable Court make an order granting the relief detailed in Section 1.1(1)(h) of this Report.

* * *

All of which is respectfully submitted,

KSV Kofman Inc

**KSV KOFMAN INC.**
**IN ITS CAPACITY AS MONITOR OF**
**GREAT SLAVE HELICOPTERS LTD.**
**AND NOT IN ITS PERSONAL CAPACITY**

TAB 2

THE HIGH COURT

2015 No. 8 MCA

BETWEEN/

BELAIR HOLDINGS LTD.

APPLICANT

AND

ETOLE HOLDINGS LIMITED AND AVIARETO LIMITED

RESPONDENTS

**JUDGMENT of Ms Justice O'Malley delivered on 26th of March 2015**

This is the application by the applicant, Belair, for orders compelling the first named respondent, Etole, and the second named respondent, the Registrar, to discharge a registration from the International Register made by Etole. The central issue in the application is whether the registration was validly made within the terms of the Cape Town Convention. This is a technical question depending on the proper application of the rules and principles of the Convention.

The ruling does not therefore make any findings as to the conduct of the contractual dealings at the heart of a dispute between the parties or on the question of the jurisdiction of this court to adjudicate on matters arising from that dispute. Those issues have yet to be determined.

However it is common case that, pursuant to Article 44 of the Convention, the High Court of Ireland has exclusive jurisdiction to make orders directed to the Registrar with regard to the discharge of invalid registrations. Etole has submitted to the jurisdiction and no issue arises in that regard.

The entry made on behalf of Etole on 30th December 2014 purported to register a registrable non-consensual interest.

I now want to look at the relevant provisions of the Convention, starting with the definition of an international interest. By virtue of Article 1(o), that means an interest held by a creditor to which Article 2 applies. An international interest may be registered by either party with the consent in writing of the other.

For present purposes, the relevant part of Article 2 is that which defines an international interest as being an interest:

*"(a) granted by the chargor under a security agreement;*

*(b) vested in a person who is the conditional seller under a title reservation agreement; or*

*(c) vested in a person who is the lessor under a leasing agreement."*

This type of agreement is not relevant in this case.

An interest falling within subparagraph (a) does not also fall within subparagraph (b) or (c). It is apparent that these subparagraphs deal with situations where the interest is conferred by virtue of an agreement between the parties.

A security agreement is defined as an agreement by which a chargor grants or agrees to grant an interest, including an ownership interest, in or over an object to secure the performance of any existing or future obligation of the chargor or a third person.

A title reservation agreement means an agreement for the sale of an object in terms that ownership does not pass until fulfillment of the condition or conditions stated in the agreement.

It should be noted that the word "agreement" in the Convention means a security agreement, a title reservation or a leasing agreement. It does not include a contract for sale of a relevant object.

A registered interest means an international interest,a registrable non-consensual right or interest or a national interest specified in a notice of a national interest registered pursuant to the provisions of the Convention. The concept of national interest does not arise in these proceedings.

It is possible under the Convention to register certain legal rights and interests which are not created by agreement. A registrable non-consensual right or interest means a non-consensual right or interest registrable pursuant to a declaration deposited by a Contracting State under the provisions of Article 40. Such a declaration lists categories of non-consensual right or interest which shall be registrable as if the right or interest were an international interest.

According to Professor Goode, declarations made under this Article typically cover judgments or orders permitting attachment of equipment covered by the Aircraft Protocol and State liens for taxes or unpaid charges. A registrable non-consensual right or interest may be registered by the holder and the consent of the other party is not required.

Article 39 deals with the existence of rights that have priority without registration. In the relevant part it provides for the deposit by Contracting States of declarations which declare, either generally or specifically, those categories of non-consensual right or interest other than a right or interest to which Article 40 applies which under that State's law have priority over an interest in an object equivalent to that of a holder of a registered international interest and which shall have priority over a registered international interest whether within or outside insolvency proceedings.

According to Professor Goode, the priority given to the rights or interests covered by such declarations is a priority given under the law of the Contracting State, not under the Convention, and it is not entitled to recognition in another State except to the extent provided by that State's conflict of laws rules. He also points out that Article 39 declarations are limited to non-contractual rights and interests and that most of them deal with liens in favour of unpaid employees, repairers and bailees.

Professor Goode comments that Articles 39 and 40 are intended to be mutually exclusive in the sense that a category appearing in a declaration under Article 39.1, and thus given priority without registration, ought not also to appear in a declaration under Article 40 for which registration is required.

**The applicability of the Convention**

The Convention will only apply if the five conditions listed by Professor Goode at page 26 of his commentary are satisfied. In this case three of the five are in issue. That is, number one, whether the parties have entered into a security agreement or title reservation agreement, i.e. a conditional sale agreement, or a leasing agreement. That refers to the definitions under Article 2. Number four, whether the agreement is constituted in accordance with the formalities prescribed by the Convention. And number five, whether the debtor is situated in a Contracting State at the time of conclusion of the agreement, creating or providing for the international interest.

For the purposes of the Convention, the debtor is the chargor under a security agreement or the conditional buyer under a title reservation agreement or the lessee under a leasing agreement or a person whose interest in an object is burdened by a registrable non-consensual right or interest. The debtor is situated in a Contracting State if (a) it was incorporated or formed under the law of that State, (b) it has its registered office or statutory seat there, (c) it has its centre of administration there or (d) it has its place of business there or, if it has more than one place of business, its principal place of business or, if it has no place of business, its habitual residence.

Article 4.1 of the Aircraft Protocol also makes the Convention applicable in relation to an airframe if at the time of the conclusion of the applicable agreement it is registered in the aircraft registry of a Contracting State.

Finally, I wish to refer to Article 25.4 and Article 44.

Article 25.4 provides that where a registration ought not to have been made or is incorrect, the person in whose favour the registration was made shall, without undue delay, procure its discharge or amendment after written demand by the debtor, delivered to or received at its address stated in the registration.

Article 44.2 confers jurisdiction on the Irish courts to make an order requiring the Registrar to discharge a registration where a person fails to respond to a demand made under Article 25 and that person has ceased to exist or cannot be found for the purpose of enabling an order to be made against it requiring it to procure discharge of the registration. Article 44.3 provides that where a person has failed to comply with an order of the Court having jurisdiction under the Convention requiring that person to procure a discharge of a registration, the Court may direct the Registrar to take such steps as will give effect to that order.

**Issues for determination**

Firstly, does the agreement between the parties come within the sphere of application of the Convention? For the purpose of determining this issue I will approach it on the assumption that Etole is correct in saying that the letter of intent, combined perhaps with the subsequent dealings between the parties, is a binding legal agreement capable of creating or giving rise to an international interest.

A question then arises, where was the debtor situated at the time of conclusion of the agreement?

It is argued by Mr. Sreenan, having regard to the definition of debtor, that if what was agreed amounts to a security agreement or a title reservation agreement, Etole can be characterised as the debtor. However, I am satisfied that in the circumstances of the case, where it was Etole that registered the purported interest, the relevant part of the definition is that which provides that it is the person against whose ownership or other proprietary rights the interest is registered that is the debtor for the purposes of the Convention.

Belair was, according to the evidence, incorporated or formed in the Cayman Islands and has its registered office there. The aeroplane was also registered in the Cayman Islands. It is accepted that the Cayman Islands is a British overseas territory and not competent to ratify the Convention in its own right. The United Kingdom has signed, but not ratified, the Convention. There is no evidence to suggest that as of 11th December 2014 its centre of administration, place of business or habitual residence was in a Contracting State. Accordingly, I am satisfied that the debtor was not situated in a Contracting State at the relevant time and that the conditions of applicability have not been met.

Lest I be wrong on that, I will move on to consider whether or not Etole might have an interest capable of registration stemming from Article 40 of the Convention.

Article 40 arises because the disputed registration entry uses the term "*registrable non-consensual interest*", which can only refer to the provisions of that Article. The short answer to the question is no, given that no Contracting State with any arguable connection to the dealings between the parties has lodged an Article 40 declaration.

I then consider the question, does Etole have any interest capable of being registered under the Convention? The case made by Etole is that it has a binding agreement enforceable under the law of New York which amounts to a security agreement or a title reservation agreement and that this gives it an international interest within the meaning of the Convention. However, while assuming for the purpose of argument that this analysis is correct, an interest of this nature could not be registered without the consent of Belair. It manifestly cannot be relied upon to justify the registration of a registrable non-consensual interest.

Etole also argues that the rights accruing to it are among those covered by the Article 39 declaration lodged by the United States. However, again assuming that this is correct, I am driven to conclude that it cannot justify the registration. Article 39 declarations are a form of public announcement by the states making them as to the priorities to be accorded by the law in those states. They relate, by definition, to interests that are not registered. They are not entitled to recognition in other Contracting States unless the applicable conflict of law rules accord such recognition. They do not enjoy the same degree of recognition as interests registered pursuant to Article 40.

It has been submitted that there is no technical impediment to the registration of an interest arising from an Article 39 declaration and that in fact a practice has arisen of registering such interests. I do not see that either of these matters could justify the retention on the Registry of an entry that wrongly states it concerns a non-consensual interest under Article 40. The fact that the Registry has been established in such a way as to preclude the necessity, or indeed possibility, for the Registrar to verify the details of every entry does not mean that a court should be prepared to condone a misleading registration.

The next issue is the question of whether or not there was a proper demand made by Belair.

Etole says that the terms of the Convention require that before an order can be made, a demand must be made under Article 25.4 that the person procure a discharge of the registration without undue delay. It argues that the demand in this case did not comply with the Convention requirements because, firstly, it demanded that the discharge be procured within 24 hours and, secondly, it demanded the discharge and removal of the registration.

It appears to be common case that a registration is not removed as such. A separate entry is made registering its discharge so that the viewer can see the history of the registration. I consider that this argument, if not quite purely a matter of semantics is very close to it. The Convention obligation to procure the discharge was not affected in my view by the setting of a legally ineffective time limit by Belair. If Etole had responded to the demand in any substantive manner, the fact that it could not effect the discharge within 24 hours could not have given rise to any complaint on the part of Belair. Similarly, a demand that Etole do something that was beyond its powers did not in my view render ineffective that part of the demand that related to something that *was* within its powers, namely the procurement of the discharge. In overall terms, Etole's obligation under the Convention was clear.

The demand is also said to be ineffective because it was served on the agent of Etole, whose address accompanied the registration, rather than on Etole's lawyers. Because litigation had commenced between the parties, the service is said to have amounted to a breach of the District of Columbia Code of Ethics. I do not see how the breach of a professional code, if breach it was, could render legally ineffective a service that was carried out in accordance with the rules of the Convention.

Finally, criticism was made of the ex parte application for service out of the jurisdiction and Belair is accused of a lack of candour as regards the US litigation. I do not see that there is any substance in this point. The US pleadings were before the Court when the application was made. In any event, it seems to me that the relief sought as regards rectification of the registration is of a sort that an Applicant who proves its case is entitled to more or less *ex debito justitiae*, in that it's difficult to see what conduct on the part of the Applicant would persuade a court that a registration that should not have been made should nonetheless be left undisturbed. In this regard, the Court must be conscious of the purpose and principles of the Convention and importance of maintaining the integrity of the Registry.

I therefore propose to make the order sought.

Approved 10th June 2015
Isobel O' Malley

TAB 3

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on: 05.03.2015

% Judgement delivered on:19.03.2015

\+ **WP(C) 871/2015**

AWAS 39423 IRELAND LTD. & ORS. .....Petitioners

Versus

DIRECTORATE GENERAL OF CIVIL AVIATION & ANR. ..... Respondents

\+ **WP(C) 747/2015**

WILMINGTON TRUST SP SERVICES (DUBLIN) LIMITED .....Petitioners

Versus

DIRECTORATE GENERAL OF CIVIL AVIATION & ANR. ..... Respondents

**Advocates appeared in this case:**

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|---|---|
| For the petitioners: | Mr Kevic Setalvad, Sr. Adv. with Ms Sneha Rao & Mr Amit A. Pai, Advs. for the petitioners in WP(C) 871/2015.<br>Mr Ramji Srinivasan, Sr. Adv. with Mr Ravi Nath, Mr Ajay Kumar, Mr Rohan Ghosh, Ms Neha Singh, Mr Karan Lahiri, Mr Rajeev Kumar, Ms Radhika Mathur, Ms Sara Sundaram & Mr Rishabh Kapur, Advs. for the petitioner in WP(C) 747/2015. |
| For the Respondents: | Mr Sanjay Jain, ASG with Ms Anjana Gosain, Mr Pradeep Desodya, Mr Arnab Naskar, Ms Saroj Bidawat & Mr Vidur Mohan, Advs. with Mr S. Dutta, Director (Airworthiness) & Mr M. Debula, Asstt. Director, for R-1.<br>Mr Sandeep Sethi, Sr. Adv. with Mr Atul Sharma, Mr Anand Srivastava, Mr Milanka Choudhury & Mr Kshitiz Khera, Advs. for R-2. |

**CORAM:**
**HON'BLE MR. JUSTICE RAJIV SHAKDHER**

**RAJIV SHAKDHER,J**

WP(C) 871/2015
WP(C) 747/2015 & CM Nos. 2894/2015 & 2895/2015

1. The captioned petitions pertain to entities, which essentially seek de-registration of aircrafts (the details qua which I shall provide hereafter), upon termination of the lease agreements with respondent no.2. The other relief sought in both petitions are consequential in nature. Respondent no.2, in both petitions, is an airline, by the name of, Spicejet Limited. For the sake of convenience hereon, respondent no.2 will be referred to as Spicejet. Furthermore, hereon I will be making a reference to aircrafts as aircraft objects.

1.1 The other respondent in the two petitions is also common, which is respondent no.1. Respondent no.1 in both petitions is the Director General of Civil Aviation. Hereafter the Director General of Civil Aviation will be referred to as DGCA.

1.2 In order to adjudicate upon the petitions before me, the following facts are required to be noticed, which I would be setting out case-wise. The discussion though, concerning both facts and the law, would be common, as arguments have been advanced by counsels for parties on both sides, based on the premise that there are no substantial differences on facts in respect of the two matters.

FACTS IN WP(C) 871/2015

2. There are three petitioners in this matter. Each of these petitioners claim to be represented by their respective power of attorney holders. The

petitioners, apparently, entered into lease agreements, on various dates, with Spicejet. At that stage, Spicejet executed two crucial documents in favour of the petitioners. First, an Irrevocable De-Registration Power of Attorney (IDPOA). Second, an Irrevocable De-Registration and Export Request Authorization (IDERA). The details, with respect to the aircraft objects in respect of which the aforementioned documents have been executed, are as follows:

| Petitioners | Aircraft Model | Manufacturer's Sl. No | Indian Registration Mark | Lease agreement date | IDPOA date | IDERA date | Certificate of registration |
|---|---|---|---|---|---|---|---|
| 1 | B 737-800 | 39423 | VT-SGZ | 30.4.12 | 30.4.12 | 30.4.12 | 14.05.12 |
| 2 | B 737-800 | 39424 | VT-SZA | 22.5.12 | 24.5.12 | 24.5.12 | 04.06.12 |
| 3 | B 737-800 | 39427 | VT-SZB | 17.10.12 | 23.10.12 | 18.10.12 | 29.10.12 |

2.1 As would be evident from the details given in the table above, that Certificate of Registration (COR) was issued by the DGCA in respect of each of the three aircraft objects. The COR, inter alia, certifies that the aircraft objects, described above, have been duly entered in the Indian Civil Aviation Register (in short ICAR), with effect from the date indicated therein, in accordance with the Convention on International Civil Aviation dated 07.12.1944 and the Aircraft Act, 1934 (in short the Aircraft Act), as also the Rules framed thereunder. In the three CORs issued vis-a-vis the aforementioned, it is sated that they are hypothecated by an entity by the name of Wells Fargo Bank, Northwest National Association.

2.2. Apparently, according to the petitioners, the defaults, in payment of lease rents, by Spicejet, prompted them to issue default-cum-termination and re-delivery notices. There were three separate notices of even date, i.e., 18.12.2014, issued qua each of the aircraft objects. The said notices, inter alia, alluded to the failure on the part of the of Spicejet to pay basic and supplemental rent, in accordance with the terms of the lease, within three business days of the payments falling due; triggering an event of default under Section 17(a) of the Aircraft Lease Agreement (in short the Lease Agreement). The notices went on to state, that consequently, the lease, was terminated with immediate effect in accordance with the provisions of Section 18(a) (v) of the lease agreement. A demand was also made that Spicejet should, at the petitioners' expense, immediately return the aircraft objects, together with all documents at the location set out in the notices.

2.3 Spicejet, did not comply with the directive contained in the default notice, which propelled the petitioners to approach the DGCA. In this connection, petitioners wrote to the DGCA, on 19.12.2014. In the said communication, a request was made to the DGCA that, it should call upon Spicejet to ground the aforementioned aircraft objects and, take necessary steps, to return the same to them to the place already indicated.

2.4 Since, Spicejet continued to operate the aforementioned aircraft objects, even though the lease agreements vis-a-vis each one of them had been terminated, the petitioners, made a request to the DGCA, vide three separate communications of even date, i.e., 26.12.2014, to de-register the aircraft objects from the ICAR and, to issue an "Export Certificate of Airworthiness" – to enable them to ferry the aircraft objects out of the country, at their costs.

2.5 As there was no response by the DGCA to the petitioners' communications of 26.12.2014, by way of follow-up, once again, three separate communications were sent, all of which were dated 29.12.2014, in respect of the aforementioned aircraft objects.

2.6 In the interregnum, DGCA had issued a communication dated 26.12.2014, which the petitioners claim, they received on 29.12.2014 as an attachment to an email of the same date, whereby they were directed to submit the following documents/ information:

(i) Certificate of registration in original.

(ii) Confirmation on de-activation of aircraft objects address for "Mode S transponder".

(iii) Application for issuance of Export Certificate of Airworthiness.

2.7 The petitioners, promptly, replied to this communication vide a letter dated 02.01.2015, whereby it informed DGCA that, in so far as COR was concerned, the same was available with Spicejet, as the operator of the Aircraft, and that, in any case, in terms of the relevant provisions of law, the original was to be retained by the operator. In so far as the photocopy of the same was concerned, the same had already been handed over to it.

2.8 As regards confirmation of de-activation address allotted to them for "Mode S" Transponder was concerned, it was indicated that the said exercise was normally carried out after the aircraft objects was de-registered. In any event, the petitioners undertook to furnish the necessary information; and, for that purpose, requested that they be provided the required format.

2.9 As regards issuance of Export Certificate of Airworthiness was concerned, the petitioners indicated that they would not be requiring the same vis-a-vis aircraft objects bearing manufacturer's serial no. 39423 and 39427. In so far as aircraft objects bearing manufacturer's serial no. 39424 was concerned, it was indicated that an application in the prescribed format would be submitted for the said purpose.

3. It is pertinent to point out that there were two separate letters of the same date, i.e., 02.01.2015, which were issued. The contents of both letters were common except the last part referred to above, that is, requirement of Export Certificate of Airworthiness. Pertinently though, the request for the de-registration, was reiterated in both letters.

3.1 However, by a subsequent letter dated 08.01.2015, it was clarified that even for the aircraft objects bearing manufacturer's serial no. 39424, the petitioners did not require the Export Certificate of Airworthiness. In other words, ultimately for none of the three aircraft objects, the said certificate was required. By this letter, while the petitioners' earlier request for de-registration remained intact, they indicated their revised preference for grounding the aircraft objects, as against what was indicated in their earlier communication.

3.2 In the earlier communication, the request made was that the aircraft objects be grounded at a place in Ireland, however, in this letter, it was indicated that the aircraft objects could either be grounded at the Hosur Airport, in Belagondapalli or, at the Indira Gandhi International Airport, in New Delhi.

3.3 The aforesaid communication by the petitioners was followed by a communication dated 09.01.2015, addressed to the DGCA. In the said letter, a reference was made to the proposed amendment to be carried out in Rule 30 of the Aircrafts Rules, 1937 (in short the Aircraft Rules). While doing so, the petitioners sought to bring to the notice of DGCA the following:

(i) That the petitioners, i.e., the lessors, were the authorized parties under IDERA executed by Spicejet qua each of the aforementioned aircraft objects.

(ii) The lessors/ owners and mortgagees were the only "registered interest holders", in respect of the said aircraft objects, and that, there were no other registered interest holders in existence.

3.4 Accordingly, with this letter dated 09.01.2015, the petitioners appended the following for DGCA's reference:

(a) IDERAs.

(b) Priority interest search certificates in respect of airframes and related engines, as on the said date.

(c) Consent letters of respective owners and mortgagees dated 12.12.2014 and 18.12.2014 respectively, which had already been submitted to the Director of Airworthiness, DGCA.

3.5 As a result of the aforesaid communication, DGCA was propelled to act and, consequently, it issued an email on the same date, i.e., 09.01.2015, to Spicejet wherein, it adverted to the fact that, since, it had failed to abide by its commitment with regard to de-registration request of the petitioners/ lessors, it should surrender the COR, of the aircraft objects , and de-activate the "Mode S Transponder" Code allocated to the said aircraft objects. Reference in this regard was made to Spicejet's mail dated 07.01.2014. DGCA made it clear that the aforesaid was required to be done in order to process the lessors', i.e., the petitioners' request for de-registration of the aircraft objects from ICAR on account of termination of the lease agreement. Furthermore, Spicejet was called upon to treat the matter as "most urgent".

3.6 It appears that the petitioners received no response to their request for de-registration of the aircraft objects, and hence, sought an update from the DGCA vide letter dated 13.01.2015.

3.7 Despite, the aforesaid communications sent on the issue by the petitioners, there was no movement in the matter. Consequently, the petitioners were compelled to move this court by way of a petition under Article 226 of the Constitution.

4. The captioned petition was moved on 30.01.2015 when, both DGCA and Spicejet, were represented by counsels. Ms Gosain, who appeared on that date, on behalf of DGCA, submitted that her client was not able to process the case for de-registration, as Spicejet had not complied with its directive. Since, Ms Gosain, was not able to assist me, as to whether DGCA was invested with any coercive powers either under the Act, or the Rules and Regulations framed thereunder – the presence of the concerned officer, was sought, for that purpose on the next date of hearing. It is in this background, that arguments were heard on the returnable date, and the dates thereafter, whereupon the matter was reserved for judgement.

<u>FACTS IN WP(C) 747/2015</u>

5. In this case, there is only one petitioner. The petitioner executed three separate lease agreements of even date, i.e., 07.08.2013, with Spicejet, in respect of three aircrafts. In addition, the IDPOA and IDERA were also executed. The details of the lease agreements, the IDPOA and IDERA, and other information qua the aircraft are provided hereinafter in the tabular chart:

| S. No. | Aircraft Model | Manufacturer's Sl. No | Indian Registration Mark | Lease agreement date | IDPOA date | IDERA date | Certificate of registration |
|---|---|---|---|---|---|---|---|

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 1 | B 737-800 | 37364 | VT-SZI | 7.8.13 | 3.10.13 | 03.10.13 | 14.10.13 |
| 2 | B 737-800 | 41397 | VT-SZJ | 7.8.13 | 24.1.14 | 24.1.14 | 03.02.14 |
| 3 | B 737-8GJ | 41398 | VT-SZK | 7.8.13 | 21.5.14 | 21.5.14 | 26.5.14 |

5.1 As in the other case, Spicejet defaulted in payment of lease rent, which resulted in the petitioner issuing a common default notice dated 10.12.2014, as a termination event had occurred, as provided for in clause 23(a) of the subject lease agreements.

5.2 The petitioner thus, sought re-delivery of the aircraft objects, along with documentation on board, as early as possible, though no later than five days from the date of the notice. Spicejet was directed to deliver the aircraft objects at the specified place in Singapore.

5.3 The aforesaid communication was followed by three separate letters of even date, i.e., 19.12.2014, which were addressed to Spicejet. By virtue of these communications, lease qua each of the aircraft objects was terminated. As in the previous communications, the Spicejet was asked to re-deliver the aircraft objects at the specified site in Singapore.

5.4 On the same date, letters were also issued to the DGCA (i.e., letter dated 19.12.2014). By this communication, the DGCA was informed of the fact that, the petitioner had terminated the lease qua the aircraft objects. The said letters were accompanied by the following documents pertaining to each of the aircraft objects:

(i) The termination letter dated 19.12.2014.

(ii) Certificate of Registration.

(iii) Certificate of Airworthiness.

(iv) IDERA and IDPOA.

5.5 Furthermore, vide this very communication, the DGCA, was also informed, that there, was no litigation initiated either by the Airport Authority of India or, any private airport in India, in respect of the aforementioned aircraft objects. A request was made to the DGCA that it should permit the lessee (i.e., Spicejet), to transfer the custody of the records of the aircraft objects and, any parts removed therefrom, to their representative, at Spicejet office in Gurgaon, in India.

5.6 Spicejet was, similarly, requested by the petitioner to liaise with the DGCA for obtaining necessary permission for return of the aircraft objects. Separate letters were issued in respect of each of the aircraft objects.

5.7 Having failed to prevail upon Spicejet, to do the needful in the matter, on 30.12.2014, the petitioner, once again, by three separate communications, issued qua the aforementioned aircraft objects, made a request that they be de-registered from the ICAR, with immediate effect. It was indicated that the petitioner will be willing to ferry the aircrafts out of the country at their own costs, and that, they would deliver the COR to it, immediately, upon receipt of the same from the Spicejet.

5.8 This was followed by a letter dated 06.01.2015, wherein they reiterated the fact that they had, as far back as on 10.12.2014, requested Spicejet to allow the export of aircraft objects at their expense upon termination of the respective lease agreements. The petitioner, sought assistance of the DGCA, in de-registration of aircraft objects in consonance with their earlier request dated 30.12.2014. A passing reference was also made with regard to the fact that, they had a "bad experience", like other companies, in respect of another Indian airline company, i.e., Kingfisher, and hence, were concerned about getting involved in a lengthy repossession process.

5.9 The aforesaid was followed by yet another communication by the petitioner, on the subject, dated 09.01.2015. In this communication, inter alia, a reference was made to a meeting which its representatives had attended on 08.01.2015, with the Jt. Secretary in the Ministry of Civil Aviation.

6. The DGCA was reminded that, at the meeting they were informed by its Deputy Director of Airworthiness that, under the IDERA route, it would de-register the aircraft objects within five working days, upon documents being furnished. It appears, in the said communication a reference was also made to the Draft Rule 30(7) of the Aircraft Rules.

6.1 Consequently, by another letter sent on the same date (i.e., 09.01.2015), by the petitioner, to DGCA, information was given to the effect that: (i) it was the only IDERA holder for the three aircraft objects; and (ii) that it was also the only registered interest holder in respect of the three aircraft objects.

6.2 As in the other case, the original IDERAs of the three aircraft objects, and priority search certificates, in respect of airframe and related engines, as obtaining on that date, were furnished.

6.3 Propelled by the aforesaid, DGCA on 09.01.2015, issued a missive to Spicejet to surrender the COR and de-activate the "Mode S" Transponder code allocated qua the aircraft objects leased out by the petitioner. Once again, reference was made to Spicejet's mail dated 07.01.2014.

6.4 Evidently, Spicejet continued to disregard the directive of DGCA, which compelled the petitioner to dispatch an email dated 12.01.2015, on the subject. A copy of this communication was sent to Spicejet, as well. In this communication the petitioner indicated that they had re-submitted their request for de-registration of the aircraft objects, and that, they would like to complete the process of de-registration, as soon as possible, by a process which was as orderly as possible, under the given circumstances.

6.5 The petitioner, optimistically, reiterated this request to the DGCA vide its letter dated 16.01.2015. In this letter, reference was also made to the applicable Convention, i.e., the Convention on International Interest In Mobile Equipments (in short the Convention) and the Aircraft Protocol (in short the Protocol).

6.6 Being aggrieved by the fact that DGCA had not taken its directive dated 09.01.2015 any further, the petitioner, chose to approach this court, under Article 226 of the Constitution. This petition was moved on 28.01.2015.

6.7 On that date, DGCA was represented by Ms Gosain. On being queried, Ms Gosain informed that the matter pertaining to de-registration was under consideration, and that, she would revert with instructions on the next date. Since, Spicejet was not represented, notice was issued to the said entity in the matter. It was made clear, in case the respondents chose to resist the petition they would file their respective counter affidavits before the next date of hearing.

6.8 On the returnable date, i.e., 20.01.2015, it was found that while Spicejet had filed its counter affidavit, DGCA, had failed to do the needful. On account of urgency expressed in the matter, arguments were heard on that date and on several dates thereafter. The judgement, was finally reserved, in this matter as well, on 05.03.2015.

SUBMISSIONS OF COUNSELS

7. In the background of the aforesaid facts, arguments in WP(C) 871/2015 were advanced by Mr Kevic Setalwad, Sr. Advocate on behalf of the petitioners, while in WP(C) 747/2015, submissions were made by Mr Ramji Srinivasan, Sr. Advocate. In so far as the DGCA was concerned, submissions were made by Mr Sanjay Jain, the learned ASG, assisted by Ms Anjana Gosain, while Spicejet was represented by Mr Sandeep Sethi, Sr. Advocate, assisted by Mr Atul Sharma.

8. On behalf of the petitioners (i.e., in WP(C) 871/2015) Mr Setalwad, broadly, argued as follows:

(i) That the lease qua the aircraft objects, having been terminated, followed by the lodgement of the IDERA with the DGCA, the provisions of Article IX of the Protocol had been triggered. The petitioners, being the only registered interest holders, with none having a ranking higher than theirs, they were entitled to the de-registration of the aircraft objects.

(ii) The remedy under Article IX of the Protocol was, in addition, to remedies provided under chapter III of the Convention.

(iii) The right to seek the de-registration of the aircraft objects, remained unaffected by any declaration deposited by India qua Non-Consensual Right or Interest (in short NCRI) under Article 39 of the Convention.

(iv) The declaration made in Form No. 1, under clause (a) and (b) by Republic of India, under Article 39 (1)(a) of the Convention, were required to be registered in terms of Article 40 of the Convention. For this purpose, reliance was placed on Form No. 6, clause (a) and (b), of the Declaration lodged by India.

(v) The failure to register the liens, which are delineated in Form No. 1, clause (a) & (b), would render them inefficacious. In so far as liens in favour of repairers of aircraft, as described in Form No. 1 clause (c) is concerned, that would be dependent on their position and limited by the extent of service or services performed on and value added to, the aircraft objects.

(iv)(a) In support of this submission, my attention was drawn to Article 1 (m), (bb) and (cc) of the Convention.

(vi) The DGCA, upon being informed that the lease in respect of the aircraft objects is not in force, is required to cancel its registration as reflected in the ICAR. The fact that this obligation is cast on DGCA is clearly provided in Rule 30 (6)(iv) of the Aircraft Rules.

(vii) Post, the amendment of Rule 30, by insertion of sub-rule (7), in the said Rule, any doubt, as to the mandatory nature of the duty, cast upon DGCA to de-register the aircraft after the lease is terminated, was removed.

(vii)(a) The amendment, which was brought about by gazette notification dated 09.02.2015, prescribes that registration of an aircraft, registered in India, to which the Convention or the Protocol applies, shall be cancelled by the Central Government, as provided in the Protocol, if an application is received from IDERA holder, prior to expiry of the lease, along with the following documents:

(a.1)The original or notarized copy of IDERA.

(a.2) A certificate that all registered interests, ranking in priority, have been discharged, or the holder's of such interests have consented to the de-registration and the export of the aircraft objects.

(vii)(b) The petitioners having lodged both these documents with their letter dated 09.01.2015; the DGCA was bound, in law, to de-register the aircraft objects.

(viii) A mandamus could issue to the DGCA to discharge its duties cast upon it, in law, once the conditions prescribed therein, stood fulfilled. The law required placement of documentary evidence of a fact that the lease qua the aircraft objects, on the date when request for de-registration was lodged was not in force. The factum of the lease having been terminated, is reflected by the termination notice, which in turn, is based, on the rights conferred on the petitioners under IDERA.

(viii)(a) The other requirement that, there was no other registered interest which ranked higher than the petitioners', having also been fulfilled upon lodgement of a priority interest search certificate, the DGCA, was bound to proceed to de-register the aircraft objects.

(ix) In support of his submissions, reliance was placed by Mr Setalwad, on the judgement of this court in ***Corporate Aircraft Funding Company LLC vs Union of India & Ors., (2013) 199 DLT 327***, and the Division Bench judgement in the same case, which is dated 10.05.2013, passed in LPA No. 226/2013, titled: ***Directorate of Revenue Intelligence vs Corporation Aircraft Funding Company LLC & Ors***. On the aspect of the power of the court to issue a writ of mandamus in certain circumstances, reliance was placed on the judgements of the Supreme Court in ***CAG vs K.S. Jagannathan, (1986) 2 SCC 679*** and in the case of ***State of Bombay vs Pandurang Vinayak, AIR 1953 SC 244***.

9. Mr Srinivasan, in full measure, supported the stand taken by Mr Setalwad, except qua one aspect which, I would advert to immediately

hereafter.

9.1 The learned counsel, in no uncertain terms, stated before me that, in so far as the petitioner, he was representing, was concerned, for the moment, was only interested in obtaining the de-registration of the aircraft objects.

9.2 Like Mr Setalwad, Mr Srinivasan took me through the provisions of the Convention and Protocol to buttress his point of view.

10. On the other hand, Mr. Sethi, appearing for Spicejet, made the following submissions :

(i). That the issue involved in the present writ petitions was similar to the one, which arises in LPA No.32/2015. The said appeal, is pending adjudication before a Division Bench of this court and, therefore, this court ought to hold its hand rendering a decision in the instant petition.

(i)(a). In respect of aforesaid submission, I may only note that I was informed that, though initially, the Division Bench, had reserved orders in the appeal, it had refrained from pronouncing an order as, an application had been moved, bringing on record the fact that an amendment had been brought about in Rule 30 of the Aircrafts Rules. Accordingly, the decision in the appeal, it appears, has been deferred.

(ii). The petitioners, cannot be granted reliefs as there are, disputed questions of fact involved in the matter.

(iii). The petitioners, qua the alleged disputes have initiated proceedings in the High Court of Justice, Queens Bench Division, Commercial Court in London against Spicejet. The claim lodged in those proceedings is based on an identical cause of action. There is a similarity both, in respect of facts as well as reliefs.

(iii)(a) It may only be noted that claims in the English Court, evidently, were lodged on 04.02.2015.

(iv). The petitioners are holding with them security deposits far in excess of their respective claims.

(iv)(a). Reference in this respect was made to the details of deposits held by the petitioners, as set out in paragraph 13 of the counter affidavit, filed in each of the two petitions.

(v). The issue, as to whether the petitioners are entitled to terminate the subject lease agreements, is an aspect, which requires determination by a competent court of law.

(vi). Spicejet has filed a scheme of reconstruction and revival for enabling take over of its ownership, management and control with the Government of India, Ministry of Civil Aviation, on 15.01.2015. The said scheme has received the approval of Government of India on 22.01.2015. The scheme of acquisition of interest by the new promoter has also received approval of the Competition Commission of India vide order dated 19.02.2015.

(vii). In case the petitioners are allowed to repossess the aircraft objects, great prejudice would be caused to Spicejet which, cannot be compensated in terms of money. The repossession of aircraft objects will engineer a collapse of the turn-around plan and, would, consequently, impact public interest as, it would impinge on the employment prospects of the personnel engaged with it. This apart, the interest of passengers, who have already booked their air passage with Spicejet, would get affected. For such passengers the cost of air travel, would become expensive.

(viii). The petitioners prayer for de-registration of the aircraft objects cannot be allowed till such time the claims, as stipulated in the declaration are settled.

(viii)(a) For this purpose, reliance was placed on paragraph 18 of the counter affidavits filed in the present petition; to demonstrate that, Spicejet owed a sum of Rs.1,580 Crores to various creditors, which included, the Airport Authority of India (AAI), Private and International Airports; the Tax Authorities, Aircraft Lessor and other creditors.

(viii)(b) The submissions in this behalf were pivoted on the declarations filed by the Government of India under Article 39 of the Convention. The other provisions, which were relied upon were Article 40 of the Convention read with Article IX and XI of the Protocol.

(ix). This court, could not in any event issue a mandamus to DGCA for de-registration of the aircraft objects . The DGCA, is required to exercise its power of de-registration in line with the declarations made by the Government of India under Article 39 (1)(a) of the Convention.

(x). The amendment to Rule 30, carried out by way of insertion of Sub-Rule (7) did not materially change the existing position, which is that, the DGCA on receiving the request for de-registration, would have to consider, whether or not to issue a direction as sought, having regard to the subsisting lien(s) qua wages of employees, taxes, and the dues owed by the Airline i.e., Spicejet to various statutory authorities. In this case, since, admittedly, payments were outstanding towards employees and statutory authorities, the DGCA, cannot direct de-registration.

10.1 In support of his submissions, Mr Sethi placed reliance on the following judgments: judgment dated 10.05.2013, passed in LPA 226/2013, titled: ***Directorate of Revenue Intelligence Vs. Corporate Air***

***Craft Funding Company LLC and Ors.***; and the judgements of the Supreme Court in ***U.P. State Road Transport Corporation and Anr. Vs. Mohd. Ismail and Ors., (1991) 3 SCC 239*** and ***Union of India and Anr. Vs. Bilash Chand Jain and Anr., (2009) 16 SCC 601.***

11. Mr. Jain, the learned ASG, while, substantially, supporting the submissions made on behalf of Spicejet, stressed upon the following, in so far as the declarations lodged by the Government of India are concerned :-

(i). The power to de-register an aircraft conferred on DGCA under Rule 30 of the Aircrafts Rules is an enabling power, and that, in exercising this power, it would have to take into account the various liens that may obtain vis-a-vis the aircraft objects.

(i)(a). It is pertinent to note here that the learned ASG on being queried as to whether the declarations lodged by the Government of India could travel beyond the Municipal Law – agreed that the declarations could not enlarge the scope of the Municipal Law. On being further queried, as to what were those Municipal Laws, under which liens were sought to be enforced, the learned ASG, candidly, stated that this aspect of the matter had not been examined by the DGCA.

(ii) Therefore, in the context of the above, the learned ASG submitted that as long, as this court, were not to order export of the aircraft objects, the other aspect of de-registration, could be dealt with in the present petitions.

<u>REASONS</u>

12. I have heard the learned counsel for parties and perused the record. What has emerged from the record is as follows:-

(i). The petitioners have taken recourse to the IDERA route, as prescribed in Article IX of the Protocol.

(ii). The IDERA along with IDPOA have been voluntarily executed by Spicejet. The IDERA, has been lodged with the DGCA.

(iii). The events of default have occurred qua the lease agreements in issue; the details of which are provided hereinabove.

(iv) Consequent to the defaults occurring which, essentially, pertain to non-payment of lease rents, the petitioners have terminated the lease agreements.

(v). The DGCA, has been informed about the factum of termination of the lease agreements.

(vi). The DGCA, has received the original IDERAs from the petitioners qua each of the aircraft objects , as also, photocopies of Priority Search Certificates, evidencing that the lessors, owners and mortgagees are the only registered interest holders.

(vii). The DGCA, recognizing the request for de-registration and export of the aircraft objects, outside the country, has called upon Spicejet to surrender the original CORs and, to de-activate the "Mode S" transponder code allocated to each of the aircraft objects. This aspect is evidenced by the e-mails dated 09.01.2015, issued by the DGCA to Spicejet.

(viii) The provisions of Rule 30 have been amended to the extent that a new sub-rule (7) has been inserted in the said Rule.

13. In the light of the aforesaid facts, what is required to be considered is: whether the petitioners are entitled to seek de-registration of the aircraft objects and, if so, what consequential reliefs, if any, ought to be granted to them?

14. In order to consider the various submissions made before me, one

would have to examine the provisions of the Convention, the Protocol and the Aircraft Rules, which were relied upon by the counsels for the parties represented before me.

15. In this context, a broad frame-work of the Convention has to be borne in mind. The preamble of the Convention would suggest that it seeks to facilitate the acquisition and use of mobile equipment of "high value" and economic significance. In other words, it encourages and facilitates asset-based financing. While doing so, it seeks to recognize the interest in such equipment and protects the same universally. The Convention thus, in effect, provides a legal architecture for international interest created in such equipment(s). For this purpose, the Convention has put in place an international registration system.

15.1 The idea being to provide, uniformity, certainty and predictability in commercial transactions involving high financial stakes. The Convention while protecting the interest of the creditors seeks to give due deference to the National Legal Regime, i.e., the Municipal Law of the Contracting State. Therefore, logically and, quite clearly, the Convention does not affect National Legal Regimes which concern and are relatable to criminal conduct and tortious liability. The Convention, also, does not appear to impinge upon public law issues.

15.2 The thrust of the Convention is to make available private finance for mobile equipments, to persons, situate in Contracting States.

15.3 The Convention, as currently positioned, deals with airframes and aircraft engines; helicopters; railway rolling stock; and space assets. It is the Protocol, which is, industry specific, which, provides the necessary frame-work vis-a-vis the concerned industry. Therefore, the Aircraft

Protocol, which is referred to, for sake of brevity, as the Protocol, both ***supplements*** and, wherever necessary, ***modifies*** the Convention (which is more generic in nature), to the extent necessary, for the purposes of the Aircraft Industry.

16. With this preface, let me deal with the submissions raised before me with regard to the declarations lodged by the Government of India under the Convention and their effect.

16.1 The Government of India, it appears, has lodged six (6) declarations under the Convention and five (5) declarations under the Protocol, under various Forms.

16.2 I will, however, for the sake of brevity, quote and discuss only those declarations, which are necessary for the purposes of the present case, albeit at the appropriate stage.

16.3 Suffice it to say, that Article 11(1) of the Convention, provides that parties may agree in writing as to what would constitute an event of default or otherwise give rise to rights and remedies, under Articles 8 to 10 and 13 of the very same convention. In each of the lease agreements, it is inter alia provided that lessee's failure to make payment of the lease rent, would constitute a "***termination event or an event of default***".

16.4 It is not disputed before me by Spicejet that, a termination event or an event of default has been triggered. In these circumstances, the remedies available to a lessor are those, which are provided in Article 10 of the Convention.

16.5 Article 10 provides that if, the event of default has occurred under a leasing agreement as envisaged under Article 11 of the Convention then, subject to any declaration that a Contracting State may have made under

Article 54, the lessor would have the right to either terminate the agreement and take possession or, control of any object to which the agreement relates or, could apply for a court order authorising or directing either of these acts.

16.6 Article 54(1) of the Convention, provides that a Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that while the charged object is situated within, or controlled from its territory, the chargee shall not grant a lease of the object in that territory. Clause (2) of Article 54 specifically provides that, the Contracting State shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare whether or not any remedy available to the creditor under any provision of the Convention which is not "***there expressed***" to require application to the court may be exercised only with the leave of the court.

16.7 I may only note that under Article 54(2) of the Convention, the Government of India has filed in Form No.13, with the following mandatory declaration: "...Any and all remedies available to the creditor under the Convention which are not expressed under the relevant provision thereof to require application to the court may be exercised ***without*** court action and without leave of the court." (emphasis is mine)

16.8 This would mean that in its declaration filed under the Convention, the Government of India has made it categorically clear that unless the remedy available to the creditor under the Convention, requires application to the court, the same can be exercised "***without court action and without the leave of the court***". This is important in the context of Article IX of the Protocol, as would be evident from the discussion, set forth hereafter.

16.9 In these circumstances, the petitioners are entitled to approach a court and, seek advance relief pending final determination under Article 13 of the Convention. The relief that the petitioners can seek under the said Article, ordinarily would be of the following nature: (a) preservation of the object and its value; (b). possession, control or custody of the object; (c). immobilisation of the object; and (d). lease or, except where covered by sub-paragraphs (a) to (c), management of the object and the income therefrom.

17. Clause (2) of Article 13 of the convention empowers the court to inter alia impose such conditions as it may deem necessary to protect, interested persons, in the event the creditor i.e., the petitioners herein, would either fail to perform any obligation qua the debtor under the Convention or Protocol while implementing such order of the court granting relief or, fails to establish its claim wholly or in part on the final determination of the claim. Under clause (3) of Article 13, it is indicated that the court may require notice of the request made to it, to be given to any of the interested persons before proceeding to grant relief pending final determination.

17.1 Article IX of the Protocol though, introduces modifications to the default remedies in as much as it confers an additional right on the creditor to procure: de-registration of the aircraft objects ; and, the export and physical transfer of the aircraft object from the territory in which it is situated. For these rights to operate, one would have to examine the other clauses of Article IX, which I intend to extract, in the judgment, to the extent necessary.

17.2 I may only indicate that Article X of the Protocol, similarly, introduces certain modifications, regarding reliefs pending final determination that a creditor may seek from the court. Since, there was much discussion with regard to the provisions of clause (6) of Article X, I would be adverting, in particular, to the same, in the course of my discussion.

17.3 Article XI of the Protocol pertains to remedies available on insolvency of the debtor. It provides for two alternatives i.e., Alternative A and Alternative B. This article, one need not discuss any further, as the debtor, admittedly, is not insolvent, as yet.

17.4 Article XIII of the Protocol speaks, inter alia, of what would be the consequences of the debtor issuing an IDERA and, who could exercise the remedies specified in Article IX (1).

17.5 Notably, clause (4) of Article XIII says that the "registry authority" and other administrative authorities in the contracting State, "***shall***" expeditiously, co-operate with and assist the authorised party in exercise of the remedies provided under Article IX. Therefore, if a Contracting state has made a declaration pursuant to Article XXX (1) of the Act, and if, an IDERA is issued by the debtor, in this case, Spicejet, which is substantially in the 'Form' annexed to the Protocol (which is recorded with the "registry authority"), then, on the authorised person or its certified designee triggering the remedy under Article IX (1) (having regard to the applicable aviation safety laws and regulations), the same will have to be honoured by the registry authority and other administrative authorities of the Contracting States.

17.6 In the present case, a declaration has been filed by the Government of India in Form No. 27 under Article XXX (1), as required under Article

XIII of the Protocol. The debtor i.e., Spicejet, has admittedly issued an IDERA, which stands lodged with DGCA. Consequently, the remedies under Article IX (1) of the Protocol, stand triggered.

17.7 Pertinently, none of the provisions of Article IX refer to court intervention. In other words, remedy under Article IX can be availed of by a creditor (i.e., lessor in this case), without having to approach the court or having to seek its intervention.

17.8 The counsels for Spicejet and DGCA seek to contend that the remedies sought under Article IX of the Protocol are not available to the petitioners as there are in existence "registered interests", which rank higher than that of, the creditor i.e., the lessors/ petitioners herein.

17.9 It is in this context that the counsels for the respondents have argued that before the DGCA could act upon, the requests made for de-registration and / or export and physical transfer of the aircraft objects from India – it will have to take into account the NCRIs, which under the Municipal Law, would have priority over an interest in the aircraft object equivalent to that of the holder of a registered international interest.

17.10 This submission has been advanced by the counsels for the respondents based, inter alia, on various clauses of Article IX of the Protocol and Article 39 and 40 of the Convention. In this context, a reference is also made to the definition of words and/or expression used in the aforementioned provisions of the Convention and Protocol. I will advert to the same and endeavour to explain the applicability of the provisions of the convention and Protocol in juxtaposition to the facts obtaining in the instant case as I go along with the discussion. But let me first extract the relevant provisions.

"**<u>Article IX – Modification of default remedies provisions</u>**

1. ***In addition*** to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter :

(a). Procure the de-registration of the aircraft; and

(b). Procure the export and physical transfer of the aircraft object from the territory in which it is situated.

2. The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.

3. Article 8(3) of the Convention shall not apply to aircraft objects. Any remedy given by the Convention in relation to an aircraft object shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable.

4. A chargee giving ten or more working days' prior written notice of a proposed sale or lease to interested persons shall be deemed to satisfy the requirement of providing "reasonable prior notice" specified in Article 8(4) of the Convention. The foregoing shall not prevent a chargee and a chargor or a guarantor from agreeing to a longer period of prior notice.

5. The registry authority in a Contracting State shall, subject to any applicable safety laws and regulations, honour a request for de-registration and export if:

(a) the request is properly submitted by the authorised party under a recorded irrevocable deregistration and export request authorisation; and

(b) the authorised party certifies to the registry authority, if required by that authority, that all registered interests ranking in priority to that of the creditor in whose favour the authorisation has been issued have been discharged or that the holders of such interests have consented to the de-registration and export.

6. A chargee proposing to procure the de-registration and export of an aircraft under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed deregistration and export to:

(a) interested persons specified in Article 1(m)(i) and (ii) of the Convention; and

(b) interested persons specified in Article 1(m)(iii) of the Convention who have given notice of their rights to the chargee within a reasonable time prior to the de-registration and export.."

"**<u>Article 39 – Rights having priority without registration</u>**

1. A Contracting State may at any time, in a declaration deposited with the Depositary of the Protocol declare, generally or specifically :

(a). Those categories of non-consensual right or interest (other than a right or interest to which Article 40 applies) which under that State's law have priority over an interest in an object equivalent to that of the holder of a registered international interest and which shall have priority over a registered international interest, whether in or outside insolvency proceedings; and

(b). That nothing in this Convention shall affect the right of a State or State entity, intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of that State for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object or another object.

2. A declaration made under the preceding paragraph may be expressed to cover categories that are created after the deposit of that declaration.

3. A non-consensual right or interest has priority over an international interest if and only if the former is of a category covered by a declaration deposited prior to the registration of the international interest.

> 4. Notwithstanding the preceding paragraph, a Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that a right or interest of a category covered by a declaration made under sub-paragraph (a) of paragraph 1 shall have priority over an international interest registered prior to the date of such ratification, acceptance, approval or accession."
>
> "**Article 40 – Registrable non-consensual rights or interests**
> A Contracting State may at any time in a declaration deposited with the Depositary of the Protocol list the categories of non-consensual right or interest which shall be registrable under this Convention as regards any category of object as if the right or interest were an international interest and shall be regulated accordingly. Such a declaration may be modified from time to time.."

18. Having regard to the aforementioned extracts from the Protocol and Convention, let me begin with the effect that of provisions of clause (5) of Article IX of the Protocol on the issue under consideration. Article IX(5) of the Protocol casts an obligation on the registry authority in the Contracting State to honour a request for de-registration and export, if the following two conditions, are fulfilled. First, the request made, is properly submitted by an authorised party, under a recorded IDERA. Second, the authorised party certifies to the registry authority that all registered interests ranking in priority to that of the creditor in whose favour the authorisation has been issued have been discharged, or that, the holders of such interests have consented to the de-registration and export.

18.1 Admittedly, in this case both these conditions have been fulfilled.

18.2 The respondents, however, contend that since the definition of the expression, "registered interests" means a registrable NCRI, the DGCA cannot proceed to de-register the aircraft objects. In this context, the definition of the following words and expressions needs to be kept in mind. Let me therefore, cull out the definition of: NCRI, registered, registered interests, unregistered interests, and registrable NCRI.

> "non-consensual right or interest" means a right or interest conferred under the law of a Contracting State which has made a declaration under Article 39 to secure the performance of an obligation, including an obligation to a State, State entity or an intergovernmental or private organisation..." [Article 1(8), the Convention]
>
> "registered" means registered in the International Registry pursuant to Chapter V..." [Article 1(bb), the Convention]
>
> "registered interest" means an international interest, a registrable non-consensual right or interest or a national interest specified in a notice of a national interest registered pursuant to Chapter V..." [Article 1(cc), the Convention]
>
> "unregistered interest" means a consensual interest or non-consensual right or interest (other than an interest to which Article 39 applies) which has not been registered, whether or not it is registrable under this Convention..." [Article 1(mm), the Convention]
>
> "registrable non-consensual right or interest" means a non-consensual right or interest registrable pursuant to a declaration deposited under Article 40.. [Article 1(dd), the Convention]"

18.3 A bare perusal provisions of the Article 39(1)(a) of the Convention would show that the Contracting State is required to indicate (by filing relevant declaration), the types of NCRIs (other than a NCRI to which Article 40 applies) which, under the Municipal Law, have priority, over an interest in the aircraft object equivalent to that of the holder of registered international interest and, which shall have priority over a registered international interest, without they themselves being registered as international rights or interests.

18.4 In other words, a NCRI is a status, which is, conferred by the Municipal Law of the Contracting State. It is not a right or interest created by any agreement obtaining between the parties. The equivalent interest alluded to in Article 39 would be that of a person, who has an interest created under a charge or one, held by a conditional seller reserving title under an agreement or, even a lessor under a lease agreement. The petitioners, in the captioned petitions fall under the last category, that is, they are lessors under a lease agreement.

18.5 Thus, quite clearly, these rights and interests, referred to in the declaration filed under Article 39(1)(a) are created under the Municipal Law of the Contracting State and, are not, conferred by the Convention.

18.6 Therefore NCRIs covered by the declarations lodged by the Contracting State would have a priority over registered international interest, even though, they are not registered themselves.

18.7 I may only note here that an interest is construed as an international interest under the Convention, if it fulfils the requirements of Article 7 of the Convention. In the context of the lessor, it would suffice if, the agreement creating or providing for such an interest is: in writing; relates to an object qua which the lessor has the necessary power of disposal; and it enables the object to be identified in conformity with the Protocol. (Also see, Article 2 of the Convention).

18.8 The arguments advanced by Mr. Setalvad, based on Article 40 of the Convention that, NCRIs would not be enforceable unless they are registered, overlooks the fact that under the Convention, there are two distinct types of NCRIs. The first kind of NCRIs are those, which find mention in Article 39 of the Convention. These NCRIs operate and have priority by virtue of the declaration lodged by the Contracting State. Their priority is not dependent on registration. There are other kinds of NCRIs, which are registrable, and accordingly, provision for them is made in Article 40 of the Convention. The use of the word, "registrable" as against "registered" in Article 40 of the Convention makes that amply clear.

18.9 The declarations made in Form No. 1, filed under Article 39(1)(a) and in Form No. 6 under Article 40 of the Convention, bring to fore this distinction, as well. The declarations filed by the Government of India under Article 39(1)(a), Article 39(1)(b) and Article 40 are set out below for the sake of convenience :-

> "..(i). Form No.1 [Specific opt-in declarations under Article 39(1)(a)]
> The following categories of non-consensual right or interest have priority under its laws over an interest in an aircraft object equivalent to that of the holder of a registered international interest and shall have priority over a registered international interest, whether in or outside insolvency proceedings, namely :-
>
> (a). liens in favour of airline employees for unpaid wages arising since the time of a declared default by that airline under a contract to finance or lease an aircraft object;
>
> (b). liens or other rights of an authority of India relating to taxes or other unpaid charges arising from or related to the use of that aircraft object and owed by the owner or operator of that aircraft object, and arising since the time of a default by that owner or operator under a contract to finance or lease that aircraft object; and
>
> (c). liens in favour of repairers of an aircraft object in their

possession to the extent of service or services performed on and value added to that aircraft object.

(ii). Form No.4 [General opt-in declaration under Article 39(1)(b)]

Nothing in the Convention shall affect its right or that of any entity thereof, or any intergovernmental organization in which India is a member, or other private provider of public services in India, to arrest or detain an aircraft object under its laws for payment of amounts owed to the Government of India, any such entity, organization or provider directly relating to the service or services provided by it in respect of that object or another aircraft object.

(iii). Form No.6 (opt-in declarations under Article 40)

The following categories of non-consensual right or interest shall be registrable under the Convention as regards any category of aircraft object as if the right or interest were an international interest and shall be regulated accordingly, namely :-

(a) liens in favour of airline employees for unpaid wages arising prior to the time of a declared default by that airline under a contract to finance or lease an aircraft object;

(b) liens or other rights of an authority of India relating to taxes or other unpaid charges arising from or related to the use of an aircraft object and owed by the owner or operator of that aircraft object, and arising prior to the time of a declared default by that owner or operator under a contract to finance or lease that aircraft object; and

(c) rights of a person obtaining a court order permitting attachment of an aircraft object in partial or full satisfaction of a legal judgment.."

19. A bare reading of the declarations would show that via Form No. 1, clause (a) and (b), liens have been created in favour of Airline employees

for unpaid wages arising since the time of the declared default by that Airline. This apart, lien has also been created qua authorities in India in respect of taxes or other unpaid charges, arising from or related to the use of the aircraft objects and, owed by the owner or the operator of the aircraft object. The lien adverted to is, one, which arises since the time of the declared default by the concerned airline under the lease agreement. The repairers of the aircraft objects have also been declared, as having lien, over an aircraft objects in their possession to the extent of service or services performed on and value added to the aircraft objects.

19.1 Under Article 39(1)(b) of the Convention, the declaration filed, makes it clear that nothing in the Convention will affect the right of the Government of India or any of the authorities or any inter-governmental organisation, in which India is a member or that of a private provider of public services in India to arrest or detain an aircraft object under its laws for payment of amounts owed to any of the above, which, directly relates to the service or services provided in respect of that object or another aircraft object.

19.2 The declaration under Article 40 of the Convention makes a distinction and, in that sense, is different to the one lodged under Article 39(1)(a) of the Convention, in as much as, though it adverts to the very same liens pertaining to employees with respect to their unpaid wages, taxes and unpaid charges of authorities in the Contracting State – it alludes to a period arising "***prior to the time of the declared default***". [See Form No. 6, clause (a)&(b)]. Therefore, unless such liens are registered, they may not be efficacious.

19.3 Identical situation arises vis-a-vis rights of a person obtaining a court order permitting attachment of an aircraft objects in partial or full satisfaction of a legal judgment. The attachment will be recognized only if, it is registered.

20. The above discussion would show that the existence of lien under Article 39(1)(a) of the Convention has nothing to do with the remedy which the petitioners seek to avail of under Article IX of the Protocol. De-registration of the aircraft is not, in my opinion, hampered by the existence of liens, if any, under the Municipal Law of the Contracting State. The liens, as indicated above, under Article 39(1) (a) shall obtain if so provided under the Municipal Law. The extent of the lien shall also be governed by the Municipal Law and not by the Convention.

20.1 The learned ASG during the course of his submission was not able to inform me, as to the Municipal Law under which DGCA has liens, and whether, the appropriate stage had been reached for triggering any of the liens, referred to in the declarations lodged by the Government of India.

21. This brings to the issue as to the statutory obligation cast on the DGCA. The provisions of Rule 30 of the Aircraft Rules, are relevant for this purpose. Once again for the sake of convenience, the relevant provisions are extracted below :-

> "...30. Certificate of Registration – (1). The authority empowered to register aircraft and to grant certificate of registration in India shall be the Central Government. The certificate of registration shall include the following particulars, namely :-
>
> Type of aircraft, constructor's number, year of manufacture, nationality and registration marks referred to under these rules, full name, nationality and address of the owner, usual station of aircraft and the date of registration and the period of validity of

such registration.

Provided that in the case of leased aircraft, the certificate of registration shall also include the validity of the lease and the names, nationalities and addresses of the lessor and the lessee:
(1A). x x x
(2). x x x
(3). x x x
(4). x x x
(5). x x x

(6). The registration of an aircraft registered in India may be cancelled at any time by the Central Government, if it is satisfied that –

(i). Such registration is not in conformity with the provisions of sub-rule (2); or

(ii). The registration has been obtained by furnishing false information; or

(iii). The aircraft could more suitably be registered in some other country; or

(iv). The lease in respect of the aircraft, registered in pursuance of sub-clause (iv) of clause (a) of sub-rule (2), is not in force; or

(v). The certificate of airworthiness in respect of the aircraft has expired for a period of five years or more; or

(vi). The aircraft has been destroyed or permanently withdrawn from use; or

(vii). It is inexpedient in the public interest that the aircraft should remain registered in India.."

(emphasis is mine)

21.1 As would be evident upon a careful reading of the proviso to sub-rule (1) that, in case of a leased aircraft, the COR should include inter alia the factum of the validity of the lease. In the cases under discussion, the lease is no longer valid; the lease agreements having been terminated.

21.2 The Central Government, which in this case, would be the DGCA, upon termination of the lease is required to cancel the registration of an aircraft, inter alia, under clause (iv) of sub-rule (6) of Rule 30 if, the lease is not in force.

21.3 The argument advanced on behalf of the petitioners, proceeds as follows, which is, that, a perusal of clauses contained in sub-rule (6) of Rule 30 would show, once the conditions stipulated therein are fulfilled, there is no discretion left with the DGCA, to defer the de-registration of the aircraft.

21.4 This argument was sought to be supported by drawing my attention to various situations, which were contemplated, inter alia, under clause (ii), (v) and (vi) of sub-rule (6) of Rule 30. These are cases where de-registration could be ordered if, the registrant has supplied false information, or that, the certificate of airworthiness stood expired for a period of five years or more, or if a situation arose whereby, the aircraft was destroyed or permanently withdrawn from use. In other words, the submission was, the word, "may" should be read as "shall".

21.5 As against this, the respondents have vehemently argued that it is only an enabling power, and therefore, the decision in this regard will have to be taken by the DGCA, and that, there can be no directive by the court to act in a particular manner. It is, in this context, that the counsel for the respondents had relied upon the Division Bench judgment of this court in the case of: ***DRI Vs. Corporate Aircraft Funding Company LLC***.

21.6 The argument that, this court cannot issue a writ of mandamus to DGCA is sought to be supported by placing reliance on two Supreme Court judgments, referred to in the Division Bench judgment in the case of ***DRI Vs. Corporate Aircraft Funding Company LLC***. These being: ***U.P. SRTC & Anr. Vs. Mohd. Ismail*** & ***Ors***. and ***UOI & Anr. Vs. Bilash Chand Jain & Anr***.

21.7 I may only note that the Division Bench in the case of ***DRI Vs. Corporate Aircraft Funding Company LLC***, concluded that the instructions issued by DRI with regard to its dues, was not binding upon the DGCA. The Division Bench, however, came to the conclusion that it would be a factor which the DGCA will keep in mind while examining the request of respondent no.1/lessor in that case, seeking de-registration of the aircraft object under Rule 30 of the Aircraft Rules. The Division Bench also, agreed that a writ of mandamus, directing the DGCA to de-register the aircraft objects, could not have been issued. The court in its operative directions, though, issued a writ of mandamus directing DGCA to exercise its enabling power to take a decision on the request made by respondent no.1/lessor for de-registration. [See Paragraphs 19, 22 and 24 of the Division Bench judgment].

21.8 One cannot quibble with the proposition that a court cannot issue a writ of mandamus where, an authority, is not required to act in a particular manner by express provisions of law. This dicta finds reflection even in Paragraph 12 of that judgement rendered in the case of ***UP SRTC & Anr. Vs. Mohd. Ismail & Anr***. The obligation, cast on DGCA under clause (iv), sub-rule (6) of Rule 30 of the Aircraft Rules requires it to de-register an aircraft if, the lease agreement qua the aircraft object is not in force.

Notably, like under clause (iv), each of the circumstances set out in sub-rule (6) are independent of each other. It may be, in a given situation that, more than one circumstance is attracted.

21.9 It is, therefore, quite possible that a statutory authority, which is vested with the power to act, under the law, chooses not to act by citing factors, with which the court finds fault: Would the court, in such a situation, be obliged to refer the matter to concerned authority for a fresh decision? I think not. The court, in my opinion, is not required to refer the matter, once again, to the statutory authority for revisiting the issue if, the necessary ingredients for exercise of that power are found to be in place, and the reasons cited, not to act, by the statutory authority, are found, by a competent court, to be legally untenable. In such a situation, the statutory authority has no other option but to act, as that is the duty cast on it, under the law. The court can thus issue a writ of mandamus. That, courts have issued writ of mandamus in such like, situations is, evident on perusal of the dicta and directions set out in the following cases: ***(i) Union of India and Ors. Vs. Indo Afghan Agencies Ltd., (1968) 2 SCR 366; (ii) Judgment dated 02.02.2012, passed in: WP(C) 423/2010, titled: Centre for Public Interest Litigation and Ors. Vs. Union of India and Ors. (2G case where the court ordered an auction to be carried out);*** and ***(iii) The CAG and Anr. Vs. K.S. Jagannathan, AIR 1987 SCC 537.***

22. In this context, I may only quote the following observations contained in paragraph 20 of the judgment in the case of the ***CAG and Anr. Vs. K.S. Jagannathan*** which are both instructive and illustrative of the situations in which a court can issue a writ of mandamus:-

> "..There is thus no doubt that the High Courts in India

exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion malafide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case, a High Court can in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion.." (emphasis is mine)

22.1 In my opinion, a bare perusal of the unamended clauses of sub-rule (6) of Rule 30 would show that all that the DGCA is required to do is to ascertain whether circumstances exist, once it is found circumstances exist as contemplated in the relevant clause, and the DGCA is found wanting, a writ of mandamus could issue to compel performance. The fulfilment of ministerial act and, therefore, vesting of a minor discretion in that behalf, if it can be called one ought not to deter a court from not issuing a writ of mandamus. The observations of the Supreme Court in this behalf in the case of ***Sharif Ahmad & Ors. Vs Regional Transport Authority, Meerut & Ors,. (1978) 1 SCC 1*** being apposite, are extracted hereinafter:

"…. It may describe any duty, the discharge of which involves no element of discretion or independent judgment. Since an order of mandamus will issue to compel the performance of a ministerial act and since, moreover, wrongful refusal to carry out a ministerial duty may give rise to liability in tort, it is often of practical importance to determine whether discretion is present in the performance of a statutory function. The cases on mandamus show, however, that the presence of a minor discretionary element is not enough to deter the courts from characterising a function as ministerial.

We think that the Regional Transport Authority, pursuant to the order of the Appellate Tribunal, had merely to perform a ministerial duty and the minor discretionary element given to it for finding out whether the terms of the Appellate Order had been complied with or not is not enough to deter the Courts from characterising the function as ministerial. On the facts and in the circumstances of this case by a writ of mandamus the said authority must be directed to perform its function…."

22.2 The Division Bench Judgment of this court in ***DRI Vs. Corporate Aircraft Funding Company LLC***, has however, construed the power of the DGCA under Rule 30 of the Aircraft Rules, as an enabling power. Being a judgment of the Division Bench, concerning the issue at hand, it would have to be followed both as a matter of propriety and in law, having regard to the principle of judicial hierarchy.

22.3 This aspect of the matter, however, need not detain me any further as, Rule 30 stands amended with the insertion of sub-rule (7) in Rule 30 of the Aircraft Rules. The relevant amendments brought about in Rule 30, vide notification no. GSR 78(E) dated 09.02.2015, issued by Ministry of Civil Aviation read as follows :-

"…3. In Rule 30 the said rules, -
(a). In sub-rule (6), in clause (iv), for the words "is not in force; or", the words "has expired or has been terminated in

accordance with terms of lease or" shall be substituted;

(b). After sub-rule (6), the following sub-rule shall be inserted, namely :-

"7. The registration of an aircraft registered in India, to which the provisions of the Cape Town Convention or Cape Town Protocol apply, ***shall*** be cancelled by the Central Government, as provided in the Cape Town Protocol, if an application is received from IDERA Holder prior to expiry of the lease along with :-

(i). The original or notarized copy of the IDERA; and

(ii). A certificate that all registered interests ranking in priority have been discharged or the holders of such interest have consented to the deregistration and export :

Provided that the deregistration of an aircraft by the Central Government under sub-rule (6) or sub-rule (7) shall not affect the right of any entity thereof, or any inter-governmental organisation, or other private provider of public services in India to arrest or detain or attach or sell an aircraft object under its laws for payment of amounts, owed to the Government of India, any such entity, organisation or provider directly relating to the services provided by it in respect of that object.."

22.4 A bare reading of the aforesaid would show that with the insertion of sub-rule (7) in Rule 30, the doubt, if any, as to whether the DGCA had any discretion in the matter has got removed. Upon the creditor fulfilling the conditions prescribed in clause (i) and (ii), of sub-rule (7), of Rule 30, the DGCA is mandatorily required to cancel the registration.

22.4 Therefore, keeping in mind the aforesaid, in my view, a mandamus shall issue to the DGCA to act in a particular manner, as the conditions prescribed for acting in that manner, as required by law, stand fulfilled.

Any other direction would only frustrate the object and purpose with which the amendment has been brought about in Rule 30. I am, thus, persuaded to direct the DGCA to de-register the aircraft objects, which are subject matter of the captioned writ petitions.

23. Before I conclude, let me also deal with other tertiary submissions made by counsels.

23.1 As indicated above, one of the aspects qua which much argument was advanced, pertained to, whether or not the remedies provided in Article IX of the Protocol had to be given effect within five working days, after the creditor notifies to the concerned authorities its intention to seek relief in terms of the said Article.

23.2 This argument, advanced by Mr Srinivasan, stems from Article X(6) of the Protocol. A careful perusal of Article X of Protocol would show that it deals with modification of provisions regarding relief pending final determination. The clauses (1) to (5) of Article X, give a clear indication that they refer to the court route for seeking relief as provided in Article 13 of the Convention, as against IDERA route, as provided in Article IX of the Protocol.

23.3 Therefore, once a creditor, takes recourse to the provisions of Article 13 of the Convention for seeking relief pending final determination by the court, and such relief, is granted by the court, then the registry authority and other administrative authorities (as applicable), in a contracting State, are required to make available the specified reliefs as sought and granted by the court, within five working days.

23.4 A confusion has arisen on account of the fact that both, in the heading concerning clause (6) of Article X of the Protocol, as well as in the body of the provision, there is a reference to Article IX(1) of the Protocol. This appears to be incongruous, as Article X, relates to a remedy which is sought by a creditor via court route. This conclusion, finds support in the comments made in the Official Commentary, distributed under the approval of UNIDROIT Governing Council, pursuant to resolution no. 5, adopted by the Cape Town Diplomatic Conference[1]

23.5 Therefore, the argument of Mr Srinivasan, based on the provisions of Article X(6) of the protocol, are not sustainable. However, this will not have any impact on the aspect of de-registration by the DGCA, in view of my discussion hereinabove.

24. The other submission advanced on behalf of Spicejet, which is that the petitioners having initiated action in the English Court, in which, amongst others reliefs sought, includes the relief of de-registration, and therefore, the instant petition is not maintainable, in my view, is also untenable. The jurisdiction of this court, if rightly invoked, cannot be

[1] 3.32 Article X(6) provides the trigger for action by the authorities where the creditor follows the court route. A creditor invoking Article X(6) must have obtained an order for advance relief under Article 13(1) from a court in a Contracting State which is the State of registry or an equivalent order from a foreign court, which need not itself be a court of a Contracting State. In effect the order must be one which gives possession or control to the creditor or otherwise removes control from the debtor. In the case of an order by a foreign court the relief must be "recognized" by a court of the State of registry. "Recognised" denotes recognition of the foreign court's jurisdiction to make the order granting the relief, whether under the Convention or under other rules of recognition of the law of the State of registry. The basic idea is that any order should be either made or recognized by a court in a Contracting State which is the State of registry. The relevance of Article 13 is not apparent from Article X(6) because of a drafting slip. The second reference to Article IX(1) makes no sense because nowhere in the Convention or Protocol is there any reference to the grant by a court of relief under Article IX(1). The reference should be to an order granting relief under Article 13(1) of the Convention, as is clear from (a) an earlier draft presented by the Aviation Working Group in which the precursor of Article X(6) referred back to the relief specified in what became Article 13 and (b) the fact that, as indicated by its heading, the whole of Article X is concerned with the modification of provisions regarding relief pending final determination. To trigger Article X(6) the creditor must notify the relevant authority (a) that relief has been granted under Article 13(1) and (b) that the creditor is entitled to procure the remedies of de-registration and export. The purpose of this requirement is to dispense with the need for the authority to investigate external facts and to require it to rely solely on the creditor's notification. In short, the process is perceived as purely documentary...."

ousted merely on the ground that the petitioner has instituted an action in the English Court. Spicejet has not filed any proceedings in this court, in the nature of an anti-suit injunction. The fact that the aircraft objects are registered with the DGCA, and have their particulars mentioned in the ICAR, is not in dispute. Therefore, in my opinion, this court would have jurisdiction to deal with the captioned petitions.

25. This brings me to one yet another argument advanced on behalf of the respondents. The argument is that, money, in the form of cash security is available with the petitioners – which is, far in excess of what is claimed by them, and therefore, reliefs of the nature, including the relief of de-registration, sought for in the petition, ought not to be granted.

25.1 This is an argument, which is, pivoted, if at all, on equity. For the record, the petitioners have disputed that the amount available with them is sufficient to tied-over the arrears payable to them, and the recurring rentals, which would add up on use of aircraft objects. The petitioners' commercial sense, at least at this juncture, is that, continued engagement with Spicejet is not a viable proposition. The fact that an event of default has occurred, is not in dispute. The petitioners' right to seek remedies, both under the Convention and Protocol, have got triggered. The court, therefore, cannot impose its own view on the creditors, contrary to their commercial judgement, when there is no justification for the same either under the lease agreement or, the Convention or, the Protocol, or even the Municipal Law of the land. The argument centred on equity, even if considered, is tenuous in view of the apprehensions of the petitioners. Equity, as is often said, can only follow law, and not precede it.

25.2 Furthermore, India is a signatory to the Convention and has ratified the same. Article 5(1)[2] of the Convention clearly sets forth, inter alia, an obligation on the contracting States, to promote uniformity and predictability in the application of the Convention. Article 51(c) of our Constitution obliges the State to "***foster respect for international law and treaty obligations in dealings of organized people with one another***". The provisions of Article 51(c) of the Constitution when read with Article 26[3], 27[4] and 31[5] of the Vienna Convention clearly cast an obligation on the contracting State to not only remain bound by the terms of a treaty entered into by it but also obliges the State not to cite internal law (read municipal

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[2] Article 5. Interpretation and applicable law

1. In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.

[3] **Article 26**. PACTA SUNT SERVANDA: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[4] **Article 27**. INTERNAL LAW AND OBSERVANCE OF TREATIES: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

[5] **Article 31**. GENERAL RULE OF INTERPRETATION:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

law), as a justification for failure to perform its obligation under a treaty. An international Convention, i.e., a treaty, is required to be interpreted in good faith, in accordance with the ordinary meaning given to the terms of the treaty, in their context, and in the light of its stated object and purpose.

25.3 With the insertion of sub-rule (7) in Rule 30 of the Aircraft Rules, in my opinion, the position with regard to the manner in which the DGCA has to proceed, once a creditor seeks recourse to the remedy under Article IX of the Protocol, has only acquired greater clarity. The court, therefore, cannot interdict the process of de-registration on the nebulous ground of equity as it would be contrary to the provisions of the Convention and Protocol, to which, India is a party.

25.4 There is another aspect, which has to be kept in mind, while dealing with such like matters; which is that, a court ought not to proceed in a manner which retards funnelling of much needed private finance for business transactions in India. This is not to say where legitimate legal rights surface under the Municipal Law, the court would ignore them. Sans such legitimate legal rights, the courts must prod the concerned statutory authorities to act in consonance with the provisions of international conventions, to which the contracting State is a party. [see ***Vishaka & Ors. vs State of Rajasthan & Ors., (1997) 6 SCC 241*** and ***Jolly George Varghese & Anr. vs The Bank of Cochin (1980) 2 SCC 360***]

26. In passing, a reference was also made to the fact that the issue with regard to the petitioners' entitlement to terminate the lease agreements, would require determination by a competent court of law, and therefore, no relief could be given in the present petitions. This argument, in my view,

is misconceived, because it ignores the provisions of Convention and the Protocol, which proceed on documentary evidence vis-a-vis the remedy sought under Article IX of the Protocol. Upon fulfilment of the ingredients set out in Article IX of the Protocol, the petitioners become entitled to the reliefs encapsulated therein. Entitlement to termination of the subject lease agreements is not an ingredient of Article IX of the Protocol. All that the petitioners have to demonstrate qua this aspect, is that, they have exercised their right under IDERA, and thus, proceeded to terminate the subject lease agreements. There is no dispute that this aspect has been taken care of by the petitioners. The submission is, accordingly, rejected.

27. I am also not impressed by the submissions advanced on behalf of the Spicejet that de-registration and/or re-possession of the aircraft objects would impinge upon public interest. As indicated above, there is as much if not more public interest in ensuring that treaty obligations are honoured, and that, the parties adhere to their respective contractual obligations. The very fact that India has ratified the Convention and Protocol, gives rise to the presumption that it has been done in, the larger public interest, as against a narrow interest of one particular airline. The argument that passages have been booked with Spicejet, does not improve the case put forth by the respondents as this is a risk that every unsecured creditor will take vis-a-vis its transactions with the airline. This interest cannot come in the way of a larger public interest, which is the obligation undertaken by the contracting State to honour its commitments under the Convention and the Protocol.

28. Which brings me to other reliefs, prayed for in the petitions,

including the direction sought for the export of aircraft objects along with documentation on board. Grant of these reliefs, may require a prior decision of the DGCA qua NCRI liens. As noted above, the learned ASG was not able to inform me as to whether or not, there are liens obtaining vis-a-vis the aircraft objects under the Municipal law; as contemplated under Article 39(1) of the Convention. The difficulty has been compounded by the fact that the DGCA, has not filed its return in the matter. Therefore, the DGCA will, take a decision in the matter qua liens, if any, obtaining. The decision in the matter will be taken by the DGCA within two (2) weeks from today.

28.1 The decision will, inter alia, indicate the existence lien(s), if any, with reference to the relevant Municipal Law as required by the declarations filed by the Government of India. DGCA's decision will also indicate as to whether, the liens, as contemplated in the declarations filed, in consonance with the Convention, are operable at present.

28.2 The DGCA will, thus specifically, deal with the prayer made by the petitioners for export of the aircraft objects along with the documentation on board, out of the country.

28.3 Furthermore, as indicated above, DGCA will, forthwith, de-register the aircraft objects.

29. The writ petitions and the pending applications are, accordingly, disposed of.

**RAJIV SHAKDHER, J**

**MARCH 19, 2015**
kk/yg

TAB 4

CONVENTION ON INTERNATIONAL INTERESTS
IN MOBILE EQUIPMENT AND PROTOCOL THERETO
ON MATTERS SPECIFIC TO AIRCRAFT OBJECTS

# OFFICIAL COMMENTARY

**Third Edition**

by

**Professor Sir Roy Goode CBE, QC**

*Emeritus Professor of Law*
*University of Oxford*



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(2) **Prospective international interests**, that is, interests intended to be taken over identifiable equipment as international interests in the future but which have not yet become international interests, for example, in the case of a security agreement because the terms of the agreement are still being negotiated or the prospective debtor has not yet acquired an interest in the equipment to be charged. A prospective international interest may be registered as such in the International Registry but does not have effect until it becomes an international interest, in which case it ranks for priority purposes as from the time of its registration as a prospective international interest if that registration has not been discharged. The definition of this requires that the interest be one which is intended to be created or provided for *as an international interest* in the future (Article 1(y)).

(3) **National interests**, that is, interests registered under a national registration system which would be registrable as international interests but for the fact that they are created by internal transactions (as defined in the Convention) in respect of which a Contracting State has made a declaration under Article 50 excluding the application of the Convention. However, such an exclusion is of limited effect. In the first place, the national interest remains governed by the priority rules of the Convention, not those of national law (Article 50(2)), and by various other provisions of the Convention. Secondly, while it cannot be registered as an international interest, notice of it can be registered in the International Registry, thereby securing its priority in the same way as if it were a registered international interest.

(4) **Non-consensual rights or interests arising under national law and given priority without registration.** A Contracting State may make a declaration under Article 39(1) specifying those categories of non-consensual right or interest which under national law would be given priority over interests equivalent to an international interest and which, to the extent specified in the declaration, are to have priority over a registered international interest even though such non-consensual rights or interests are not themselves registered in the International Registry. The appellation "non-consensual right or interest", a phrase defined in Article 1(s), denotes a right or interest created by law, not by agreement. It is confined to a right or interest given priority under

definition of "helicopters" in Article I(2)(l). However, prior to installation or after removal and before re-installation a helicopter engine is an aircraft engine, for its status as such cannot be made to depend on whether it is to be installed on an airframe or on a helicopter. So in a Contracting State an international interest in an uninstalled helicopter engine can be created and registered and its efficacy preserved after installation. See further paragraph 3.10.

3.9. Each of the three categories of aircraft object is defined to include installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto. The items so included (which do not cover items merely resting on an airframe by their own weight) form part of the object and are not separately governed by the Convention or Protocol. So such items as installed propellers, auxiliary power units and computers and engines installed on a helicopter are not distinct objects for the purpose of these two instruments, which do not, however, affect rights in them, or in other items not constituting an object, existing under the applicable law. See Article 29(7) of the Convention and Article XIV (3) and (4) of the Protocol.

3.10. An aircraft engine, even when installed on an airframe, is not an accessory of the airframe but constitutes an independent object (see Article I(2)(a)) and ownership of the engine or rights or interests in it under the applicable law are not affected either by its installation on an aircraft or its removal from it (Article XIV(3)). Accordingly an international interest can be taken in an aircraft engine as an independent object and is separately registrable. By contrast an engine installed on a helicopter is not an aircraft engine but an accessory of the helicopter (see paragraph 3.8) and while so installed is not capable of being the subject of a separate international interest under the Convention. The position is otherwise prior to its installation or subsequent to its removal, when it constitutes an aircraft engine. This means, first, that when not installed it can become the subject of a registrable international interest and, secondly, that the creditor's pre-installation rights and interests under the applicable law (including, in a Contracting State, its rights and interests under the Convention) are not affected by installation of the engine on a helicopter. In this situation the rights of the holder of the international interest are governed by Article XIV(3), referred to above, and are not subjected to the applicable law under Article XIV(4), since this is confined to items which are not objects and is therefore inapplicable to an interest acquired in an engine prior to its installation on a helicopter. So in a

Contracting State an international interest in a helicopter engine taken and registered before installation continue to enjoy the full benefits of the Convention and Protocol, including preservation of its priority, after installation even though it thereupon ceases to be an "object". Moreover, those rights and priority are preserved even after subsequent removal from the helicopter. What cannot be done, however, is to constitute and register an international interest in a helicopter engine while installed on a helicopter or to rely on such registration after its removal, when a new agreement will be needed and a new registration effected, otherwise the effect of Article XIV(3) is to preserve the helicopter financier's interest in the whole helicopter, including the engines. This is an awkward consequence of the fact that engines installed on a helicopter are not treated as separate objects, a matter that could usefully be addressed at any Review Conference convened under Article XXXVI of the Protocol to consider the practical operation of the Convention as amended by the Protocol. However, there is a practical solution to the problem, namely to register a prospective international interest in the installed engine which, immediately upon its removal, will become an international interest and be treated as registered as from the time of its registration as a prospective international interest (Article 19(4)) and have priority accordingly. So if the prospective international interest is registered before registration of an international interest in the helicopter (including the engine) by another creditor, the holder of the prospective international interest will acquire priority over the helicopter financier the moment the engine is removed from the helicopter. Such an international interest will continue to preserve its priority even after subsequent re-installation in a helicopter (Article XIV(3)). An engine installed on a helicopter may, of course, be the subject of a separate national law security or other interest if the applicable law so provides, though that interest will be subordinate to a registered international interest.

3.11. The Convention and Protocol do not cover items (other than objects, which include data, manuals and records relating thereto) that are not installed on, incorporated in or attached to an airframe, aircraft engine or helicopter, though again under Article 29(7) of the Convention and Article XIV(4) of the Protocol rights created or preserved under the applicable law are not affected. Where, for example, propellers or other components of an airframe are supplied under reservation of title, the seller's interest in them cannot be protected by registration under the Convention. When the components are subsequently incorporated into an airframe which is financed by a purchase-money loan only in its entirety (Article XXX(3)), or to adopt neither and simply continue to apply its ordinary domestic law. To date, with one exception, every Contracting State making a declaration has opted for Alternative A.

*Alternative A*

3.106. The "hard", or rule-based, version, Alternative A, is specifically designed to meet the requirements of advanced structured financing, including international capital market financing structures. Paragraphs 2 and 7 require the insolvency administrator or the debtor, as applicable, either (a) to give possession within the earlier of a waiting period specified in a Contracting State's declaration or the date on which the creditor would otherwise be entitled to possession or (b) within the above time to cure all defaults (other than a default constituted by the opening of insolvency proceedings) and agree to perform all future obligations under the agreement, which includes obligations under other transaction documents (e.g. a loan agreement) incorporated by reference in such agreement. If the insolvency administrator or the debtor fails to give up possession after the creditor has become entitled to it under the above provisions or in any other way fails to fulfil its obligations under Alternative A the creditor can apply for and is entitled to obtain speedily a court order requiring the insolvency administrator or the debtor to give possession of the aircraft object. Alternative A requires strict adherence to the timetable and the court is precluded from granting any extension of time for payment or other performance (Alternative A, paragraph 9). The following points arise under paragraph 2 of Alternative A:

*"Insolvency administrator or the debtor, as applicable"*

3.107. The phrase "insolvency administrator or the debtor, as applicable" covers three situations. The first concerns cases within Article I(2)(m)(ii) of the Protocol, that is, where there are no insolvency proceedings and the insolvency-related event consists of the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or exercise remedies under the Convention is prevented or suspended by law or State action. In such a case there is no insolvency administrator and it is the debtor itself upon which the duties fall. The second involves cases within Article I(2)(m)(i) where there is a gap between the commencement of the insolvency and the appointment of the

3.112. Paragraphs 9 and 10 of Alternative A preclude the court from preventing or delaying the exercise of the creditor's remedies beyond the above time-period and from modifying the debtor's obligations without the creditor's consent. In effect this removes, for aircraft objects, the preservation of the court's powers under Article 30(3)(b) of the Convention (see paragraph 2.183). Thus under Alternative A the court will be precluded from exercising some of the powers it would normally have to grant a stay or to modify a secured creditors' rights or remedies, the justification being the economic benefits anticipated from a clear and unqualified rule. Moreover, in order to conform to Alternative A a Contracting State that has made a declaration selecting that alternative must ensure that any provisions of its domestic law imposing an automatic stay, or conferring on its courts the power to impose a stay, are disapplied where they would be inconsistent with paragraph 9. Similarly, any provisions of domestic law modifying or empowering a court to modify the debtor's obligations must be disapplied where these would conflict with paragraph 10. Though paragraph 10 only precludes modification of the debtor's obligations under "the agreement", that is, the security agreement, title reservation agreement or leasing agreement relating to the aircraft object, and says nothing about security assignments of debtor's rights, it must be intended to cover these as well, particularly in view of the fact that paragraph 9, precluding prevention of or delay in the exercise of the creditor's remedies permitted by the Convention or Protocol, applies to all remedies, not merely those relating to the aircraft object. But the insolvency administrator remains entitled to terminate the agreement where so allowed by the applicable law (Alternative A, paragraph 11), that is, the law governing the agreement.

3.113. The creditor's protection under Alternative A is further strengthened by a provision that no rights or interests, except for non-consensual rights or interests of a category covered by a declaration under Article 39(1), are to have priority over registered interests (Alternative A, paragraph 12). That makes explicit what is implicit in Articles 29 and 30(2) of the Convention, namely that rules of insolvency law – for example, those giving priority to various categories of preferential debt such as claims for taxes or unpaid wages – cannot be applied to displace the priority of a registered international interest.

TAB 5

# Practitioners' Guide

## to the Cape Town Convention and The Aircraft Protocol

The Legal Advisory Panel of the Aviation Working Group

Published September, 2015

A · W · G
AVIATION WORKING GROUP

# *Practitioners' Guide to the Cape Town Convention and The Aircraft Protocol*

**_Published by the Aviation Working Group_**



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**Example:**
The owner of an aircraft object sells such aircraft object to a purchaser. In this case, the owner clearly has the "power to dispose." The same would be true if the owner leased such aircraft object to a lessee.

However, the use of the term "power," as opposed to "right," indicates that the Cape Town Convention was drafted to capture dispositions beyond those dispositions in which the disposing party had the proper authority to dispose.[51] Thus, an unauthorised disposition of an aircraft object may nevertheless be effective to pass ownership or some other interest because of a rule of law (as discussed below) to that effect (e.g., where an agent, without actual authority, but within the scope of its apparent authority, disposes of its principal's property). The "power to dispose" is meant, therefore, to include the ability of a transferor to "transfer a better title than the transferor itself possesses"[52] and would cover all cases where, a party has the ability to make a disposition which is binding on the owner even if the owner has not authorised it. There is no need for the seller, lessor, conditional seller or grantor to be the owner of an aircraft object in order to have the power to dispose of such object.

The power to dispose can arise either under the applicable national law or under the Cape Town Convention itself by virtue of its registration and priority rules.[53] National law may provide numerous ways in which a party may make a disposition which is binding on an owner or subordinates a senior interest even if the owner or party holding the more senior interest did not authorize it. For example, the apparent authority of an agent (acting outside his actual authority) to sell or lease an aircraft object may, under applicable national law, satisfy the test concerning the power to dispose. Similarly, if, under applicable national law, a sale of an aircraft object to a "bona fide" purchaser would override the owner's title (in the case of an outright disposition) or would have priority over a prior interest, then the seller/transferor would, under the Cape Town Convention, have sufficient power to dispose.[54]

**Example 1:**
Seller appoints Agent (who is in the business of selling aircraft objects) to arrange for the sale of Seller's engine. Agent arranges a sale of such engine with Purchaser and executes a bill of sale in favor of Purchaser as agent on behalf of Seller. If, under applicable national

[51] Goode at para. 4.71 (Unidroit 2013).

[52] Goode at para. 2.65 (Unidroit 2013).

[53] Goode at para. 4.72 (Unidroit 2013).

[54] Many legal systems regard the possession of goods by certain categories of parties (e.g., those who regularly sell or lease goods of that type) as implying a right of the person in possession to transfer good title to third parties, even though the person in possession does not hold title itself.

Understanding.[448] Aside from the export credit fee discount that may be available under the OECD ASU, Alternative A is also one of the most important, if not the most important, of the declarations that a Contracting State may make in order to increase the availability of and reduce the cost of financing for aircraft in its jurisdiction generally.

Alternative A is the preferred declaration because it requires the debtor, no later than the earlier of (a) the end of the waiting period specified by the Contracting State that is the primary insolvency jurisdiction and that has adopted Alternative A or (b) the date on which the creditor would be entitled to possession if the Convention and Aircraft Protocol did not apply, to either (x) give possession of the aircraft object to the creditor[449] under the security agreement, title reservation agreement or lease or (y) cure all defaults other than a default constituted by the opening of insolvency proceedings, and agree to perform all future obligations under the agreement. A practitioner should note that a second waiting period does not apply in respect of a default in the performance of such future obligations.[450] Furthermore, unless and until the creditor is given the opportunity to take possession of the aircraft object, the insolvency administrator or debtor must preserve the aircraft object and maintain it and its value in accordance with the agreement and the creditor shall be entitled to apply for any other forms of interim relief available under applicable law. In addition, the remedies of de-registration and export of the aircraft are required to be made available on an expedited basis (no later than five working days) by the aircraft registry authority and the applicable administrative authorities of a Contracting State, which opts into Alternative A, in conformity with applicable aviation safety laws and regulations.[451] Alternative A adds a special provision that only those non-consensual rights or interests covered by a declaration under Article 39(1) of the Convention have priority over registered interests in insolvency proceedings.[452]

**Practice Notes:**

(1) The remedy requiring the insolvency administrator or debtor to give possession of the aircraft object to a creditor under Alternative A by a certain date specified in paragraph 2 of Article XI cannot be delayed by "any order or action which prevents or delays the exercise of remedies after expiry of the waiting period".[453] Local law procedures required pursuant to Article 14 of the Convention cannot be used to delay the remedy of recovery of the aircraft object and records because the Protocol provision here

[448] The Aircraft Sector Understanding can be found at http://www.oecd.org/tad/xcred/aircraftsectorunderstandings.htm.

[449] Note that this is a direct obligation to give possession, not only a right of the creditor to exercise such remedies as may exist under applicable law.

[450] Article XI, Alternative A (2) and (7) of the Protocol.

[451] Article XI, Alternative A (8) of the Protocol.

[452] Article XI, Alternative A (12) of the Protocol.

[453] Goode at paras. 5.62 and 4.117 (Unidroit 2013).

# TAB 6

# SULLIVAN
# ON THE
# CONSTRUCTION OF STATUTES

**Sixth Edition**

by

Ruth Sullivan



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**Sixth Edition by Ruth Sullivan**


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CHAPTER 2

# *Driedger's Modern Principle*

## ANALYSIS OF THE MODERN PRINCIPLE

**§2.1** ***Introduction.*** In the first edition of the *Construction of Statutes*, published in 1974, Elmer Driedger described an approach to statutory interpretation which he called the modern principle:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[1]

In the years following that first edition, the modern principle was frequently cited and relied on, and in 1998, in *Re Rizzo & Rizzo Shoes Ltd.*, it was declared to be the preferred approach of the Supreme Court of Canada. Speaking for the Court, Iacobucci J. wrote:

> Although much has been written about the interpretation of legislation ... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone.[2]

Since the Rizzo case, Driedger's modern principle has been the starting point for statutory interpretation in innumerable decisions by Canadian courts. It has even been applied to interpretation of Quebec's Civil Code.[3]

**§2.2** The chief virtue of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. In interpreting a legislative provision, a court must form an impression of the meaning of its text. But to infer what rule the legislature intended to enact, it must also take into account

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1 Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), at p. 67. This principle was reproduced in the second edition, published in 1983, without modification at p. 87.

2 [1998] S.C.J. No. 2, at para. 21, [1998] 1 S.C.R. 27, at 41 (S.C.C.). For a comprehensive and critical analysis of Driedger's modern principle, see Stéphane Beaulac & Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimation" (2006), 40 Thémis 131-72.

3 See *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, [2004] S.C.J. No. 55, [2004] 3 S.C.R. 257, at para. 20*ff.* (S.C.C.).

> For this reason, ambiguity cannot reside in the mere fact that several courts – or, for that matter, several doctrinal writers – have come to differing conclusions on the interpretation of a given provision.... 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 enough to induce two people to spend good money in backing two opposing views as to their meaning".[52]

The Court here effectively repudiates the modern principle as applied in the *Rizzo* case and returns Canadian statutory interpretation to the manipulable plain meaning rule: once the meaning of a legislative text has been clearly established to the satisfaction of the court on the basis of *some* contextual factors, other contextual factors are to be ignored.

**§2.35** The account of ambiguity in the *Bell ExpressVu* case is particularly distressing. One might have thought the fact that several courts or scholars have reached different conclusions concerning the meaning of a legislative text (in the absence of evidence of incompetence or a vested interest) is indeed evidence of ambiguity. In the view of the court, however, if an interpreter reaches a linguistic conclusion that differs from its own, that interpreter either is not a competent language user or has not properly applied the modern principle. While this might be true in some cases, it cannot be assumed. An appreciation of the complexities and variables involved in the communication of meaning through texts makes it highly plausible that two competent speakers of a language, acting in good faith and taking into account a shared set of contextual factors, could reach different conclusions as to the meaning of a text simply because other significant contextual factors are not shared.[53]

**§2.36** ***Rhetorical use of textualist language.*** Judges sometimes use textualist language for primarily rhetorical effect. In such cases, the court may declare that the language to be interpreted has a plain meaning, which therefore prevails over other considerations. Here are two examples from recent judgments of the Supreme Court of Canada:

> ... When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the

52 [2002] S.C.J. No. 43, [2002] 2 S.C.R. 559, paras. 27-30 (S.C.C.). In the final paragraph, Iacobucci J. quotes John Willis, "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at pp. 4-5. The reference is odd. Clearly any case that makes it to the Supreme Court of Canada on a point of statutory interpretation has induced two people to spend a great deal of money backing opposing interpretations.

53 This point is developed in R. Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1998-1999), 30 Ottawa L. Rev. 175-227 at 177. For discussion of the pervasive ambiguity of language and the complex process by which meaning is derived from a text, see Chapter 3 at §3.10-3.14. See also W. Farnsworth, D.F. Guzior and A. Malani, "Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation", ssrn, 1441860.

> ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.[54]

> ... The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision. Where ambiguity arises, it may be necessary to resort to external factors to resolve the ambiguity.... However, Parliament has clearly stated the requirements for finding adult witnesses with mental disabilities to be competent. Section 16 shows no ambiguity.[55]

In both cases, the text to be interpreted was considered in its full context, having regard to its purpose. The point of these declarations is not to preclude examination of — and possible reliance on — purposes or consequences or extrinsic aids, but rather to emphasize that the meaning of the text, because it is plain, should receive significant weight and *in the circumstances of this case* outweighs other considerations which are less compelling. The italicized words are important. In another case, clear meaning might give way to a more important contextual factor.

## CONCLUSION

**§2.37** Texts are not either plain or ambiguous; rather they are more or less plain and more or less ambiguous. The factors that justify outcomes in statutory interpretation are multiple, involving inferences about meaning and intention derived from the text, non-textual evidence of legislative intent, specialized knowledge, "common sense" and legal norms. These factors interact in complex ways. It is never enough to say the words made me do it.

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54 *Canada Trustco Mortgage Co. v. Canada*, [2005] S.C.J. No. 56, [2005] 2 S.C.R. 601, at para. 10 (S.C.C.).

55 *R. v. D.A.I.*, [2012] S.C.J. No. 5, [2012] 1 S.C.R. 149, at para. 26 (S.C.C.). See also *R. v. Clarke*, [2013] O.J. No. 94, 2013 ONCA 7, at para. 18 (Ont. C.A.), where the Ontario Court of Appeal — relying on the passage quoted from *R. v. D.A.I.* — wrote: "... the starting rule of statutory interpretation is to examine the plain words Parliament used.... If those words have a clear meaning and do not give rise to any ambiguity — that is, they are not reasonably capable of more than one meaning — the court should give effect to those words." This is a straightforward return to the plain meaning rule.

subsection of the same section to receive a different interpretation. The word must have the same meaning in both subsections.[54]

§8.35 The reasoning of Cory J. is exemplary. He first notes that elsewhere in the legislation the word or expression to be interpreted has a single clear meaning; he then invokes the presumption of consistent expression to justify his conclusion that this meaning must prevail throughout. Finally, he points out that the presumption applies with particular force where the provisions in which the repeated words appear are close together or otherwise related. This way of resolving interpretation problems is often relied on in the cases.[55]

§8.36 ***Different words, different meaning.*** Given the presumption of consistent expression, it is possible to infer from the use of different words or a different form of expression that a different meaning was intended. As Malone J.A. explains in *Jabel Image Concepts Inc. v. Canada*:

> When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.[56]

This reasoning was relied on in several Supreme Court of Canada decisions interpreting the insanity defence provisions of the *Criminal Code*. Section 16(1) provides that a person is insane only if he or she is "incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong". In *R. v. Schwartz*, Dickson J. argued that the word "wrong" must mean morally wrong and not illegal because elsewhere in the Code the term "unlawful" is used to express the idea of illegality; by using the word "wrong" the legislature must

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54 *Ibid.*, at paras. 26-28.

55 See, for example, *Amaratunga v. Northwest Atlantic Fisheries Organization*, [2013] S.C.J. No. 66, 2013 SCC 66, [2013] 3 S.C.R. 866, at paras. 41-42 (S.C.C.); *R. v. Knoblauch*, [2000] S.C.J. No. 59, [2000] 2 S.C.R. 780, at para. 85 (S.C.C.); *Canada v. Schwartz*, [1996] S.C.J. No. 15, [1996] 1 S.C.R. 254 (S.C.C.); *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85, at 123-24 (S.C.C.); *Henrietta Muir Edwards v. A.G. for Canada*, [1930] A.C. 124, at 124 (P.C.); *R. v. Hutchinson*, [2013] N.S.J. No. 1, 2013 NSCA 1, at paras. 124-126 (N.S.C.A.), affd [2014] S.C.J. No. 19 (S.C.C.); *Toronto-Dominion Bank v. Canada*, [2011] F.C.J. No. 1029, 2011 FCA 221, at paras. 37-38 (F.C.A.); *Swales v. I.C.B.C.*, [2011] B.C.J. No. 319, 2011 BCCA 95, at para. 16 (B.C.C.A.); *Sero v. Canada*, [2004] F.C.J. No. 71, at paras. 35-36 (F.C.A.); *Wishing Star Fishing Co. v. "B.C. Baron" (The)*, [1987] F.C.J. No. 1149, 81 N.R. 309, at 313 (F.C.A.); *R. v. Budget Car Rentals (Toronto) Ltd.*, [1981] O.J. No. 2888, 20 C.R. (3d) 66, at 82 (Ont. C.A.).

56 [2000] F.C.J. No. 894, 257 N.R. 193, at para. 12 (F.C.A.). See also *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 81-84 (S.C.C.); *Lukács v. Canada (Transportation Agency)*, [2014] F.C.J. No. 301, 2014 FCA 76, at para. 41 (F.C.A.); *British Columbia (Attorney General) v. Beacon Community Services Society*, [2013] B.C.J. No. 1465, 2013 BCCA 317, at paras. 25-26 (B.C.C.A.); *Swailes v. Insurance Corporation of British Columbia*, [2011] B.C.J. No. 319, 2011 BCCA 95, at para. 16 (B.C.C.A.); *Shier v. Manitoba Public Insurance Corp.*, [2008] M.J. No. 305, 2008 MBCA 97, at para. 52 (Man. C.A.).

have meant to express a different idea.[57] In *R. v. Barnier*[58] the issue was whether the trial judge had erred in instructing the jury that the words "appreciating" and "knowing" in s. 16(2) mean the same thing. Estey J. wrote:

> One must, of course, commence the analysis of a statutory provision by seeking to attribute meaning to all the words used therein. Here Parliament has employed two different words in the critical portion of the definition, which words in effect established two tests or standards in determining the presence of insanity.... Under the primary canon of construction to which I have referred, "appreciating" and "knowing" must be different, otherwise the Legislature would have employed one or the other only.[59]

As this passage from the *Barnier* case indicates, the presumption that using different words implies an intention to express different meanings is often reinforced by the presumption against tautology. In *R. v. Clark*,[60] for example, the issue was whether performing an indecent act in an illuminated room near an uncovered window violated s. 173(1)(a) of the *Criminal Code*. The relevant provisions were in the following terms:

> 150. In this Part,
>
> ...
>
> "public place" includes any place to which the public have access as of right or by invitation, express or implied;
>
> 173. (1) Every one who wilfully does an indecent act
>
> (a) in a public place in the presence of one or more persons,
>
> ...
>
> is guilty of an offence punishable on summary conviction.
>
> 174.(1) Every one who, without lawful excuse,

---

57 [1976] S.C.J. No. 40, [1977] 1 S.C.R. 673, at 677-90 (S.C.C.), *per* Dickson J. dissenting; approved by Lamer C.J. for the majority of the Court in *R. v. Chaulk*, [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303, 2 C.R. (4th) 1, at 39-41 (S.C.C.). See also *Frank v. The Queen*, [1977] S.C.J. No. 42, [1978] 1 S.C.R. 95, at 101 (S.C.C.), *per* Dickson J.: "I do not think 'Indians of the Province' and 'Indians within the boundaries thereof' refer to the same group. The use of different language suggests different groups."; *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85, at 123-124 (S.C.C.), *per* La Forest J.: "... whenever Parliament meant to include Her Majesty in right of a province, it was careful to make it clear by using explicit terms. In the absence of such specific indication, ... one would expect that an unqualified reference to 'Her Majesty' should be taken as limited to the federal Crown." See also *Walsh v. Mobil Oil Canada*, [2008] A.J. No. 830, 2008 ABCA 268, at para. 74 (Alta. C.A.).

58 [1980] S.C.J. No. 33, [1980] 1 S.C.R. 1124 (S.C.C.).

59 *Ibid.*, at 1135-36. See also *John Doe v. Ontario (Finance)*, [2014] S.C.J. No. 36, 2014 SCC 36, at paras. 24, 53 (S.C.C.); *Marche v. Halifax Insurance Co.*, [2005] S.C.J. No. 7, [2005] 1 S.C.R. 47, at paras. 93-94 (S.C.C.); *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] S.C.J. No. 31, [1999] 2 S.C.R. 625, at paras. 134-35 (S.C.C.).

60 [2005] S.C.J. No. 4, [2005] 1 S.C.R. 6 (S.C.C.).

> (a) is nude in a public place, or
>
> (b) is nude and exposed to public view while on private property, …
>
> is guilty of an offence punishable on summary conviction.

**§8.37** The Supreme Court of Canada held that although the indecent act in question was witnessed by two neighbours who were peeking through their windows into the accused's apartment, the act had not been done in a public place. In reaching this conclusion, Fish J. relied on both the presumption against tautology and the presumption of consistency:

> Section 174(1) makes it perfectly clear that the definition of "public place" in s. 150 of the *Criminal Code* was not meant to cover private places exposed to public view. Were it otherwise, s. 174(1)(*b*) would be entirely superfluous.
>
> Section 150 applies equally to s. 174(1) and s. 173(1)(*a*). If "public place" does not, for the purposes of s. 174(1), include private places exposed to public view, this must surely be the case as well for s. 173(1)(*a*). And I hasten to emphasize that ss. 173(1) and 174 of the *Criminal Code* were enacted in their present form *simultaneously*, as ss. 158 and 159, when the present *Code* was revised and enacted as S.C. 1953-54, c. 51. Parliament could not have intended that identical words should have different meanings in two consecutive and related provisions of the very same enactment.[61]
>
> [Emphasis in original]

The reasoning here is persuasive and is consistent with any purposive or consequential analysis the court might undertake.

**§8.38** ***Recurring pattern of expression.***[62] The presumption of consistent expression applies not only to individual words, but also to patterns of expression. In *Kirkpatrick v. Maple Ridge (District)*,[63] for example, the Supreme Court of Canada was concerned with a provision of British Columbia's *Municipal Act* which conferred on municipalities a power to require permits for the removal of soil or other substances and to "fix a fee for the permit". The question was whether this authorized the imposition of a flat fee for all holders, a fee proportionate to the amount of substance removed by each holder, or both. In concluding that the fee must be flat, the Court relied on the pattern apparent in the Act of setting out the basis for differential fees when such fees were contemplated, but simply providing for the imposition of the fee when the same rate was to be charged to all. La Forest J. wrote:

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61 *Ibid.*, at paras. 50-51. See also *R. v. Daoust*, [2004] S.C.J. No. 7, [2004] 1 S.C.R. 217, at paras. 62-63 (S.C.C.); *343091 Canada Inc. v. Canada (Minister of Industry)*, [2001] F.C.J. No. 1327, [2002] 1 F.C. 421 (F.C.A.), leave to appeal dismissed [2001] S.C.C.A. No. 537 (S.C.C.), at para. 50: "… by exempting 'advice and recommendations' from disclosure, Parliament must be taken to have intended the former to have a broader meaning than the latter; otherwise it would be redundant."

62 For discussion of patterns of express reference, see below at §8.97*ff.*

63 [1986] S.C.J. No. 47, [1986] 2 S.C.R. 124 (S.C.C.).

TAB 7

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"There was a troublesome doctrine of the common law which established, in the case of a lease not operating under the Statute of Uses, that the lessee acquired no estate in the land until he actually entered into possession. Until that time he was said to have a mere right to take possession, and this right was called an *interesse termini*. This requisite of entry to perfect a lease has, however, been swept away by the Law of Property Act, 1925, and all terms of years absolute, whether created before or after the commencement of the Act, can take effect from the date fixed for the commencement of the term without actual entry." G.C. Cheshire, *Modern Law of Real Property* 128–29 (3d ed. 1933).

**interest,** *n.* (15c) **1.** The object of any human desire; esp., advantage or profit of a financial nature <conflict of interest>. **2.** A legal share in something; all or part of a legal or equitable claim to or right in property <right, title, and interest>. • Collectively, the word includes any aggregation of rights, privileges, powers, and immunities; distributively, it refers to any one right, privilege, power, or immunity.

▸ **absolute interest.** (18c) An interest that is not subject to any condition.

▸ **beneficial interest.** (18c) A right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing. • For example, a person with a beneficial interest in a trust receives income from the trust but does not hold legal title to the trust property.

▸ **carried interest. 1.** The share of any profits produced by a partnership's investment, paid to the general partner as compensation for managing the investment. • The general partner often contributes little or no capital to acquire the investment but gains an interest in it by providing time and skill. The general partner's interest in the property is "carried" with the property until it is liquidated. **2.** *Oil & gas.* In an oil-and-gas lease, a fractional interest that is free of some or all costs of exploring, drilling, and completing the well. • The owner of a carried lease may earn royalties on production but does not have a working interest, at least until all costs are recouped by the working-interest owner or owners, and often until some multiple of those costs are paid.

▸ **concurrent interest.** See *concurrent estate* under ESTATE (1).

▸ **contingent interest.** (18c) An interest that the holder may enjoy only upon the occurrence of a condition precedent. Cf. *vested interest.*

▸ **controlling interest.** (1842) Sufficient ownership of stock in a company to control policy and management; esp., a greater-than-50% ownership interest in an enterprise.

▸ **defeasible interest.** (18c) An interest that the holder may enjoy until the occurrence of a condition.

▸ **direct interest.** (17c) A certain, absolute interest <the juror was disqualified because she had a direct interest in the lawsuit>.

▸ **entailed interest.** (1846) An interest that devolves through lineal descendants only as a result of a fee tail.

▸ **entire interest.** (17c) A whole interest or right, without diminution. See FEE SIMPLE.

▸ **equitable interest.** (17c) An interest held by virtue of an equitable title or claimed on equitable grounds, such as the interest held by a trust beneficiary.

▸ **executory interest.** See EXECUTORY INTEREST.

▸ **expectant interest.** See *future interest.*

▸ **expectation interest.** (1836) The interest of a nonbreaching party in being put in the position that would have resulted if the contract had been performed. See *expectation damages* under DAMAGES; BENEFIT-OF-THE-BARGAIN RULE.

▸ **financial interest.** (1846) An interest involving money or its equivalent; esp., an interest in the nature of an investment. — Also termed *pecuniary interest.*

▸ **fractional interest.** See *undivided interest.*

▸ **future interest.** (17c) A property interest in which the privilege of possession or of other enjoyment is future and not present. • A future interest can exist in either the grantor (as with a reversion) or the grantee (as with a remainder or executory interest). Today, most future interests are equitable interests in stocks and debt securities, with power of sale in a trustee. — Also termed *future estate*; *expectant estate*; *expectant interest*; *estate in expectancy.* Cf. *present interest.*

"[T]he interest is an existing interest from the time of its creation, and is looked upon as a part of the total ownership of the land or other thing [that] is its subject matter. In that sense, future interest is somewhat misleading, and it is applied only to indicate that the possession or enjoyment of the subject matter is to take place in the future." Lewis M. Simes & Allan F. Smith, *The Law of Future Interests* § 1, at 2–3 (2d ed. 1956).

"To own a future interest *now* means not only to be entitled now to judicial protection of one's possible future possession, but also (in most cases) to be able to make transfers now of that right of possible future possession." Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests* 56 (2d ed. 1984). "When O transfers today 'to A for five years,' we can say *either* that O has a future interest *or* that he has a 'present' estate subject to a term for years in A. Similarly, when O transfers today his entire estate in fee simple absolute by a conveyance 'to A for five years, then to B and his heirs,' we can say *either* that B has a future interest *or* that he has a 'present' estate subject to a term for years in A. Unhappily, the fact that we have two locutions available to us can be a source of confusion. . . ." *Id.* at 42.

▸ **inalienable interest.** (1848) An interest that cannot be sold or traded.

▸ **inchoate interest.** (1800) A property interest that has not yet vested.

▸ **insurable interest.** (18c) A legal interest in another person's life or health or in the protection of property from injury, loss, destruction, or pecuniary damage. • To take out an insurance policy, the purchaser or the potential insured's beneficiary must have an insurable interest. If a policy does not have an insurable interest as its basis, it will usu. be considered a form of wagering and thus be held unenforceable. See *wager insurance* under INSURANCE.

▸ **interest in the use and enjoyment of land.** (1834) The pleasure, comfort, and advantage that a person may derive from the occupancy of land. • The term includes not only the interests that a person may have for residential, agricultural, commercial, industrial, and other purposes, but also interests in having the present-use value of the land unimpaired by changes in its physical condition.

TAB 8

Province of Alberta

# PERSONAL PROPERTY SECURITY ACT

## Revised Statutes of Alberta 2000
## Chapter P-7

Current as of June 13, 2016

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## Copyright and Permission Statement



## Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

## Regulations

The following is a list of the regulations made under the *Personal Property Security Act* that are filed as Alberta Regulations under the Regulations Act

| | Alta. Reg. | *Amendments* |
|---|---|---|
| **Personal Property Security Act** | | |
| Personal Property Security | 95/2001 | *251/2001, 109/2003, 237/2004, 80/2006, 130/2007, 229/2007, 164/2010, 107/2012, 158/2015* |
| Personal Property Security Forms | 231/2002 | *35/2007, 230/2007, 108/2012, 159/2015* |

or a security interest in the crops referred to in section 34(9), that is registered in accordance with section 49 not later than 15 days after the time the security interest in the crops attaches.

**(6)** Section 36(8) to (15) apply to the seizure and removal of growing crops from land.

1988 cP-4.05 s37;1990 c31 s26;1994 cC-10.5 s148

**Security interests re accessions**

**38(1)** In this section,

(a) "other goods" means goods to which an accession is installed or affixed;

(b) "the whole" means an accession and the goods to which the accession is installed or affixed.

**(2)** Except as provided in this section and section 30, a security interest in goods that attaches before or at the time the goods become an accession has priority with respect to the goods over a claim to the goods as an accession made by a person with an interest in the whole.

**(3)** A security interest referred to in subsection (2) is subordinate to the interest of

(a) a person who acquires for value an interest in the whole after the goods become an accession, including an assignee for value of the interest of a person with an interest in the whole at the time the goods become an accession, and

(b) a person with a security interest taken and perfected in the whole who, after the goods become accessions,

(i) makes an advance under a security agreement, but only with respect to the advance, or

(ii) acquires the right to retain the whole in satisfaction of the obligation secured

without knowledge of the security interest in the accession and before it is perfected.

**(4)** A security interest in goods that attaches after the goods become an accession is subordinate to the interest of a person who

(a) has an interest in the other goods at the time the goods become an accession and who

(i) has not consented to the security interest,

(ii) has not disclaimed an interest in the accession,

(iii) has not entered into an agreement under which a person is entitled to remove the accession, or

(iv) is not otherwise precluded from preventing the debtor from removing the accession,

or

(b) acquires an interest in the whole after the goods become an accession, if the interest is acquired without knowledge and before the security interest in the accession is perfected.

**(5)** A secured party who, under this Act, has the right to remove an accession from the whole shall exercise that right of removal in a manner that causes no greater damage or injury to the other goods and that puts the person in possession of the whole to no greater inconvenience than is necessarily incidental to the removal of the accession.

**(6)** A person, other than the debtor, who has an interest in the other goods at the time the goods subject to the security interest become an accession is entitled to reimbursement for any damages to the person's interest in the other goods caused during the removal of the accession, but is not entitled to reimbursement for diminution in the value of the other goods caused by the absence of the accession or by the necessity of its replacement.

**(7)** The person entitled to reimbursement as provided in subsection (6) may refuse permission to remove the accession until the secured party has given adequate security for the reimbursement.

**(8)** The secured party may apply to the Court for one or more of the following:

(a) an order determining who is entitled to reimbursement under this section;

(b) an order determining the amount and kind of security to be provided by the secured party;

(c) an order prescribing the depository for the security;

(d) an order dispensing with the need to provide security for reimbursement under subsection (7).

**(9)** A person having an interest in the whole that is subordinate to a security interest as provided in this section may, before the accession has been removed from the whole by the secured party, retain the accession on payment to the secured party of the lesser of

(a) the amount secured by the security interest having priority over the person's interest, and

(b) the market value of the accession if it were removed.

**(10)** The secured party who has a right to remove the accession from the whole shall give

(a) to each person who is known by the secured party to have an interest in the other goods or in the whole, and

(b) to each person who has registered a financing statement indexed in the name of the debtor and referring to the other goods or according to the serial number of the other goods where the other goods are of a kind prescribed by the regulations as serial number goods

a notice of the intention of the secured party to remove the accession.

**(11)** A notice referred to in subsection (10) shall contain

(a) the name and address of the secured party,

(b) a description of the goods to be removed,

(c) the amount required to satisfy the obligations secured by the security interest,

(d) a description of the other goods,

(e) a statement of intention to remove the accession unless the amount referred to in subsection (9) is paid on or before a specified date that is not less than 15 days after the notice is given in accordance with subsection (12), and

(f) a statement of the market value of the accession.

**(12)** A notice referred to in subsection (10) must be given at least 15 days before removal of the accession, and may be given in accordance with section 72 or by registered mail addressed to the address of the person to be notified as it appears on the financing statement.

**(13)** A person entitled to receive a notice under subsection (10) may apply to the Court for an order postponing removal of the accession.

1988 cP-4.05 s38;1990 c31 s27;1994 cC-10.5 s148

**Security interests in processed or commingled goods**

**39(1)** A perfected security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product.

**(2)** For the purposes of section 35, perfection of a security interest in goods that subsequently become part of a product or mass is also to be treated as perfection of the interest in the product or mass.

**(3)** Any priority that a perfected security interest that has been continued in the product or mass under subsection (1) has over a perfected security interest in the product or mass is limited to the value of the goods at the time they became part of the product or mass.

**(4)** Subject to subsection (6), if more than one perfected security interest continues in the same product or mass under subsection (1), and each was a security interest in separate goods, the security interests are entitled to share in the product or mass according to the ratio that the obligation secured by each security interest bears to the sum of the obligations secured by all the security interests.

**(5)** For the purposes of subsection (4), the obligation secured by a security interest does not exceed the market value of the goods at the time the goods become part of the product or mass.

**(6)** A perfected purchase-money security interest in goods that continues in the product or mass under subsection (1) has priority over

(a) a non-purchase-money security interest in the goods that continues in the product or mass under subsection (1),

(b) a non-purchase-money security interest in the product or mass, other than as inventory, given by the same debtor, and

(c) a non-purchase-money security interest in the product or mass as inventory given by the same debtor if

(i) the secured party with the purchase-money security interest in the product or mass gives a notice to any secured party with a non-purchase-money security interest in the product or mass who registers a financing