

November 23, 2020

Airline insolvency and repossession – Canada

What are the principal types of insolvency proceedings?

In Canada, the insolvency regime is centered around two federal statutes, the Bankruptcy and Insolvency Act (the **BIA**) and the Companies' Creditors Arrangement Act (**CCAA**). The main insolvency procedures are bankruptcy and reorganization. Bankruptcy is a terminal procedure, whereas reorganization is a recovery/rescue procedure.

Insolvency-related liquidations are usually bankruptcies under the BIA, although the CCAA has, on occasion, been used where a court has been convinced that a liquidation under its provisions will lead to a better result for key stakeholders.

Reorganizations may take place under either the BIA or the CCAA. During a reorganization under either the BIA or the CCAA, an insolvent debtor continues to operate its business and remains in possession of its property during the restructuring. In a BIA reorganization, a licensed "proposal trustee" assists the debtor with the development of the plan of reorganization and monitors the debtor's property. In a BIA reorganization, the debtor can automatically become bankrupt as a result of failing to meet various deadlines or if the reorganization fails.

Under a CCAA reorganization, an insolvent company applies to the court for protection from its creditors while it formulates a reorganization plan. The CCAA is intended for use by large corporations, and the debtor must have at least US\$5 million of debt to initiate a CCAA reorganization. Unlike the BIA, which provides for detailed statutory procedures, the CCAA is largely based on case law and judicial discretion and, as a result, the courts are more involved. A monitor is appointed to oversee the debtor's operations during the restructuring.

Most Canadian airline insolvencies have been CCAA reorganizations, due to their greater flexibility than reorganizations under the BIA. Leased aircraft are not included in the airline's insolvency estate.

Recent Canadian airline insolvencies and issues

Recent local insolvencies/restructurings include Air Georgian Limited (2020 BIA deemed assignment in bankruptcy) and Discovery Air (2020 CCAA court supervised sale process of certain equity interests). At this time, these

insolvencies are both ongoing and no new issues affecting owner-lessors/mortgagees have arisen.

Have any recent measures or legislative changes (temporary or permanent) been introduced to prevent or mitigate airline insolvencies?

Yes. As part of the Canadian government's COVID-19 economic response plan, the Department of Finance is waiving ground lease rents from March 2020 through to December 2020 for the 21 airport authorities that pay rent to the federal government, as well as PortsToronto, which operates Billy Bishop Toronto City Airport.

We also note that, due to the COVID-19 pandemic, temporary suspensions of federal limitation periods and procedural time limits have been enacted, which are relevant to the applicable statutory time limits for enforcement with respect to specific federal legislation such as the BIA and CCAA.¹ Each province has taken its own approach to its provincial limitations laws.

Has Canada adopted the 2001 Cape Town Convention and its Aircraft Equipment Protocol (together, Cape Town)?

Yes. Each Canadian province and territory has passed legislation to implement Cape Town in Canada and Canada is a "Contracting State" for the purposes of the Convention and Protocol.

Cape Town declarations

"Alternative A" insolvency regime	Yes, 60-day waiting period
IDERAs	Yes
Self-help remedies	Yes (but see below)
Choice of law	Yes

Alternative A overrides all stays on repossessing aircraft under Canadian insolvency law. Unless the insolvent airline has cured all relevant defaults, creditors under registered international interests are entitled to the return of their aircraft no later than 60 days after the airline goes into insolvency.

Can creditors use "self-help" to repossess leased or mortgaged aircraft?

Yes – generally. In provinces with a Personal Property Security Act (PPSA), a lessor/lender, as a secured party, has the right to take possession of the aircraft by any method permitted by law. If the lessee refuses to co-operate, or access to the aircraft or other equipment cannot be obtained, a receiver and/or court order can generally be quickly obtained.

The Ontario Personal Property Security Act (OPPSA)² provides an additional self-help remedy. If the collateral is "equipment" (which definition would normally include a commercial aircraft), and the security interest has been

perfected by registration, a lessor may, in a reasonable manner, render such equipment unusable without removal thereof from the lessee's premises, and the lessor shall be deemed to have taken possession.

However, in Quebec, self-help remedies are not permitted and any enforcement measures must first be authorized by a court. With the adoption of Cape Town in Canada, self-help remedies are now permitted in the event of a default under a lease agreement to which Cape Town applies; however, use of these remedies is yet to be judicially authorized. Moreover, under Quebec law, unless the debt is certain, liquid and due, a default under a hypothec agreement does not necessarily allow the enforcement of the creditor's rights.

How long does the aviation authority typically take to deregister an aircraft when an IDERA is invoked?

As a practical matter, Transport Canada (**TC**) will usually deregister an aircraft on the basis of an IDERA within three working days (depending on the volume of requests and other filings). Unless a "Certificate of Airworthiness for Export" is required, an aircraft will automatically be deregistered upon the termination of a lease filed with TC, usually on the same day as it receives a completed notification. If a lessee objects, deregistration can still normally be obtained within a few days of filing proper evidence of default, or a court order if necessary – A court order can normally be obtained on an accelerated basis, if required.

In addition to IDERAs, lessors and mortgagors typically take irrevocable deregistration powers of attorney (enabling them to sign any other documents and take other actions that are required to export the aircraft). Canadian law broadly recognizes such powers of attorney as irrevocable and effective. It is also common practice and recommended to obtain a duly executed in blank aircraft repossession agreement as a part of the initial financing deliverables to assist with repossession.

Are there any non-consensual liens which would take priority to an ownership interest/ mortgagee's rights as a secured creditor?

Yes. There are various Canadian law aircraft liens and detention rights that allow a creditor to detain an aircraft as security for specific liabilities. They take priority to ownership or security interests, including registered international interests under Cape Town. Such rights include rights to detain aircraft for unpaid airport fees, navigation charges, customs duties and repairers' costs.

However, relevant rights cannot be invoked to initiate the detention of an aircraft during any of the bankruptcy or insolvency moratoria mentioned in this note.

As demonstrated in the NAV Canada³ case, legal titleholders are not subject to personal or corporate liability to pay the unpaid charges to the relevant aviation authorities. Lessors and financiers should note, however, that in⁴, the Supreme Court of Canada held that air authorities may seize and detain a leased aircraft unless the lessor has terminated the lease and repossessed the aircraft prior to the air authority obtaining an order authorizing seizure.⁵ If the lessor is unable to terminate the lease prior to detention, then the aircraft can be detained indefinitely until payment is made, a bond or other security is provided, or by court order.

Are there any "fleet liens" (i.e. a lien for debts relating to one aircraft that may be asserted against any aircraft in the airline's fleet, regardless of ownership)?

Yes. Certain private operators of airports and navigation service providers have the power to assert fleet liens.

Key practical considerations for lessors and financiers

Speed – In relation to the rights of the Aviation Authorities, the case law has established that there is a "race" to preserve rights in a leased aircraft in Canada. If a lessor/lender wins the race by fully repossessing an aircraft, the aircraft is forever "seizure proof" against the Aviation Authorities. If the Aviation Authorities win the race, they can forever detain the aircraft (or replacement security) until paid. The current state of the law emphasizes the importance of, not only prompt repossession, but also a quick termination of the lease and deregistration from the Canadian Civil Aircraft Register.

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1. For more information on this, please see the following Dentons Canada post regarding the same:
<http://www.limitationslaw.com> ↩
 2. Personal Property Security Act (Ontario), R.S.O. 1990, c. P 10, s.62 (b)↩
 3. NAV Canada c. Wilmington Trust Co., 2006 SCC 24.↩
 4. Canada 3000 Inc., 2006 SCC 24.↩
 5. Canada 3000 Inc., 2006 SCC 24. ↩

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