

**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 SKYLINK EXPRESS INC. (the "**Applicant**")

**FACTUM OF THE APPLICANT,
SKYLINK EXPRESS INC.**

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**FACTUM OF THE APPLICANT,
SKYLINK EXPRESS INC.
(APPROVAL AND VESTING ORDER – LAD)**

PART I - INTRODUCTION

1. The Applicant, Skylink Express Inc. (the "**Applicant**") brings this motion seeking approval of, among other things, among other things,

- (a) the sale (the "**Transaction**") of the Aircraft (defined below) contemplated by the agreement of purchase and sale dated June 24, 2024 ("**Sale Agreement**") between the Applicant and LAD Inc. (the "**Purchaser**") and vesting title in the Purchaser (the "**AVO**") free and clear of all claims and encumbrances;
- (b) authorizing, requesting and directing the applicable government authorities to register the transfer of ownership of the Aircraft to the Purchaser in the applicable registries and discharge the encumbrances against the Aircraft including in favour of The Toronto-Dominion Bank ("**TD**");
- (c) authorizing and directing KSV Restructuring Inc., the monitor in the CCAA (as defined below) proceedings (the "**Monitor**"), to distribute, on behalf of the Applicant, and in its capacity as escrow agent, the net proceeds of sale from the Transaction to TD; and

- (d) sealing the confidential appendix to the fourth report of the Monitor (the “**Fourth Report**”).

PART II - SUMMARY OF FACTS

2. Further background in these proceedings is set out in the affidavit of Kyle Dennhardt sworn June 27, 2024 and the Fourth Report.

3. On March 11, 2024, the Applicant obtained protection under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) pursuant to an initial order of this Court (the “**Initial Order**”).¹

4. On March 21, 2024, this Court granted the amended and restated initial order (the “**ARIO**”), which further extended the stay up to and including April 26, 2024.² The stay currently expires on July 31, 2024.³

5. In connection with the CCAA proceedings, the Applicant and TD, the Applicant’s senior secured lender, negotiated an escrow agreement and a forbearance agreement (the “**TD Standstill Agreements**”).⁴

6. The Applicant’s primary customer is United Parcel Service Canada Ltd. (“**UPS**”). One of the main goals of the Applicant in its restructuring was to renegotiate the terms of long-term feeder aircraft charter agreement (the “**UPS Contract**”).⁵

7. The Applicant had hoped to have made more progress on the negotiation on the UPS Contract. However, the Applicant and UPS were not able to make the progress on a new long

¹ Affidavit of Kyle Dennhardt sworn June 27, 2024 (“**Dennhardt Affidavit**”) at para. 4, [Motion Record of the Applicant dated June 27, 2024 \(“Applicant’s MR”\) at p. 8 \(CaseLines p. A12\)](#).

² Dennhardt Affidavit at para. 6, [Applicant’s MR at p. 8 \(CaseLines p. A12\)](#).

³ Dennhardt Affidavit at para. 8, [Applicant’s MR at p. 9 \(CaseLines p. A13\)](#).

⁴ Dennhardt Affidavit at para. 7, [Applicant’s MR at p. 8 \(CaseLines p. A12\)](#).

⁵ Fourth Report to Court of KSV Restructuring Inc. as Monitor of Skylink Express Inc. dated June 28, 2024 (“**Fourth Report**”), [p. 2 at para. 1.0.6 \(CaseLines p. E4\)](#).

term arrangement that would see the Applicant continue to provide services to UPS. Instead, the Applicant and UPS began discussions to agree on terms for a shorter-term transition plan (the “**Transition**”) up through to the end of July, which negotiations are ongoing.⁶

8. In May 2024, the Applicant sought authorization to engage 1262396 Alberta Ltd., dba Pollock Aviation (the “**Agent**”), to act as its sales agent to market and sell its assets, which consist primarily of the Applicant’s aircraft (the “**Fleet**”), aircraft parts inventory and potentially its air operator certificate.⁷

9. The Agent, in conjunction with Skylink, and under the supervision of the Monitor, developed its proposed approach to the marketing and sale of the Fleet and other assets. Briefly, the Sale Process provided that the Fleet and other assets would be marketed for sale on a one-off or en-bloc basis without a specific bid deadline.⁸

10. This proposed sale process (the “**Sale Process**”) was approved by the Court pursuant to an Order dated May 30, 2024.⁹ The Sale Process has been conducted in accordance with the Sale Process Order and remains ongoing.¹⁰

11. In accordance with the Sale Process, the Applicant, in consultation with the Monitor, negotiated and finalized the terms of a transaction for the sale of the Aircraft pursuant to the Sale Agreement between the Applicant and LAD Inc., as purchaser.

12. The key terms of the Sale Agreement include:¹¹

(a) **Purchaser**: LAD Inc.

⁶ [Fourth Report, p. 3 at para. 1.0.7 \(CaseLines p. E5\).](#)

⁷ [Dennhardt Affidavit at para. 9, Applicant’s MR at p. 9 \(CaseLines p. A13\).](#)

⁸ [Dennhardt Affidavit at para. 10, Applicant’s MR at p. 9 \(CaseLines p. A13\).](#)

⁹ [Dennhardt Affidavit at para. 9, Applicant’s MR at p. 9 \(CaseLines p. A13\).](#)

¹⁰ [Fourth Report, p. 5 at para. 3.0.2 \(CaseLines p. E7\).](#)

¹¹ Capitalized terms used in this paragraph and not otherwise defined have the meaning given to them in the Sale Agreement.

- (b) **Assets to be purchased:** (i) One Cessna Grand Caravan airframe, manufacturer's serial number 208-0662, together with one Pratt and Whitney Canada PT6A-114 engine; and (ii) all appurtenances, appliances, parts, avionics, instruments, components, accessions, furnishings, items of equipment and accessories installed thereon or appurtenant thereto as set forth in the Aircraft Specification attached as Exhibit "A" to the APA; and (iii) all Aircraft Documents (the "Aircraft").
- (c) **Purchase price and deposit:** For the reasons provided in Section 3.4 of the Fourth Report, the Company is seeking to have the purchase price and the amount of the deposit sealed pending closing of the sale of all of the Fleet.
- (d) **Delivery location:** The Company's designated facility at Vancouver International Airport.
- (e) **"As is, where is":** The APA is consistent with standard insolvency transactions, i.e. to be completed on an "as is, where is" basis with minimal representations, warranties and conditions.
- (f) **Closing Date:** Five Business Days following the date the Court makes the AVO or such other date as may be agreed by the parties in writing.
- (g) **Material Conditions:** include, among other things:
- (i) the Company shall have delivered or cause to be pre-delivered to the Escrow Agent (being the Monitor) any documentation as may be reasonably required to release any Liens against the Purchased Assets;
 - (ii) the Company shall have delivered or cause to be pre-delivered to the

Escrow Agent, any documentation as may be required to deregister the Purchased Assets from the register of civil aircraft maintained by Transport Canada or to transfer registration of the Purchased Assets to the Purchaser; and

(iii) the Court shall have issued the AVO.¹²

13. The Sale Agreement contemplates that the Purchaser shall pay the sale proceeds to the Monitor as the escrow agent and the Monitor, on behalf of the Company, will distribute the proceeds to TD, net of the Agent's commission and HST.

TD

14. The Company is indebted to TD pursuant to a credit facilities letter agreement dated November 2, 2020. TD was granted security over all of the Company's assets pursuant to a general security agreement, aircraft security, assignment of insurance and hypothec (the "**TD Loan Security**"). Momentum has also provided a limited recourse guarantee of the TD Loan Facilities in the amount of \$15 million and provided security in connection with its guarantee. The current balance on the TD Loan Facilities is approximately \$12.2 million.¹³

15. Cassels has provided the Monitor with an opinion confirming the validity and enforceability of the TD Loan Security in the Aircraft, subject to standard assumptions and qualifications.¹⁴

16. Pursuant to the TD Standstill Agreements, the Applicant has agreed that the net proceeds of all sales, transfers or other disposition of Assets outside of the ordinary course shall be paid to TD.¹⁵

¹² [Fourth Report, pp. 6-7 at para. 3.2.1 \(CaseLines pp. E8-E9\).](#)

¹³ [Fourth Report, p. 5 at para. 2.1.2 \(CaseLines p. E7\).](#)

¹⁴ [Fourth Report, p. 5 at para. 2.1.3 \(CaseLines p. E7\).](#)

¹⁵ [Dennhardt Affidavit at para. 15, Applicant's MR at p. 10 \(CaseLines p. A14\).](#)

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

The Court Should Grant the AVO

17. Pursuant to Section 36 of the CCAA, the Court has the jurisdiction to approve a sale transaction within the context of CCAA proceedings. Section 36(3) of the CCAA sets out the relevant factors for consideration as follows:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.¹⁶

18. The above factors, however, are not intended to be exhaustive nor to be considered a checklist that must be followed in every transaction.¹⁷ The Courts have also continued to consider

¹⁶ *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**"), [s. 36\(3\)](#).

¹⁷ *Target Canada Co. (Re)*, [2015 ONSC 1487 \(CanLII\) \["Target"\]](#) at para. 16.

the *Soundair* criteria as relevant to whether or not a sale should be approved, which factors are similar to those set out in Section 36(3) of the CCAA and are as follows:

- (a) whether the Court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;
- (b) the interest of all parties;
- (c) the efficacy and integrity of the process by which the offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.¹⁸

19. The Sale Agreement and proposed sale of the Aircraft satisfy the above test. Among other things:¹⁹

- (a) The process undertaken by the Agent to market the Aircraft was commercially reasonable and consistent with the terms of the Sale Process;
- (b) the Agent is an experienced sales agent and aircraft broker and is well known in the aviation industry;
- (c) in the Agent's view, the purchase price for the Aircraft is acceptable and consistent with its expectations considering the age and condition of the Aircraft;
- (d) the Transaction is unconditional, except for Court approval. The deposit is non-refundable unless the Court does not approve the Transaction; and
- (e) TD does not oppose and Momentum consents to the Transaction

¹⁸ *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\) \["Soundair"\] at para. 16](#). See also, [Target, supra at paras. 14-17](#).

¹⁹ [Fourth Report, pp. 7-8 at para. 3.3.1 \(CaseLines pp. E9-E10\)](#).

20. The Court has the jurisdiction to direct governmental authorities to transfer ownership and discharge registrations. Vesting Orders are routinely used to (a) transfer title in real property; (b) discharge land registrations; and (c) register partial discharges in the personal property registry. Indeed, the model approval and vesting order for Ontario includes specific language in that regard.²⁰

21. Ownership of aircrafts in Canada and aircraft security must take place in the international registry of mobile assets (the “**International Registry**”). The International Registry permits individuals and organizations to register and search financial interests in aircraft assets. Pursuant to the applicable regulations governing the International Registry in order to discharge security interests and register a sale the seller, buyer and secured party must each be a “Transacting User Entity” and a “Professional User Entity”²¹ and must consent to the discharge of a registered security interest and sale. TD and the Company are each Transacting User Entities and Professional User Entities. Similar orders directing governmental authorities to transfer title and discharge registrations have been granted in the context of other airline insolvencies.²²

The Distribution Should be Approved

22. Courts routinely grant orders authorizing distributions to secured creditors. In *AbitibiBowater*, the Court considered a number of factors in the context of an interim distribution including (a) whether the payee’s security was valid and enforceable; (b) whether the distribution would leave the estate with sufficient liquidity; and (c) whether the amounts owed to the beneficiary of the distribution far exceed the amount of the distribution.²³

²⁰ See: <https://www.ontariocourts.ca/scj/files/forms/com/approval-and-vesting-order-EN.doc>.

²¹ See sections 2.1, 15 and 25 of the *Regulations and Procedures for the International Registry*: <https://www.internationalregistry.aero/ir-web/common/documentDownload?locale=en&documentId=4>.

²² See, for example:

[http://cfcanada.fticonsulting.com/lynxair/docs/Approval%20and%20Vesting%20Order%20\(AERO\).%20filed%20May%2024.%202024.pdf](http://cfcanada.fticonsulting.com/lynxair/docs/Approval%20and%20Vesting%20Order%20(AERO).%20filed%20May%2024.%202024.pdf).

²³ *AbitibiBowater Inc. (Arrangement relatif à)*, 2009 QCCS 6461 (CanLII) at para. 75.

23. In this case, the proposed distribution should be made. TD is the Applicant's senior secured creditor. Its security in respect of the Aircraft is not primed by any of the charges under the Initial Order and the Applicant has agreed for all net proceeds of sale to be paid to TD by the Monitor acting as escrow agent on its behalf. The Monitor has received an opinion from its legal counsel with respect to the validity and enforceability of TD's security in respect of the Aircraft.²⁴

The Sealing Order Should be Granted

24. The Applicant is requesting that the confidential appendix to the Fourth Report be sealed until either the completion of the Sale Process or further Order of this Court.

25. In *Sierra Club of Canada v Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where: (i) the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and (ii) the salutary effects of the order outweigh its deleterious effects.²⁵ More recently, in *Sherman Estate v Donovan*, the Supreme Court of Canada held that a party requesting that a court exercise its discretion in a way that limits the 'open court' presumption must establish that: (i) the openness poses a risk to an important interest of the public; (ii) the request sought is necessary to prevent the risk to the identified interest as reasonable alternative measures will not prevent said risk; and (iii) the benefits of the request outweigh the negatives as a matter of proportionality.²⁶

26. Within the context of insolvency proceedings, it is common to seal bids and other commercially sensitive material, such as the details of competing offers, in the event that the proposed transaction not close or where further assets continue to be marketed.²⁷

²⁴ [Fourth Report, p. 5 at para. 2.1.3 \(CaseLines p. E7\); p. 8 at para. 3.5.1 \(CaseLines p. E10\)](#).

²⁵ *Sierra Club of Canada v Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#).

²⁶ *Sherman Estate v Donovan*, [2021 SCC 25 \(CanLII\)](#).

²⁷ See, for example: <https://assets.kpmg.com/content/dam/kpmg/ca/pdf/creditorlinks/ignite/order-endorsement-2023-11-09.pdf>.

27. The confidential appendix contains the purchase price and deposit information for the Aircraft. If revealed, it could negatively impact i) the sale of the Aircraft if the transaction does not close; and ii) the sale of other assets available for sale in the Sale Process.²⁸ The salutary effects of the proposed sealing order outweigh the deleterious effects of the public not knowing the purchase price information for the Aircraft until the remainder of the Fleet can be sold or further order of the Court.

PART IV - ORDER REQUESTED

28. For the reasons set out above, the requested relief should be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of July, 2024.



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²⁸ [Fourth Report, p. 8 at para 3.4 \(CaseLines p. E10\)](#).

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *AbitibiBowater Inc. (Arrangement relatif à)*, [2009 QCCS 6461 \(CanLII\)](#)
2. *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
3. *Sherman Estate v Donovan*, [2021 SCC 25 \(CanLII\)](#)
4. *Sierra Club of Canada v Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#)
5. *Target Canada Co. (Re)*, [2015 ONSC 1487 \(CanLII\)](#)

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY - LAWS

COMPANIES’ CREDITORS ARRANGEMENT ACT
R.S.C., 1985, c. C-36

Obligations and Prohibitions

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Factors to be considered

- (3) In deciding whether to grant the authorization, the court is to consider, among other things,
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the monitor approved the process leading to the proposed sale or disposition;
 - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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Proceeding commenced at TORONTO

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