IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Viking Air Limited v. Cascade Aerospace Inc.,* 2024 BCSC 841

Date: 20240515
Docket: S236674
Registry: Vancouver

Between:

Viking Air Limited

Plaintiff

And

Cascade Aerospace Inc.

Defendant

Before: The Honourable Justice MacNaughton

Reasons for Judgment

Counsel for the Plaintiff:	J. Buysen K. Campbell D. Bell
Counsel for the Defendant:	A. Winton A. Wong
Place and Date of Trial/Hearing:	Vancouver, B.C. January 10–11, 2024
Place and Date of Judgment:	Vancouver, B.C. May 15, 2024

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The Application

[1] Viking Air Limited ("Viking") applies under R. 10-1(4) of the *Supreme Court Civil Rules* and s. 57(1) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*Act*], for the pretrial return of its aircraft, and associated records and components, from Cascade Aerospace Inc. ("Cascade").

[2] By way of brief introduction, Viking contracted with Cascade to complete certain work on its amphibious aircraft as part of a larger avionics upgrade program ("AUP"). Aircraft avionics are the electronic systems used for communication, navigation, and the display and management of other aircraft systems. The AUP involved Cascade installing an avionics system bought by Viking from Rockwell Collins, a non-party avionics supplier ("Collins").

[3] The work did not proceed as expected. Since May 2023, Cascade's work has been paused while the parties discussed potential termination of their contractual relationship. Viking asked that two of its aircraft, that were then in Cascade's possession as prototypes for the purposes of the AUP, be returned to it. Cascade returned one aircraft, but has refused to return the other.

[4] Viking says that Cascade has no lawful basis for withholding its aircraft and commenced this action for wrongful withholding and filed this injunction application for the aircraft's pretrial return.

[5] Cascade claims that it is entitled to retain the aircraft on two bases: first, that it has a lien over the aircraft and, second, that the terms of the parties' contract allow it to retain the aircraft even if Viking asks for its return.

The Parties

Viking

[6] Viking is a BC company. It operates as part of a group of companies including Longview Aviation Capital Corp. ("Longview"), Longview Aviation Services Inc. ("Longview Services"), and De Havilland Aircraft of Canada Limited ("De Havilland") (collectively, the "Viking Group"). Viking has a facility in North Saanich, BC.

[7] Viking manufactures, supports, and sells various aircraft, and aircraft parts and systems. As relevant here, it manufactures amphibious CL-215, CL-215T, and CL-415 models (the "Waterbomber Aircraft"), used to combat forest fires in BC and elsewhere.

Cascade

[8] Cascade is a Canadian company, extra-provincially registered in BC. It is a subsidiary of IMP Group Limited ("IMP") and has a facility in Abbotsford, BC.

[9] Cascade provides specialized aviation engineering and aircraft maintenance services to the military, government, and aircraft manufacturers and operators. It maintains and upgrades aircraft to comply with Transport Canada's evolving regulatory requirements.

Avionics Upgrade Program

[10] Due to the recent and drastic increase in forest fires, the global demand for Waterbomber Aircraft has increased.

[11] In 2019, Viking launched the AUP to modernize the avionics systems in its Waterbomber Aircraft. The AUP was required to meet Transport Canada's regulatory requirements, to enable the Waterbomber Aircraft to meet modern operational needs, and to address obsolescence and repairability issues.

[12] For the purposes of the AUP, Viking retained two main contractors: Collins and Cascade.

[13] Collins manufacturers aircraft avionics systems, and, pursuant to Master Supply Agreement #1 entered into between it and Viking, Collins supplied a "Pro Line Fusion System" (the "B-Kit") for installation into Viking's Waterbomber Aircraft. Viking retained Cascade to install the B-Kit, which involved developing the materials, including the intellectual property, required to integrate the B-Kits into the Waterbomber Aircraft. Cascade's work product is referred to as the "A-Kit".

[14] In short, pursuant to an integration agreement, Cascade was to develop the A-Kit required to integrate the Collins-manufactured B-Kit into Viking's Waterbomber Aircraft.

[15] In order to perform the integration, a Software & Documentation Data License Agreement was entered into between Collins and Cascade to allow the exchange of data and information.

The Integration Agreement

[16] On April 26, 2019, Viking and Cascade entered into a fixed-price, multi-year, written agreement, titled "Viking Air Ltd, & Cascade Aerospace Inc. Agreement for the Integration of the Rockwell Collins Avionics System into Viking Air Ltd., CL-215T-CL-415 Aircraft & for the Acquisition of the Intellectual Property & Know How". It was referred to as the "Integration Agreement".

[17] Under the Integration Agreement, Viking is responsible for delivering to Cascade serviceable and certifiable B-Kits that comply with Canadian Aviation Regulations, and for budgeting for B-Kit development and certification risk (s. 2.3(r), Appendix D at section 4.4, Appendix C).

[18] Pursuant to s. 2.3(a) of the Integration Agreement, Cascade is responsible for the installation and integration of the B-Kit, and for obtaining a supplemental type certificate ("STC") from Transport Canada, approving the modifications (the "Integration Services"). The fixed price includes materials (s. 2.3(i)), and all testing and certification requirements (s. 2.6(b)).

[19] Section 2.6(a) of the Integration Agreement provides:

> The price provided by Cascade shall be fixed firm for the scope of work and number (quantity) of aircraft as set forth in Appendix D.

[20] Appendix D sets out the price and payment terms of the Integration Agreement. It contemplates that in each of the first two years, one A-Kit and one installation would be completed on two prototype aircraft provided by Viking. In the

following four years, the number of A-Kits and installations would ramp up. With respect to payment terms, Appendix D provides:

> a. Non-Recurring Engineering ("NRE") would be invoiced in accordance with the schedule set out in Appendix D: i.e. a fixed amount would be paid every four months in accordance with the schedule.
>
> b. A-Kits and Installations would be invoiced based on when certain work was completed. Specifically, the following amounts were payable on the following schedule: (i) 20% on induction of the Aircraft; (ii) 20% on completion of the Aircraft open up and removals; (iii) 20% when the Aircraft is ready for ground test; and (iv) 40% on delivery (collectively, the "Milestone Payments"). The total price for an A-Kit was fixed at $300,000 and the total price for an installation was fixed at $1,000,000 (with an annual CPI adjustment starting in year three of the Integration Agreement).
>
> c. "Additional Work Requests" (as defined in the Integration Agreement) had to be expressly approved by Viking before being undertaken and would be invoiced monthly.

[21] Appendix D also provided for the total number of A-Kits and installations over six years of the Installation Agreement and referred to the termination provision:

> Cascade shall be the provider of a minimum of 42 A-Kits and 12 Installations of AUP modifications, this includes the installation on one (1) CL215T aircraft (Prototype) and one (1) CL415 aircraft (Prototype). Viking shall buy from Cascade a minimum of [forty-two] (42) A-kits and twelve (12) installations of the AUP modifications within six (6) years of contract signing for the firm fixed price(s), shown below. However as shown in 9.1 Termination the maximum liability to Viking would be the remaining NRE & the remaining portion of the twelve (12) Installations and forty-two (42) A Kits.

[22] Under the Integration Agreement, Cascade incurred significant up-front engineering costs in excess of Viking's Milestone Payments. In effect, Cascade provided Viking with favourable cash flow terms in exchange for fixed minimum purchase requirements, thereby providing Cascade with an ongoing, minimum revenue over the term of the Integration Agreement. As a result, the parties agreed that if Viking unilaterally terminated the Integration Agreement, it would be liable to Cascade for a termination amount.

[23] Section 8.10 of the Integration Agreement makes time of the essence and provides that "because of the critical nature of this aircraft in fire fighting operations", if Cascade fails to meet certain timelines, Viking may terminate the Integration

Agreement and would not be liable for any of the remaining installations and A-Kits in Appendix D.

[24] Termination of the Integration Agreement is dealt with in s. 9.1. In general, and if applicable, it provides that Cascade could be entitled to a termination fee, based on a formula. The termination fee totals approximately US$26 million. Specifically, s. 9.1 provides:

> Upon failure by Cascade to observe any of the material terms and conditions of this Agreement and/or to comply with all of its material obligations hereunder, or as a result in a change in Viking's business requirements, Viking shall have the right, but not the obligation, to terminate this Agreement on the issuance of sixty (60) days written notice. Upon such termination notice, Cascade shall return to Viking all data and Confidential Information (including any Intellectual Property or New Intellectual Property created during the work that Cascade has carried out up to the date of termination) and material work in progress as per the terms and conditions of this Agreement. Viking shall be responsible to pay Cascade for a minimum of 12 Installations, 42 A Kits and the NRE cost shown in Appendix D except in such instance where Cascade is late on delivery of any post STC Aircraft by more than ten percent (10%) of the committed timeline and such late delivery is not due to circumstances outside of Cascade's control and on the basis that Viking, on Viking's option, has elected not to cancel the Agreement and in such case Viking would only purchase Installations & A Kits on an as needed basis as shown in 8.10 above.

[25] Viking has not delivered written notice of termination to Cascade. Cascade acknowledges, in its evidence on this application and in its counterclaim, that Viking has not terminated the Integration Agreement and that Cascade's claim to a termination fee is a potential future claim for contractual damages.

[26] Viking has also not commenced an action against Cascade alleging breach of the Integration Agreement.

[27] Cascade's counterclaim against Viking seeks specific performance of the Integration Agreement or the termination fee under Article 9.1.

Viking's Prototype Aircrafts

[28] Pursuant to the Integration Agreement, Viking delivered two prototype aircraft to Cascade:

a. In October 2019, a CL-415 aircraft, serial number 2019 (the "CL-415"), along with its associated records and components. The CL-415 is legally owned by the Province of Quebec, but care, custody, and control of it was given to Viking for the purposes of the AUP.

b. On June 30, 2022, a CL-215T aircraft, serial number 1090 (the "CL-215T"), along with its associated records and components (collectively, the "CL-215T Property"). The CL-215T is legally owned by Longview Services, part of the Viking Group. Care, custody, and control of the CL-215T Property was given to Viking for the purpose of the AUP.

[29] The CL-215T has an estimated value of between US$35–40 Million.

[30] The associated records for the CL-415 and CL-215T are necessary to operate them and must be maintained in accordance with applicable regulatory requirements.

The Parties' Disagreement

[31] As set out, work under the Integration Agreement did not proceed as expected, and disputes arose between the parties. Although irrelevant to this application, in brief, as set out in its counterclaim, Cascade alleges that Viking failed to deliver it a certifiable avionics system. Cascade blames Collins and says that the B-Kit that Collins provided to Viking does not meet certain technical requirements and that certain system-level testing on the B-Kit is outside the scope of the Integration Agreement.

[32] Cascade says that, under the Integration Agreement, Viking assumed the risk that the B-Kit it purchased from Collins, and supplied to Cascade for integration into the Waterbomber Aircraft, may not be certifiable by Transport Canada and that Cascade did not guarantee that Collins' B-Kit would be certifiable.

[33] Cascade says that Viking transferred possession of the CL-415 and the CL-215T so that it could perform the Integration Services on both aircraft. Cascade says

that the Integration Agreement requires Cascade to maintain possession of the aircraft until its work is complete.

[34] Cascade began its Integration Services work shortly after taking possession of the CL-415. It designed, developed, and manufactured what it says is a certifiable A-Kit. However, it quickly became clear to Cascade that the Integration Services included elements beyond the scope of the Integration Agreement including unanticipated testing and certification requirements. Cascade repeatedly alerted Viking that this work fell outside the scope of its responsibility under the Integration Agreement and sought to resolve the issues.

[35] By August 2021, Cascade says its integration work and efforts to meet the requirements necessary to obtain STC approval from Transport Canada led to significant delays and cost overruns. It asserts that this was due to Viking's failure to provide the necessary B-Kit compliance data required to achieve regulatory approval.

[36] Cascade says that, over the past four years, it expended extensive resources and incurred costs of millions of dollars on the B-Kit. By November 2021, Cascade says that it expended almost double the originally projected engineering hours and that its forecast costs nearly exceeded the selling price to Viking. Instead of taking steps to bring the B-Kit into regulatory compliance, Cascade says that Viking tried to offload its obligations under the Integration Agreement by assigning Cascade out-of-scope work.

[37] Viking does not accept that either it, or Collins, are responsible for Cascade's failure to meet the requirements of the Integration Agreement. It says that Cascade failed to advance its work under the AUP, resulting in unacceptable delays. Viking rejects Cascade's position about alleged "out-of-scope" work.

[38] Viking says that Cascade tried to increase the fixed prices in the Integration Agreement and asked Viking to pay for certain alleged out-of-scope work that Viking says Cascade completed without its approval.

[39] In a November 23, 2022 letter from Cascade to Viking, Cascade wrote:

> While Cascade appreciates the complexity of altering agreed pricing, ultimately, a negotiated solution must be reached quickly or the program's completion will be in jeopardy.

[40] Viking rejected Cascade's request to increase the negotiated fixed prices. It responded that:

> Cascade … agreed to provide the Integration Services at a firm fixed price and that the contract contained provisions for how out of scope work was to be handled: i.e. it had to be submitted and approved in advance.

[41] However, in the interest of advancing the AUP, between May 2020 and April 2022, the parties agreed to some compromises. Issues about the scope of the work remained unresolved, and, despite repeated attempts to reach agreement, Viking says that Cascade continued to fail to perform the Integration Services as agreed. Cascade says that the parties were unable to agree on compensation for its out-of-scope work.

[42] In around May 2023, Viking advised Cascade that if issues remained unresolved, it would arrange for another supplier to perform the Integration Services. It asked Cascade to stop all further work on the AUP while the parties discussed a potential termination of their relationship. Cascade agreed to stop work and to enter into termination discussions. Those discussions did not result in agreement and are now at standstill.

Return of the CL-415 and Refusal to Return the CL-215T Property

[43] In early July 2023, while the parties were discussing potential termination of the Integration Agreement, Viking asked Cascade to return the CL-415 and Cascade agreed to do so. On June 27, 2023, Kevin Lemke, Cascade's Executive Vice President and COO, emailed Jean-Phillippe Côté, De Havilland's Vice-President of Programs and Business Improvement:

> You had indicated that as part of the program pause the intention was to move the [CL-415] to Calgary so we do not have to worry about the preservation aspects associated with parking the aircraft outside. Can we enquire as to the status of that concept.

> There is a hard timeline for decision/action. The aircraft is due a B1 check as of 16 July. Aircraft can't fly after that date so if we are going to relocate the aircraft it really should happen before the B1 is due. …Preference from our side is to move it in advance of the down date [July 16] so none of us have to worry about schedule and hangar.

[44] In the same email, Mr. Lemke expressed his wish to also have the CL-215T removed from Cascade's facility and transferred to Viking:

> Also we need to discuss the plans for the [CL-215T]. We can't have it occupying a bay with no revenue for months, so it is either going to have the outside storage program/requirements defined or possibly you could rent space in the Shell next door. We may need the bay as early as mid to late July so need to move on this fairly quickly.
>
> [Emphasis added.]

[45] In early July 2023, Cascade returned the CL-415 to a Viking facility in Calgary. The CL-415's technical and engineering records remain in Cascade's possession.

[46] On September 1, 2023, in response to Mr. Lemke's request, Mr. Côté advised that Viking was arranging a space at the Abbotsford airport for the CL-215T and asked for confirmation that it, and its associated records and components, would be ready to be returned by September 8, 2023.

[47] On September 13, 2023, Clark Bain, IMP's Senior Vice President of Strategic Development, told Mr. Côté that Cascade would not release the CL-215T while the parties' dispute was ongoing. At that time, he did not assert that Cascade had a lien over the CL-215T. That position was first taken in the response to this application.

Detinue Action

[48] On September 29, 2023, Viking commenced this action, advancing a claim for the tort of detinue, and filed this application. The notice of civil claim alleges that Cascade failed to perform the Integration Services in accordance with the Integration Agreement and failed to meet the timelines set out therein.

[49] In response to this application, Cascade has not tendered any specific evidence of what it says it is owed for the work it has completed to date. Instead, it

asserts that it is owed US$26 million, the amount due if it establishes that it is entitled to the termination fee pursuant to the Integration Agreement.

[50] In unrefuted evidence, Viking sets out that it has paid the following amounts under the Integration Agreement:

a. For NRE services, Cascade invoiced a total of US$6,933,334 of which Viking has paid US$5,733,334. The outstanding balance relates to two invoices delivered on February 14, 2023, in the amount of US$666,667 and on June 30, 2023, in the amount of US$533,333. Viking says it has not paid these invoices due to the parties' ongoing dispute over Cascade's failure to perform under the Integration Agreement.

b. For Milestone Payments:

    i. Cascade has invoiced a total of US$360,000 for A-Kits, with respect to which Viking has paid US$240,000.

    ii. Cascade has invoiced a total of US$1,200,000 for installations of the A-Kits, with respect to which Viking has paid US$800,000.

[51] The outstanding balance for A-Kits and installations relates to an invoice delivered on September 19, 2020, in the amount of US$520,000 for a purported Milestone Payment related to the "delivery" of an A-Kit and installation in the CL-415. Viking has not paid this invoice as it says the installation of the A-Kit was unsuccessful and does not meet the regulatory certification standard. In other words, Viking says the final Milestone Payment is not payable.

[52] Viking says that the CL-415 was not returned to it because Cascade completed the installation of the A-Kit; rather, it was returned in July 2023, at Viking's request, because work under the AUP was paused. In Mr. Lemke's affidavit, at para. 33, he acknowledges that Cascade has not completed its work on the CL-415. Cascade did not issue this invoice until September 19, 2023, two months after the CL-415 was returned.

[53] Cascade also issued invoices totalling US$198,409, relating to other claimed charges and certain approved “Additional Work Requests”. Viking paid these invoices. Viking also said it expected to receive another Cascade invoice for about US$125,000.

[54] The total amount outstanding, for invoices that Cascade has delivered to date, is US$1,845,000 (including the US$125,000 expected to be invoiced). The balance of the amount Cascade says it is entitled to under the termination provision is set out in Mr. Bain’s affidavit at para. 15:

Paid to Date	**Owing**
NRE	
US$5,733,333	US$2,226,667
Installations	
US$800,000	US$11,200.000
A-Kit Purchases	
US$240,000	US$12,360,000
Total Owing	**US$25,826,667**

[55] This is a claim for potential future termination damages.

[56] According to Mr. Lemke’s second affidavit, on October 20, 2023, De Havilland announced that it had partnered with Universal Avionics, a competitor of Collins, to be the lead supplier of integrated flight decks in De Havilland CL-215T and CL415 aircraft. De Havilland also announced its acquisition Mid-Canada Mod Centre (“MC2”) and Avionics Design Services (“ADS”), companies that perform avionics installations, upgrades, and modifications similar to the work done by Cascade. Viking did not refute this evidence.

Issues

[57] The merits of the dispute between Viking and Cascade are not before me. Rather, the issues I have to decide based on the parties’ arguments are:

1. What is the applicable legal test on an application under R. 10-1(4), seeking interim return of property?

    a) Does the test under R. 10-1(4) require some evidence to support a reasonable belief that the property is threatened with disposition or transfer outside the jurisdiction?

    b) Is the threshold for the first requirement of the *RJR MacDonald* injunction test: whether there is a "serious issue to be tried" or that there is a "strong *prima facie* case"?

        i. Is the injunction being sought in the nature of a prohibitive or a mandatory interim injunction?

2. Has Viking met the test for the interim return of the property under R. 10-1(4)?

    a) If the standard is "a serious issue to be tried" or "strong *prima facie* case", has Viking met the threshold?

        i. Is there a serious issue or a strong *prima facie* case on the issue of whether Cascade has committed the tort of detinue?

            (i) What are the legal principles of detinue?

                a. Does Viking have a better claim to the CL-215T Property than Cascade?

                b. Will there be irreparable harm if the relief sought by Viking is not granted?

                c. Does the balance of convenience favour Viking or Cascade?

[58] I will deal with each of these issues in turn.

What is the applicable legal test on an application under R. 10-1(4), seeking interim return of property?

[59] The parties disagree about the applicable legal test under R. 10-1(4). Their positions diverge on two bases. First, they disagree about whether the usual test for injunctive relief as set out in *RJR-MacDonald*, or the four-part test articulated in *Terastream Networks Inc. v. Grossholz,* 2018 BCSC 837 at para. 10 [*Terastream*] applies. Second, if the test for injunctive relief applies, they disagree about whether the threshold at the first stage of the test is that there is a "serious issue to be tried" or a "strong *prima facie* case".

Does the test under R. 10-1(4) require some evidence to support a reasonable belief that there is a threat/risk of dispossession or transfer?

Viking's Position

[60] Rule 10-1 of the *Supreme Court Civil Rules* replaced the former Rule 46 of the *Rules of Court.* The language used, and the substance of the rules and each of the sub-rules, did not change. Rule 10-1 gives the court discretion to make various orders related to the pretrial preservation, and recovery, of property.

[61] Rule 10-1(4) codifies the remedy of replevin:

> **Recovery of specific property**
>
> (4) If a party claims the recovery of specific property other than land, the court may order that the property claimed be given up to the party, pending the outcome of the proceeding, either unconditionally or on terms and conditions, if any, relating to giving security, time, mode of trial or otherwise.

[62] Viking submits that the test on an application for the interim return of property under R. 10-1(4), where there is no intention to preserve the property before trial, is the same as the test for an interlocutory injunction. The test does not require any evidence to support a reasonable belief that there is a threat/risk of dispossession or transfer.

[63] In support of that position, Viking relies on the commentary in Frederick M. Irvine, *McLachlin & Taylor - British Columbia Practice*, 3rd ed. (Markham:

LexisNexis, online: 2023) ("*McLachlin Text*"), in which the authors summarize the applicable test under R. 10-1(4):

> The test for return of property on an application under Rule 10-1(4) and s. 57 of the *Law and Equity Act*, where there is no intention to preserve the property prior to trial, is the same as the test for granting an interlocutory injunction. The plaintiff must establish a prima facie case, or serious question to be tried, and the balance of convenience must weigh in favour of granting the order. In assessing the balance of convenience, the court may consider various factors, including the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the status quo; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience: *SR Télécom & Co., S.E.C. v. Apex - Micro Manufacturing Corp*., [2008] B.C.J. No. 2510, 52 C.B.R. (5th) 204, 2008 BCSC 1768, at paras. 30-31, decided on a consideration of *Midland Walwyn Capital Inc. v. Global Securities Corp.*, [1997] B.C.J. No. 2541 (S.C.).

[64] Viking submits that the test for an interlocutory injunction involves either a two-part or three-part analysis—the difference being whether the assessment of irreparable harm is subsumed under the balance of convenience analysis or is a stand-alone factor. Articulated as a three-part test, Viking submits that it is required to establish that: (1) there is a serious question to be tried; (2) there would be irreparable harm if the relief is not granted; and (3) the balance of convenience favours granting the order.

[65] Viking submits that the four-part test set out in *Terastream*, relied on by Cascade and discussed below, applies to whether a preservation order should be granted under R. 10-1(1), but not to an application for the recovery of property under R. 10-1(4). It argues that *Terastream* incorrectly conflates the two tests and deals with them under a single test, contrary to other cases under R. 10-1(4).

[66] Viking says that it is not required to adduce evidence that CL-215T is threatened with disposition or transfer out of this jurisdiction to obtain relief under R. 10-1(4).

[67] Viking relies on the decisions cited in the *McLachlin Text*, starting with *Midland Walwyn Capital Inc. v. Global Securities Corp*., [1997] B.C.J. No. 2541, 1997 CanLII 1736 (S.C.) [*Midland*], followed in *SR Télécom & Co., S.E.C. v. Apex – Micro Manufacturing Corp.,* 2008 BCSC 1768 [*SR Télécom*], and in *Pakage Apparel Inc. v. Ellis,* 2014 BCSC 884 [*Pakage Apparel*].

Cascade's Position

[68] Cascade's primary position is that the applicable test under R. 10-1(4) is the four-part test set out in *Terastream* at para. 10 and involves considering:

(a) whether the applicant has a claim on the evidence, and not just on the pleadings, to a proprietary interest in the property;

(b) whether there is some evidence to render it reasonable to believe that the property is threatened with disposition or transfer outside the jurisdiction;

(c) whether there is a substantial question to be decided as to the plaintiff's entitlement to the property; and

(d) whether the balance of convenience favours granting the order.

[69] If correct, the primary implication of Cascade's position is that Viking is required to adduce evidence to support a reasonable belief that the CL-215T is threatened with disposition or transfer out of this jurisdiction. Cascade submits that replevin will not be granted unless this requirement is satisfied. It submits that Viking has not adduced evidence that "leaving the property where it is until completion of the proceedings carries some real danger that it would be damaged, destroyed or lost" (*Terastream* at para. 16) and, as a result, Viking's application must fail.

Analysis

[70] I have concluded that Viking's position with respect to the applicable test is correct. For the reasons set out, in my view, *Terastream* sets out the applicable considerations guiding the exercise of judicial discretion with respect to preservation orders under R. 10-1(1), not orders for the recovery of property under R. 10-1(4).

[71] Although some cases suggest that, in essence, the tests are not dissimilar, they are distinct tests and that distinction is relevant here. The interlocutory injunction test should be applied on this application.

Discussion of the Relevant Cases

[72] The leading case on the applicable test under R. 10-1(4) is *Midland.* As I have said, it was followed in *SR Télécom* and *Pakage Apparel*.

[73] In *Midland*, the plaintiff, a stock brokerage, applied, under R. 46(4) (now R. 10-1(4)), and s. 57 of the *Act*, for the return of shares owned by their client that it said were mistakenly transferred to the defendant. The defendant claimed the shares were transferred pursuant to an agreement, and refused to return them: at paras. 1–5.

[74] Justice Dillon considered the appropriate test to be applied. She distinguished between cases in which the applicant seeks the return of property prior to trial and intends to preserve it, and those in which the applicant seeks the return of the property prior to trial *without* intending to preserve it: *Midland* at paras. 10–11.

[75] Where the applicant intends to preserve the property, the test, in essence, looks at who has a better claim to the property. In other words, the applicant needs only show “that there is a substantial case so that the plaintiff *prima facie* has a right to possession”: *Midland* at para. 10, citing *Allis-Chalmers, Rumely Ltd. v. Forbes Equipment Ltd*., 8 D.L.R. (3d) 105, 1969 CanLII 730 (B.C.S.C).

[76] Where the applicant does not intend to preserve the property, Dillon J. held that the test for injunctive relief applies:

> [11] … However, when, as here, the plaintiff seeks return of the chattel prior to judgment without the intention of preservation prior to trial, the test for injunctive relief is more appropriate. …
>
> [12] The plaintiff here is required to prove a *prima facie* case and to show that recovery is justified on a balance of convenience (see *Sutton Resources Ltd. v. Sinclair* (May 21, 1997), Doc. Vancouver C961401 (B.C.S.C.) at 23. [reported (1997), 37 B.C.L.R. (3d) 381 (S.C.)].

[77] In *Midland*, after applying the test for injunctive relief, Dillon J. ordered the shares returned pending the outcome of the action: *Midland* at paras. 13–15. The plaintiff was required to undertake to pay damages in the amount of the value of the shares: at para. 15. The injunction test was formulated as a two-stage test: whether there was a *prima facie* case and whether the balance of convenience favoured recovery of the shares.

[78] In *Midland* there was no evidence, or discussion, of a risk that the shares would be disposed of or transferred out of BC, if they remained in the defendant's possession.

[79] In this case, Viking does not intend to preserve the CL-215T prior to trial. The very reason it seeks to recover the aircraft is so that Longview Services, a related company and the legal owner of the CL-215T, can transfer it to the Kingdom of Morocco on an unspecified date in 2024. It has apparently been sold to Morocco, although I was not provided with details of that sale.

[80] In *SR Télécom*, the plaintiff applied for the return of equipment in which the defendant claimed to hold a security interest for unpaid invoices totalling approximately $1.48 million: at paras. 1–2. The defendant offered to return the property in exchange for replacement security, but the plaintiff refused to provide security. The defendant contended that the plaintiff would not provide security because it was unwilling and unable to do so: *SR Télécom* at para. 3.

[81] Regarding the applicable test, Justice Rice cited *Midland* and said:

> [30] The test for return of property on an application under Rule 46(4) and s. 57 of the [*Act*], where there is no intention to preserve the property prior to trial, is the same as the test for granting an interlocutory injunction: *Midland Walwyn Capital Inc. v. Global Securities Corp.*, [1997] B.C.J. No. 2541 (S.C.), at para. 10. The plaintiff must establish a *prima facie* case, or serious question to be tried, and the balance of convenience must weigh in favour of granting the order: *Midland*, at para. 12.

[82] Citing *Canadian Broadcasting Corporation v. CKPG Television Ltd*., 64 B.C.L.R. (2d) 96, 1992 CanLII 560 (C.A.), at para. 24, Rice J. held that whether granting or refusing the order would cause irreparable harm and the preservation of

the property are factors to be considered when weighing the balance of convenience:

> [31] In assessing the balance of convenience, the court may consider various factors, including:
>
> > ... the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the *status quo*; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.

[83] On the facts in *SR Télécom*, Rice J. concluded that the test for an interlocutory injunction was satisfied; the defendant's claimed security interest was weak, and it was unlikely the full amount claimed was actually owed. The property was ordered to be returned to the plaintiff subject to it posting nominal security: at paras. 32, 46.

[84] In *Pakage Apparel*, the plaintiffs applied under R. 10-1(4) for the return of certain electronic and paper copies of emails in the defendant's possession: at para. 2.

[85] Justice Fenlon, when a member of this Court, cited the test from *Midland* and *SR Télécom*:

> [40] On an application under either Rule 10-1(4) or s. 57 [of the *Act*], the test to be applied is the same as the test that is used when an interlocutory injunction is sought: *Midland Walwyn Capital Inc. v. Global Securities Corp.*, [1999] B.C.J. No 2541 (S.C.), *SR Télécom & Co. v. Apex -- Micro Manufacturing Corporation*, 2008 BCSC 1768, and *Ackerman v. Patara*, 2011 BCSC 480. That test also applies to the balance of the interlocutory relief that is sought.
>
> [41] The test for an interlocutory injunction is well settled. It is set out in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 and in *Attorney General of British Columbia v. Wale*, [1987] 2 C.N.L.R. 36 (B.C.C.A.). The test has three prongs, sometimes described in two parts: First, is there a serious question to be tried? Second, will there be irreparable harm to the applicant if relief is not granted?; and finally, [who] does the balance of convenience favour the applicant or the respondent?

[86] Applying the injunction test to the facts in *Pakage Apparel*, Justice Fenlon ordered all copies of the emails and attachments returned to the plaintiffs: at para. 54.

[87] While *Pakage Apparel* is an example of the court granting relief under R. 10-1(4) where there was no concern about property being destroyed or transferred, it is a case that was decided on a unique set of facts, and it is not readily applicable in other contexts. Viking's submission that the court in *Pakage Apparel* rejected the notion that there must be evidence of a risk of disposition arises from para. 39 of the decision. However, disposition was not an issue in *Package Apparel* because the "property" sought to be returned was emails and electronic documents, of which there were multiple copies and which, by way of a prior consent order, the plaintiffs had already gained access to. The reason for seeking return of the emails was not because they would be destroyed or their ownership transferred, but because of a concern that the sensitive information contained therein would be misappropriated.

[88] In particular, the defendants had already seen the property (emails containing confidential communications); the emails had already been distributed to third parties, in breach of an earlier order; and, in any event, the documents might have been disclosed to the defendants in the course of litigation: *McLachlin Text.*

[89] *Midland*, *SR Télécom,* and *Pakage Apparel* have not been overturned, or otherwise disturbed by a higher court. These cases establish that under R. 10-1(4), where the applicant does not intend to preserve the property it seeks to recover, the test is the usual test for an interlocutory injunction.

[90] There is, however, a line of cases, beginning with Justice Iyer's decision in *Terastream*, that applies a different test. In my view, and for the following reasons, this line of cases should not be followed.

Terastream and the Cases Cited Therein

[91] In *Terastream*, pending trial, the plaintiff sought the return of a cable modem termination system ("CMTS") and a Sprinter truck ("Truck") (collectively, the "Property") in the defendant's possession. The Property had been modified with the

defendant's technology, and the plaintiff sought to have it returned in its original condition. Doing so would have required the removal of the CMTS and the repair of Truck modifications.

[92] Although Rules 10-1(1), (4)–(5), and s. 57 of the *Act* are set out in the "Applicable Law" section of *Terastream*, Justice Iyer was only dealing with the application under R. 10-1(4): at para. 20. It is clear from the reasons that the plaintiff was not seeking a preservation order under R. 10-1(1).

[93] Justice Iyer says that the parties did not dispute the applicable law: at para. 8. Without distinguishing between the sub-rules under R. 10-1, Iyer J. sets out four "considerations" that "guide the court's exercise of discretion", citing *Casselman v. Knott*, 2016 BCSC 2260 at para. 18:

> a) Does the applicant have a claim on the evidence and not just on the pleadings to a proprietary interest in the property?
>
> b) Is there some evidence to render it reasonable to believe that the property is threatened with disposition or transfer outside the jurisdiction?
>
> c) Is there a substantial question to be decided as to the plaintiff's entitlement to the property?
>
> d) Does the balance of convenience favour granting the order?

[94] In her analysis of whether relief should be granted under R. 10-1(4), Iyer J. applies the four considerations, concluding that the success of the application turned on the second consideration, whether there was some evidence to render it reasonable to believe that the property was threatened with disposition or transfer outside of the jurisdiction:

> [14] … In my view, this consideration goes to the heart of why the extraordinary interim remedy of returning disputed property to a party is sometimes appropriate. That occurs when it is reasonable to believe that keeping the property where it is until conclusion of the trial will leave the winning party with a pyrrhic victory because the property and its value to them has been lost.

[95] Justice Iyer notes that the plaintiff did not address the second consideration in their submissions. It appears that Terastream's submissions were based, at least indirectly, on the applicable test being as set out in *Midland*, where the applicant

intends to preserve the property, that is which party has the stronger claim to the property in question. The appears to be the case because, at para. 15, Iyer J. wrote:

> [15] Terastream did not squarely address this consideration. The focus of its submission was that, as it had led evidence that the CMTS and Truck were its property, and (as it characterized it) the defendants had not established their interest in the property, it had met the test in Rule 10(1)(4).

[96] In any event, Iyer J. dismissed Terastream's characterization of the test, citing *Casselman* for the proposition that there must be evidence of a risk the property will be disposed of or transferred to obtain a remedy under R. 10-1(4):

> [16] That is not what the Rule requires. Granting a remedy under this provision requires evidence that leaving the property where it is until completion of the proceedings carries some real danger that it would be damaged, destroyed or lost. For example, in *Casselman*, this court declined to return a disputed vintage truck to the plaintiff, on the basis that the danger that it might be damaged if driven was "speculative in the extreme" (at para. 41). Instead, Dorgan J. made a preservation order.

[97] Justice Iyer dismissed Terastream's R. 10-1(4) application because there was no evidence that leaving the CMTS and the Truck where they were would be detrimental to anyone (at paras. 21–22) and because there was "no evidence that preserving the *status quo* would threaten the property in any way" (at para. 17).

[98] In *Terastream*, Iyer J. applied the test for a preservation order under Rule 10-1(1), instead of the test for the interim recovery of property under Rule 10-1(4). Because she was told that the applicable law was not in issue, and because *Midland, SR Télécom,* and *Pakage Apparel*, all of which pre-date *Terastream* and explicitly address the test under Rule 10-1(4), were not cited in the decision and no justification is provided for departing from them, I decline to follow *Terastream.*

[99] Further, in my view, the cases that were cited in *Terastream* do not support the application of a four-part test under R. 10-1(4).

[100] At para. 10, Iyer J. cites *Global Coal & Mining Pvt. Ltd. v. C.A.D. Mechanical Services (2003) Ltd*., 2004 BCSC 1495 [*Global Coal*] for the proposition that "[r]eplevin is an exceptional discretionary remedy, granted only in the limited

circumstances that would justify granting interlocutory relief". Justice Iyer then sets out the four considerations from *Casselman*. However, in *Global Coal*, the cited proposition is followed by an articulation of the usual test for granting an interlocutory injunction:

> [15] The relief available to a party under Rule 46(4) is, essentially, an exception to the law that a party cannot obtain pre-judgment execution. However, such relief should be given only in very limited circumstances such as would form the basis for the granting of an interlocutory injunction:
>
> 1. Is there a serious question to be tried?
>
> 2. Will irreparable harm result if the relief is not granted?
>
> 3. Does the balance of convenience favour the applicant?
>
> [see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.)]
>
> [Emphasis added.]

[101] In *Global Coal*, the plaintiff sought possession of mining equipment under Rules 10-1(1) and (4). The Court applied the three-part *RJR MacDonald* test. In the assessment of the balance of convenience, the Court considered that the plaintiff would transfer the mining equipment to India, removing the plaintiff's only asset in the jurisdiction: at para. 18. The Court ultimately determined the matter should be properly resolved under Rule 10-1(1) and made a preservation order: at para. 20. While the Court did so without explicitly referencing a separate test for a preservation order, there was evidence to support a real risk that the equipment would be transferred to India.

[102] In *Casselman*, cited by Iyer J. as the source of the four considerations, the application was to set aside an *ex parte* seizure order of a vintage truck, the legal ownership of which was disputed. On review, Justice Dorgan conducted a *de novo* hearing and made a preservation order pursuant to R. 10-1(1). In doing so, Dorgan J. applied the four considerations, including assessing whether there was evidence to support a reasonable belief that the property was threatened with disposition: at para. 18.

[103] At para. 18 of *Casselman*, Dorgan J. cited *Alitis Income & Growth Pool v. WIP Investment Limited Partnership*, 2015 BCSC 2274 at paras. 7–8, which, in turn, cited *Osooli-Talesh v. Emami*, 2003 BCSC 1924 at para. 43, as establishing the four considerations for relief.

[104] In *Osooli-Talesh*, the Court does not explicitly refer to R. 46(1) when articulating the four considerations; however, it is clear that the Court is referring to the test for the "preservation of property":

> (a) Rule 46, Preservation of Property
>
> [43] Rule 46 provides that the court may make an order for the preservation of any property that is the subject matter of a proceeding. The court has the discretion whether to make an order under Rule 46. The considerations for the court are as follows …
>
> (a) Is there a claim on the evidence and not just on the pleadings to a proprietary interest in property?
>
> (b) Is there some evidence to render reasonable the belief of the plaintiff that the property is threatened with disposition or transfer outside the jurisdiction?
>
> (c) Is there a substantial question to be decided as to the plaintiff's entitlement to the property?
>
> (d) Does the balance of convenience favour the granting of the order?
>
> [Emphasis added.]

[105] The Court of Appeal approved and applied the four considerations from *Osooli-Talesh* in *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420 at para. 21, in the context of a preservation order under R. 10-1(1).

[106] The other cases relied on in *Casselman* also deal with preservation orders, not orders for the return of property: see *Laxton v. Coglon*, 2006 BCCA 178; *W.S. v. T.A.C. et al.*, 2005 BCSC 28 at paras. 1–2.

[107] The foregoing analysis supports a conclusion that the four considerations in *Terastream* apply to preservation orders under R. 10-1(1). Although *Terastream* has been relied on in three subsequent decisions involving orders for the return of property under R. 10-1(4), I accept Vikings' submission that to the extent *Terastream* stands for the proposition that the test under R. 10-1(4) is not the usual interlocutory

injunction test, or that there must be evidence of a threat to dispose of the property or transfer it outside the jurisdiction, it is contrary to earlier binding authority including *Midland, SR Télécom, Pakage Apparel,* and *Global Coal*.

[108] While the test for return of property (injunctive relief) and for a preservation order are characterized differently, I note that Justice Gray said that, in substance, the two tests are not dissimilar: *Osooli-Talesh* at para. 52.

[109] In *Osooli-Talesh*, Gray J. considered whether the test for an interlocutory injunction should be applied to applications seeking the preservation of property (as argued by Justice Sharpe in his book *Injunctions and Specific Performance*, loose-leaf (Ontario: Canada Law Book Inc. 2000). Justice Gray rejected this proposition but held that:

> [50] The requirement that there be a claim on the evidence and not just on the pleadings to a proprietary interest in property, and the requirement that there be a substantial question to be decided as to the plaintiff's entitlement to the property, are essentially the same question as whether there is a fair or serious question to be tried.
>
> [51] The requirement to show that there is evidence to render reasonable the belief that the property is threatened with disposition or transfer is another formulation of the question of whether the applicant would suffer irreparable harm if the application were refused. Lastly, the question of whether the balance of convenience favours the granting of the order is similar to the traditional test for an interim injunction.
>
> [52] In my opinion, the test under Rule 46 and for a traditional interim injunction is, in essence, the same. However, they differ from the more onerous test to obtain a *Mareva* injunction because they do not require the higher standard of a “strong *prima facie* case”.

[110] Accordingly, it appears that in *Terastream*, Iyer J. considered the applicable substantive factors, albeit under a different formulation of the test.

[111] I conclude that despite similarities or overlapping considerations, the test under R. 10-1(4) should be formulated as the three-part test for an interlocutory injunction. The risk of disposition, or that property will be transferred out of the jurisdiction, is not a standalone requirement of the test but may be a factor in assessing the balance of convenience, as was done in *Global Coal*.

[112] I note that my conclusion reflects the consensus in the following secondary sources:

- James C. MacInnis & Allan P. Seckel, "§10-1:1 Commentary" in B.C. Supreme Court Rules Annotated (Thompson Reuters Canada Ltd., 2023);
- the *McLachlin Text*; and
- Will Pollitt & Laura Morrison, "Rule 10-1 – Detention, Preservation, and Recovery of Property" in John Fiddick & Cameron Wardell, eds, The CanLII Manual to BC Civil Litigation (CanLII, 2020). In this text, *Terastream* is cited under R. 10-1(1) and the commentary advises that under R. 10-1(4) the test remains the usual interlocutory injunction test – citing *Pakage Apparel.*

Is the threshold for the first requirement for injunctive relief whether there is "a serious question to be tried" or a "strong *prima facie* case"?

[113] Having decided that the appropriate test under R. 10-1(4) is the injunction test, there is a second point of contention between the parties, specifically, the appropriate threshold at the first stage of the injunction test.

[114] When *Midland, SR Télécom, Package Apparel,* and *Global Coal* were decided, the standard applied at the first step of the injunction analysis was whether there was a serious question or issue to be tried.

[115] Viking submits that this continues to be the standard.

[116] In 2018, in *R. v. Canadian Broadcasting Corp*., 2018 SCC 5 [*CBC*], the Supreme Court of Canada modified the injunction test where the relief sought is a mandatory injunction, rather than a prohibitive injunction. The Court held that a higher standard of "strong *prima facie* case" applies when the injunction sought is mandatory in nature.

[117] At para. 18 of *CBC*, Justice Brown wrote:

> [18] In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR - MacDonald* test, which proceeds as follows:

> (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
>
> (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
>
> (3) The applicant must show that the balance of convenience favours granting the injunction.

[118] Cascade's position is that the higher standard applies because the order sought by Viking is mandatory; it compels Cascade to take positive action to return the CL-215T Property.

[119] Since *CBC*, few cases have directly applied the injunction test under R. 10-1(4).

[120] Viking relies on *Enerplus Corporation v. Copyseis Ltd*., [2020] A.W.L.D. 1179, 2019 CarswellAlta 2885 (Q.B.), a decision of the Alberta Court of Queen's Bench. There, the plaintiff applied for an order of replevin, requiring the return of data pursuant to R. 6.49 of the *Alberta Rules of Court*, Alta. Reg. 124/2010. Viking submits that R. 6.49 is the equivalent of R. 10-1(4) of the *Supreme Court Civil Rules*. In *Enerplus Corp.,* the defendant refused to return the plaintiff's data until it was paid the approximately $1 million it claimed was owing under a contract. The defendant asserted that an order compelling the return amounted to a mandatory injunction, and, as a result, the applicable threshold was a strong *prima facie* case: at para. 8. The Court disagreed and held that the "threshold for establishing replevin is relatively low as the applicant need only establish substantial grounds for its claim": at para. 10. The order was granted: at paras. 23, 26.

[121] I do not agree with Viking that the test under R. 6.49 is analogous to the test under R. 10-1(4). As set out in *Enerplus Corp.* at para. 9, the test under R. 6.49 is:

> Rule 6.49 provides that, first, it must be established there was a wrongful taking or detention of the personal property, second, the value and the description of the personal property must be established, and, lastly, the applicant must establish it is the rightful owner or is entitled to lawful possession of the personal property.

[122] This is a different formulation of the test for replevin. The common law of replevin evolved differently in Alberta than in BC: see *Neill v. Vancouver Police Department,* 2005 BCSC 277 at para. 28. *Enerplus Corp.* does not assist Vikings' argument.

[123] The primary BC case relied upon by Viking is *Terekhova v. Kolinkovsky*, 2022 BCSC 1239. There, the plaintiff applied under Rule 10-1, seeking injunctive relief granting her exclusive possession of a condominium. The decision cites sub-rules (1)-(4), and the test is set out as the "well known test for an interlocutory injunction as established in *RJR-MacDonald*": at para. 30. The analysis proceeds on the basis that the threshold at the first step of the test is "serious issue to be tried": at paras. 31–35. There is no discussion of whether the threshold should be a strong *prima facie* case. The order for possession is ultimately granted, and the defendants were ordered to change the locks and relinquish possession, pending final determination of the issues at trial.

[124] Viking argues that the order granted in *Terekhova* could have been characterized as mandatory, as it required the defendants to change the locks to the condominium and provide the plaintiff with access; however, the Court treated it as prohibitive: it prohibited the defendant from continuing to restrict the plaintiff's access. I accept that the prohibitive injunction in *Terekhova* required the defendants to take some positive action, but I do not understand it as precluding the court from finding that the higher threshold may apply to applications under R. 10-1(4) in other circumstances, or as establishing that the court's inclination is to characterize injunctions in this context as prohibitory.

[125] While not referred to in the parties' submissions, in *First Nations Health Authority v. Inter Tribal Services Association*, 2020 BCSC 476, Justice Baker applied the more stringent threshold in the context of a preservation order, finding that, in the circumstances of that case, and given the consequences of the order if granted, the order was "in the nature of a mandatory injunction": at para. 24.

[126] The secondary sources cited at para. 111 above do not expressly suggest that the threshold for an injunction at the first stage will depend on the nature of the order sought. They cite the "usual" injunctive test from *RJR-MacDonald.* Given that, in the context of mandatory injunctions, *CBC* modified the usual test, I accept Cascade's submission that this modification should extend to the threshold applied in the context of R. 10-1(4), where the injunction sought is mandatory.

[127] I turn now to consider whether the order sought by Viking is properly characterized as a mandatory or a prohibitive injunction.

Mandatory or Prohibitory Injunction

[128] In paras. 15–16 of *CBC*, while acknowledging the difficulty in determining whether an injunction is mandatory or prohibitive, the Court set out principles guiding the determination:

> [16] … distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take ... positive actions". For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the ... injunction are likely to be". In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to do something, or to refrain from doing something.
>
> [Emphasis added; footnotes omitted].

[129] In *Este v. Esteghamat-Ardakani*, 2020 BCCA 202, leave to appeal to SCC ref'd [2018] S.C.C.A. No. 477, the Court of Appeal rationalized the different standards for interlocutory injunctions on the basis that some interlocutory orders will have the practical effect of determining the ultimate issues between the parties:

> [35] … Although an interlocutory order is only effective until final judgment is given, an interlocutory injunction often operates as the only, and therefore ultimate, resolution of issues between parties. Consistent with these special characteristics, the law of interlocutory injunctions demands there be merit to

> the position advanced by the applicant, and imposes standards for the anticipated consequences of the order. …
>
> [36] A mandatory interlocutory injunction, compelling a person to take a positive action, sets the test higher. Rather than requiring a "serious question to be tried", a mandatory injunction requires that the applicant establish a "strong prima facie case": *R v. Canadian Broadcasting Corp*., 2018 SCC 5. …

[130] In this case, the order sought by Viking is the pretrial return of the CL-215T Property. As in *Terekhova*, the order, on its face, could be characterized as either mandatory or prohibitory. If granted, the order would require Cascade to take positive steps to transport the CL-215T Property to Viking, or to arrange transport with Viking. It would have mandatory aspects. However, the order could also be characterized as requiring Cascade to refrain from preventing Viking from accessing or possessing the CL-215T Property.

[131] Looking beyond the form and language in which the order sought is framed, and considering the substance of what is being sought, Viking seeks the return of its CL-215T Property in the underlying action for detinue. In BC, unlike in Alberta, a final order for the return of specific property must be framed in detinue; while the remedy of replevin, codified in R. 10-1(4), provides that interim recovery of property can be ordered: *Neill* at para. 29.

[132] In this case, while other relief, including damages, is sought in the notice of civil claim, fairly read, the return of the CL-215T Property is the primary relief sought by Viking. Returning the CL-215T Property is far more burdensome than changing locks and providing access to a condominium (steps that are easily reversible).

[133] The practical consequences of the order sought would preclude specific performance of the Integration Agreement, the main relief sought by Cascade in its counterclaim. Viking asserts in its submissions that "if the parties are able to resolve their differences, Viking can return the [CL-215T Property] to Cascade and the work can continue. If not, the relationship may be terminated and, no doubt, a dispute will arise over who is responsible for the failure."

[134] I do not accept that this is the practical reality. If the CL-215T Property is returned to Viking, it is to be transferred to Morocco, and it is highly improbable that work will continue. The Integration Agreement will effectively be terminated. What will be left is the dispute about fault for the failure of the Integration Agreement and any damages that flow as a result. The unlikelihood that the work would continue is compounded by De Havilland's new partnership with Universal Avionics, and acquisition of MC2 and ADS as discussed earlier in these reasons.

[135] Considering the surrounding circumstances in this case, and the practical implications of the order sought by Viking, I conclude that the order sought is, in fact, a mandatory injunction. As a result, Viking must establish that it has a strong *prima facie* case at the first prong of the injunction test.

[136] In *CBC*, Justice Brown outlined the terms used by courts in formulating what is entailed in showing a strong *prima facie* case:

> [17] … Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success"; a "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect" of success; or "almost certain" success. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.
>
> [Footnotes omitted; emphasis added.]

Has Viking met the test for recovery of the property under R. 10-1(4)?

Has Viking established a strong *prima facie* case that Cascade committed the tort of detinue?

Applicable Law on the Tort of Detinue

[137] The underlying action brought by Viking is based on the tort of detinue. As a result, in considering the first prong of the injunction test for a mandatory injunction, I must consider whether Viking has established a strong *prima facie* case that

Cascade has wrongfully detained, or committed the tort of detinue, with respect to the CL-215T Property.

[138] In its submissions, Viking accurately sets out the three necessary elements of the tort of detinue. Viking must establish that: (i) it has better rights to the CL-215T Property than Cascade does; (ii) It has requested the return of the CL-215T Property; and (iii) Cascade has refused the request for return of the CL-215T Property.

[139] In *Welander Estate v. Hayton*, 2022 BCSC 1941, this Court set out the elements of the tort of detinue in the context of a dispute over an aircraft:

> [24] In *Neill v. Vancouver Police Department*, 2005 BCSC 277 [*Neill*] at para. 29, cited in *P.S. Sidhu Trucking Ltd. v. Elima Enterprises Ltd.*, 2020 BCSC 1062 [*P.S. Sidhu Trucking Ltd.*] at para. 130, the Court summarized the elements of detinue:
>
> > ... A final order for the return of specific property must be framed in detinue in this province. Any improper retention of goods is actionable in detinue. The elements of detinue are: the property is specific personal property, the plaintiff has a possessory interest in the property, and the defendant has refused to return the property (Lewis and Klar, *Remedies in Tort,* (Toronto: Carswell) 1987 at para. 46).
>
> [25] In *Oh v. City of Coquitlam*, 2018 BCSC 986, at para. 40, Justice Milman also made it clear that an essential aspect of a claim in detinue is evidence of a "proper demand" and a failure or refusal to deliver up the property without lawful excuse after such demand:
>
> > [40] The elements of that potential cause of action were set out in *Schaffner v. Insurance Corporation of British Columbia,* 2016 BCSC 1186 at para. 11, in which Crawford J. cited *Salmond on the Law of Torts*, 16th ed. (London: Sweet & Maxwell, 1973) at 113, to the effect that:
> >
> > > A claim in detinue lies at the suit of a person who has an immediate right to the possession of the goods against a person who is in actual possession of them, and who, upon proper demand, fails or refuses to deliver them up <u>without lawful excuse</u>.
> > >
> > > [Emphasis added in *Welander Estate*.]
>
> [26] The tort of detinue is a continuing wrong for which the cause of action may be defeated by a return of the chattel at any time before judgment: *Columere Park Development Ltd. v. Enviro Custom Homes Inc.*, 2010 BCSC 1248 [*Columere Park*] at para. 31.

[140] Justice Taylor dismissed the claim in *Welander Estate*, based on the lack of evidence of a proper demand.

[141] The remedy for the tort of detinue may be an order for the return of the property and/or damages in lieu, to be assessed at the time of trial: *P.S. Sidhu Trucking Ltd. v. Elima Enterprises Ltd.*, 2020 BCSC 1062 at paras. 131–132 [*P.S. Sidhu Tucking*]; see also *Columere Park Development Ltd. v. Enviro Custom Homes Inc.,* 2010 BCSC 1248 at paras. 31–32 for the assessment of damages for detinue as compared to conversion.

[142] In *P.S. Sidhu Trucking*, Justice Gropper said:

> [131] The court has discretion to order either return of the property or damages in lieu of return as a remedy for detinue. Where the property consists of ordinary items of commerce, damages are the appropriate remedy: *Mayne v. Kidd*, [1951] 2 D.L.R. 652 at 654 (Sask. C.A.).
>
> [132] Where recovery is not appropriate, the measure of damages is the value of the chattel at the end of trial, plus any damages for the actual detention*: Baud Corp., N.V. v. Brook*, [1979] 1 SCR 633 at para. 35.

[143] Justice Gropper concluded that ordering the return of the property was the appropriate remedy, given that the property was unique and its replacement would not be full remedy: at para. 143. She also awarded damages for loss of profit: at para. 158.

[144] Two of the requirements of the tort of detinue are not at issue in this case. Viking demanded the return of the CL-215T Property, and Cascade has refused to return it. In this case, the success of the tort claim turns on whether Viking has a strong *prima facie* case that it has a better right to the CL-215T Property than Cascade does.

[145] Viking asserts that it has a better right to the CL-215T Property as the aircraft is legally owned by its affiliate, Longview Services, which, in accordance with the industry standard, transferred care, custody, and control of the CL-215T Property to Viking to complete the AUP. Viking submits that Cascade has no right to the CL-215T Property.

[146] As set out earlier in these reasons, Cascade asserts that it has a right to retain the CL-215T Property on two bases: (1) it has a common law lien over the CL-215T Property (both general and particular); and (2) it is contractually entitled to retain possession of the CL-215T Property.

Strength of Cascade's Claim Based on a Common Law General Lien

Cascade's Position

[147] Cascade claims to retain a general lien over the CL-215T Property based on custom and contract. Specifically, Cascade asserts that the Integration Agreement contains express provisions granting care, custody, and control to it and does not require Cascade to release the CL-215T Property until the Integration Services are complete. Further, Cascade asserts that the Integration Agreement allows it to retain the intellectual property developed for the CL-215T Property until after the scope of work under the Integration Agreement is complete. Cascade asserts that, when read together, these provisions of the Integration Agreement confer a general lien over the Assets for all of Viking's indebtedness under the Integration Agreement.

[148] In particular, Cascade relies on Articles 2.3(u) and (y) of the Integration Agreement. They provide that Cascade is responsible for the release and return to service of the aircraft (including the CL-215T) once Cascade's Integration Services under the Integration Agreement are complete. As work under the Integration Agreement is paused, Cascade says it is not required to return the aircraft.

[149] Cascade also asserts that trade and custom in the aviation industry is for aerospace maintenance experts and engineers to retain a general lien over aircraft for debts in respect of their services. Given the timeframe for this application, Cascade says that it has not had an opportunity to obtain an expert report regarding trade and custom in the aviation industry. However, it says it intends to retain an expert for trial.

Viking's Position

[150] Viking disputes that Cascade has any lien over the CL-215T Property and specifically disputes that it has a common law general lien. Viking says that under the Integration Agreement, Cascade expressly disclaimed its right to assert any lien —whether general or particular. In support of its submissions, Viking relies on Article 8.8 of the Integration Agreement:

> On the date of this Agreement Viking (or a designated affiliate of Viking) is the sole and absolute legal and beneficial owner of the Aircraft and any materials therein (the "Viking Provided Items"). Viking shall at all times retain title to all Viking Provided Items and Cascade shall not in any way sell, assign, convey, mortgage, charge, hypothecate, grant a security interest in, exchange or otherwise transfer or relinquish possession of or dispose of the Aircraft, or any part thereof.
>
> [Emphasis added.]

[151] Viking submits that because Cascade agreed not to "in any way … charge" the CL-215T Property, it expressly relinquished any right it had to assert a lien.

[152] Viking also submits that the fact that Cascade is not entitled to a lien is supported by Article 6.2(c) of the Integration Agreement, pursuant to which Cascade agreed to indemnify and hold Viking harmless in the event that a lien arose as a result of its work (the "Indemnification Provision"):

> Cascade shall release, indemnify and save harmless Viking from and against all claims, damages, losses, costs, and expenses that may at any time be incurred or suffered as a result of or arising from any liens, attachments, charges or other encumbrances or claims (each a "Lien") upon, or in respect of, any work-in-process or finished work, which Lien arises as a direct result of the Integration Services performed by Cascade. Viking agrees that Cascade shall not be responsible for any claims, damages, losses, costs or expenses resulting or arising from any Liens upon, or in respect of, any work-in-process or finished products to the extent that such Liens are not the result of or related to the Integration Services performed by Cascade.

[153] Viking submits that the Indemnification Provision is irreconcilable with the notion that Cascade could, on its own behalf, impose a charge or lien on the CL-215T Property as Cascade would then be required to indemnify Viking for any losses arising from its own lien.

Applicable Law

[154] The right to common law lien is a defence to a replevin claim: *Reddick v. Barry's Place Collision Repairs Ltd.*, [1984] A.J. No. 448 (K.B.), 1984 CarswellAlta 745 at para. 17; *Saskatchewan Wheat Pool v. Smith*, 150 Sask. R. 211, 1996 CanLII 7138 (K.B.).

[155] A general lien is broader than a particular lien. It can be asserted for claims related to specific property but also for other amounts due from the owner of the property—effectively, it creates a super-priority charge to the detriment of other creditors.

[156] Given the broad scope of common law general liens, their "draconian nature", and their implications for other creditors, courts have demonstrated a "relatively consistent judicial attitude" of reluctance towards them: *Dutton Pacific Forest Products Ltd. Re*, 117 D.L.R. (3d) 507, 1980 CarswellBC 474 (S.C.) at paras. 15, 17 [*Dutton*]. On this reluctance, the Court in *Dutton* said:

> [17] The reason courts have regarded general liens "with jealousy" (per Lord Ellenborough in *Rushforth v. Hadfield* (1806), 7 East 224 at 228, 103 E.R. 86 at 88) is that such a lien is by its nature "prone to operate to the detriment of other creditors of the lienor" (per Stephen J. in *Majeau*, supra, p. 9). Given their "draconian nature" it is my view that, in the absence of clear statutory language, the courts should be reluctant to conclude that the legislature intended to create and confer upon a warehouseman a general lien.

[157] In *Dutton*, the Court accepted that general liens offer "manifest advantages" to the lien claimant and, accordingly, the circumstances in which they arise are limited: at para. 16. Citing N.E. Palmer, *Bailment* (Sydney: Law Book Co., 1979) at 550, the Court accepted that "the law does not favour them and they must be strictly proved": *Dutton* at para. 16. See also: *In the Bankruptcy of Merrill Engineering Ltd.,* 2004 BCSC 493 at paras. 30–31 [*Merrill*].

[158] At common law, someone who does work on a chattel becomes entitled to a particular lien, but not a general lien. A general lien must be shown to have arisen

either by: (i) express contract; (ii) notorious trade custom; or (iii) statute: *Merrill* at paras. 30–31. In this case, there is no statutory lien.

General Liens Based on Contract

[159] A right of lien may be created by contract where the language of the contract, or the surrounding circumstances, clearly indicate an intention to create a lien. The terms of a lien arising from a contract must be lawful, clear, and enforceable: *British Columbia (Workers' Compensation Board) v. Canadian Imperial Bank of Commerce*, 48 B.C.L.R. (3d) 27, 1998 CanLII 4019 (C.A.) at para. 41.

[160] When a party seeks to rely on a contract as creating a general lien, the court will strictly construe the contract against the claimant: *Dutton* at para. 16.

[161] As a result of these requirements, and the court's general disposition against imposing general liens, there are few cases considering general liens created by contract. Viking refers to two examples of what is, or is not, sufficient to establish a general lien by contract. Although not directly analogous to the circumstances of this case, the cases are instructive. Drawing heavily on Viking's submissions, I summarize the two decisions as follows.

[162] First, in *Bowman v. Malcom*, (1843) 152 E.R. 1042, the plaintiff, was an assignee of a bankrupt wool dealer, and the defendant, a warehouseman, claimed to have a general lien over bags of wool in the plaintiff's warehouse. At 1044, the defendant asserted that a general lien arose based on the basis of the following express contractual term:

> All charges are expected to be paid on or before the delivery of the goods, and <u>all goods are considered as general lien</u>, subject not only to the freight thereon, but also to the balance of any <u>former</u> account due from the owner or consignors.
>
> [Emphasis added.]

[163] The plaintiff asserted that the notice was "too vague in nature to create a general lien in favour of the defendant". In that regard, the term spoke to a lien for

"former" accounts whereas a general lien would be for all accounts: *Bowman* at 1045. At 1047, the Court agreed the contractual term did not create a general lien:

> As a shipping agent or warehouse-keeper, he could have no general lien unless by contract…the question depends, therefore, on the construction of the printed notice; and that is left in such obscurity, that I cannot say I am satisfied that the defendant has thereby established his claim.
>
> [Emphasis added.]

[164] Second, in *George Barker (Transport) Ltd. v. Eynon* (1973), [1974] 1 All E.R. 900 at 902, the Court found the following contractual term created a general lien:

> General Lien. The Carrier shall have a general lien against the owner of any goods for any moneys whatsoever due from such owner to the Carrier. If any lien is not satisfied within a reasonable time the Carrier may at his absolute discretion sell the goods as agents for the owner and apply the proceeds towards the moneys due and the expenses of the sale, and shall upon accounting to the Trader for the balance remaining, if any, be discharged from all liability whatsoever in respect of the goods.

[165] The Integration Agreement does not include an express term creating a general lien.

[166] Cascade relies upon terms in the Integration Agreement that provide that the CL-215T Property is to remain with it until the Integration Services are complete as the basis for its general lien claim. Articles 2.3(n) and (s) of the Integration Agreement require Viking to deliver the CL-215T to Cascade. Cascade is assigned sole responsibility for the care, custody, and control of the CL-215T while it is at it's facility.

[167] Article 2.3(u) provides that Cascade "is responsible for the release and return to service of the [CL-215T] after the Integration Services are complete." Accordingly, under the framework of the Integration Agreement, Cascade says it retains control and possession of the CL-215T as long as the Integration Agreement is ongoing. Cascade says it is contractually entitled to retain the CL-215T Property until Viking terminates the Integration Agreement and pays termination costs under Article 9.1. When these terms are construed against Cascade, as is required in assessing

whether Cascade has a general lien, the provisions fall short of the level of clarity that courts require in order to find that a general lien was intended.

[168] Cascade's general lien claim appears even weaker when considered in light of Article 8.8 of the Integration Agreement which precludes Cascade from claiming a "charge", which includes a lien, against the CL-215T Property. This is further supported by the Indemnification Provision, which would have the circular result of appearing to require Cascade to indemnify Viking with respect to its own lien.

[169] Given the lack of an express term, and the general judicial reluctance to find a general lien, I conclude that it is highly unlikely that Cascade could establish that it is entitled to a general lien, arising from contract, against the CL-215T Property.

General Liens Based on Custom

[170] In *Merrill*, the court discussed the very high standard required to establish "trade custom" as a basis for a general lien:

> [30] Regarding what is a "trade custom", the *Canadian Encyclopedic Digest* (3rd Ed.), Landlord and Tenant, Vol. 21 states:
>
> > A trade custom will also be recognized as conferring a right of lien when the usage is sufficiently notorious to enable a court to assume that, in the absence of an agreement to the contrary, reasonable parties would have taken the lien to be conferred. (at 83.1 – 19)
>
> [31] In order to establish the existence of a general lien based on trade custom, universal acquiescence must be shown. In *Spotten & Co., Re* (1877), 11 I.R. Eq. 412 (Eng. Ch.), Miller, J. stated:
>
> > General liens are not favoured, and it is therefore generally necessary for any party seeking to establish a general lien to show some express contract for that purpose between the parties, or a contract necessarily implied from their course of dealing or a custom of trade, on the faith of which it must be supposed the parties dealt with each other. … The evidence necessary to sustain such a usage or custom of general lien must go the length of establishing that it was so universally acquiesced in that everybody in the trade knew it, or that it could have been ascertained if the party had taken the pains to inquire. (at p. 414)
>
> [32] In *Holowach v. Hunt* (1992), 4 P.P.S.A.C. (2d) 1 (Alta. Master), Master Quinn cites with approval the following passage from 28 Halls (4th Ed.) at para 528:
>
> > To establish a general lien arising by usage in a particular case, for instance in a particular locality, the usage must be certain and reasonable

> and so universally acquiesced in that everyone in the trade knew of, or on inquiry could have ascertained, its existence. To establish a general lien of this nature there must be satisfactory evidence of numerous and important instances of its exercise; if the evidence is sufficient to establish the usage, the parties are presumed to be aware of, and are bound by, the usage. The question whether the lien exists is one of fact.
>
> [Emphasis added.]

[171] As emphasized in the cases cited in *Merrill*, the standard has been described as "sufficiently notorious" so that reasonable parties would understand the lien to have been conferred, or "so universally acquiesced in" that everyone in the trade would know of it.

[172] In this case, Cascade has not adduced any evidence, expert or otherwise, in support of its claim that it is trade custom in the aviation industry for aerospace maintenance experts and engineers to retain a general lien over aircraft for debts in respect of their services. Without precluding a different finding by the trial judge, if expert evidence is adduced at trial, as I am told is Cascade's intention, I cannot find that Cascade has established a common law general lien arising from custom at this stage of the proceedings. It seems unlikely that the high bar set out in the case law will be met. This is particularly so in light of the explicit terms of Article 8.8 of the Integration Agreement and the Indemnification Provision.

Conclusion on Cascade's General Lien Claim

[173] Overall, even without considering in depth Viking's arguments that Cascade contracted out of their ability to assert a lien on the CL-215T Property, I conclude that it is highly unlikely that Cascade will be successful in its defence to Viking's claim in detinue on the basis that they are entitled to retain the CL-215T Property on the basis of a common law general lien.

Strength of Cascade's Claim Based on a Particular Lien

[174] A particular lien permits a claimant to retain possession of property for any claims relating to the specific property retained, in respect of which liability has been incurred. The liability to the lien claimant must be "connected in some way to the property." A particular lien can arise where work is done on a chattel. Where a

person has expended skill, labour, material, or expense on a chattel of another, that person has a particular lien over that chattel until their charge is paid. The purpose of a particular lien is to protect a repairer's right to be compensated for work they have done. As a result, a particular lien can only be claimed for the value of the services rendered, not for other claimed losses or damages.

[175] Cascade submits that it has expended significant skill, labour, materials, and expense in respect of the CL-215T Property, including by installing A-Kits and inputting Know-How (as defined in the Integration Agreement) into the Aircraft records. As the CL-215T Property clearly has a connection to the amounts owing to Cascade under the Integration Agreement, Cascade says it has a particular lien over the CL-215T Property for Viking's full indebtedness to it under the parties' contract.

[176] A particular lien claimant has the onus of establishing the amount owed for its work and to distinguish that amount from other amounts that may be owed but are not lienable.

[177] This distinction was explained in *Cansearch Resources Ltd. v. Regent Resources Ltd.*, 2017 ABQB 535 [*Cansearch Resources*]. Cansearch Resources asserted that it had a particular lien over the defendant's assets for certain unpaid invoices. The defendant did not dispute that amounts were owed but said that most were unrelated to work done on the chattel and, therefore, could not be liened.

[178] The court accepted that the claimant "clearly" expended work on the property. However, to satisfy its onus, the Court said that Cansearch Resources:

> [61] … must identify specifically what equipment the possessory lien covers and establish that money, labour, or skill was expended in enhancing the value of that specific equipment.

[179] The Court found that Cansearch Resources had not met its burden because it only provided a preliminary description of equipment, which the Operator's Lien was intended to cover, coupled with generalized invoices including claims for work done to the property and for other amounts owed under the contract. The Court wrote:

> [70] There is an important distinction between services related to general operational activities and those specifically related to performing work to enhance the value of chattels. Expenses for work or services relating to non-chattel items are unlikely to be expenses covered by a possessory lien, such as those identified in this case as being for land lease costs, roadway rentals, property taxes, royalty payments etc. In short, Cansearch's generalized expenses are not enough to establish entitlement to a possessory lien because there is insufficient evidence to substantiate that the Unpaid Expenses represent money or services provided to enhance the value of specific identified chattels. …

[180] A similar result was reached in *Stro-Built Wall & Ceiling Inc. v. Kamal & Bros. Enterprises Ltd.*, [1997] B.C.J. No. 2725, 1997 CanLII 1072 (S.C.). In that case, a builder's lien claimant was not entitled to security against the assets for work that was yet to be done or billed. At para. 15, the Court explained that the plaintiff could not obtain a declaration of lien—an *in rem* judgment—as damages are not lienable.

[181] The *Repairers Lien Act*, R.S.B.C. 1996, c. 404 [*RLA*], codified the common law particular lien and strengthened the rights afforded to repairers by adding a right to sell the chattel. The *RLA* did not abolish the common law particular lien. At common law, someone who does work on a chattel becomes entitled to a particular lien but not a general lien.

[182] Section 2 of the *RLA* provides:

> A mechanic or other person who, by bestowing money, skill or materials on any chattel in altering and improving its properties, or increasing its value, becomes entitled to a lien on the chattel for the amount or value of the money, skill or materials bestowed, has, while the lien exists, power to sell the chattel, if the amount to which he or she is entitled remains unpaid for 90 days after it ought to have been paid.

[183] Cascade does not assert a statutory lien under s. 2 of the *RLA.* That is not surprising as the wording of s. 8.8 of the Integration Agreement disclaims any right that Cascade might have to assert a lien. A lien is a charge on property. Cascade clearly gave up the right to charge the CL-215T Property under the terms of the Integration Agreement.

[184] In *British Columbia (Workers' Compensation Board) v. Canadian Imperial Bank of Commerce* (1998), 157 D.L.R. (4th) 193, 1998 CanLII 2019 (B.C.C.A.) [*BC*

Workers], the Board claimed a lien under s. 52 of the *Workers' Compensation Act,* R.S.B.C. 1996, c. 492 for unpaid assessments owed by an employer. In deciding the case, the Court canvassed the history of both common law and statutory liens and expressly found that a lien is a charge on property. Justice Newbury wrote:

> [12] A lien, of course, is a remedy *in rem*. At common law, its existence depended on one's continuous possession of property which was the subject of the lien: as noted in Halsbury's, "In its primary legal sense lien means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied." (*Supra*, v. 28, at para. 502.) Although the lien has since expanded beyond its possessory origins, its essence is still that it "binds" (consistent with its French root, to tie) or charges real or personal property.
>
> [Emphasis added.]

[185] In the same paragraph, Justice Newbury cited with approval this definition of a lien from *Chassey v. May*, [1925] 2 W.W.R. 199, 1925 CanLII 599 (B.C.C.A.) at 201:

> The definition of "lien", at law, and in equity, and in admiralty, is well and succinctly set out in Hall on Possessory Liens (1917) Ch. 1, and at p. 16 it is said: "The word is derived directly from the French lien, and further back from the Latin *ligamen*, which signifies 'a tie' or 'something binding'. As will be seen, the right in its fullest and widest application means a **charge** upon property – that is to say, something which is binding upon it."
>
> [Emphasis in original.]

[186] Justice Lambert, in his concurring reasons, explained that a lien can arise at common law, in equity, by contract, or by statute. With respect to all such liens he said, "[i]n each case the lien is an encumbrance on the asset". In other words, a charge against the property: *BC Workers'* at para. 43.

[187] As a result, the broad terms of the Integration Agreement contain an express relinquishment of any right to impose a lien. Assertion of a lien is, in my view, irreconcilable with Cascade's agreement to the terms of s. 8.8, which provides that Cascade shall *not in any way* "mortgage", "charge", "hypothecate" or "grant a security interest in" the assets. The objective the expansive language is intended to prevent Cascade from taking any action that would in *any way* burden the assets.

[188] As set out, there are other provisions which support this interpretation of the Integration Agreement including the indemnity provision in s. 6.2(c) discussed earlier in these reasons.

[189] In addition, s. 2.1 of the Integration Agreement expressly contemplates that the aircraft may not remain in Cascade's possession until its work is completed. It provides:

> The aircraft referenced in Option 1 & 2 above [i.e. the 2019 Aircraft and the Detained Aircraft] may not be required to remain at Cascade's facility for the complete period of Integration during the fire fighting season. Scheduling shall be agreed between the Parties to accommodate, where possible, (i) as short a timeline as possible for certification, and (ii) aircraft availability to be operational during the fire fighting season.

[190] The right to a common law lien requires that the lien claimant maintain continuous possession of the assets. Thus, the parties' express acknowledgement that the aircraft may be returned to Viking during the fire fighting season is inconsistent with Cascade's right to assert a common law possessory lien.

[191] Similarly, in relation to the payment for B-Kits and Installations, Cascade is only entitled to the final Milestone Payment "on delivery" of an aircraft. If the parties intended that Cascade had the right to a lien, the final – and largest payment – would be expected to become due prior to delivery, as once the aircraft is delivered to Viking any common law possessory lien is extinguished. The Integration Agreement contemplated Viking paying Cascade for its work on a progress basis, as certain agreed dates and deliverables were achieved, as opposed to on completion of all its work. This payment structure meant that Cascade was not at risk of completing a large amount of its work without first being paid; the risk a lien is meant to protect against.

[192] As a result, I find that Cascade relinquished any right to assert a common law general lien or a particular lien.

Strength of Cascade's Argument that the Terms of the Integration Agreement Entitle it to Retain Possession of the CL215-T Property until the Integration Services are Complete

[193] As set out, Cascade asserts that the terms of the Integration Agreement require it to maintain possession of the CL215-T Property until its Integration Services are complete, giving rise to a contractual right to retain the CL215-T Property.

[194] In support of its position, Cascade relies on ss. 2.3(u) and (y) of the Integration Agreement. Those sections provide:

> Section 2.3(u): Cascade is responsible for the release and return to service of the Aircraft after the Integration Services are complete. All certification and compliance requirements shall be completed as outlined in Appendix C.
>
> Section 2.3(y): The final release of the two (2) prototypes shall be the result of the STC issuance to Viking for the AUP certification, which is Cascade's responsibility.

[195] I conclude that those sections do not give Cascade a contractual right to retain the CL215-T Property. Rather, they explain that Cascade is the contracting party responsible for releasing the Aircraft and, that in doing so, it will ensure that all certification and compliance are completed, including the issuance of the STC.

[196] The sections, even read broadly, do not provide Cascade the right to indefinitely detain the CL215-T against Viking's request to have it returned. I agree with Viking's submission that if the parties intended to create such a right, the Integration Agreement would have expressly said so.

[197] The fact that the sections relied on by Cascade did not confer such a right is clear from the other terms of the Integration Agreement, in particular s. 8.8

[198] In addition, Cascade's position cannot be reconciled with s. 2.1 of the Integration Agreement which expressly contemplates that Viking's aircraft may not, in the firefighting season, remain in Cascade's possession until its work is complete.

[199] Cascade's claim that it needs to retain the CL215-T Property to complete work under the Integration Agreement is inconsistent with the fact that, since May 2023, it stopped work under the AUP while the parties discussed a potential termination of the Integration Agreement and that in June 2023, Cascade wished to release CL215-T aircraft to Viking. An indefinite suspension of the Integration Services has meant that Cascade has been in possession of the CL215-T Property for longer that the Integration Agreement contemplated.

[200] Finally, on Viking's undisputed evidence, the CL215-T has a value of at least US$35 million, far exceeding any termination fee that may be payable under the Integration Agreement.

Conclusion on Strong Prima Facie Case

[201] Based on all of the foregoing, I conclude that Viking has established a strong *prima facie* case that it is entitled to a return of the CL-215T Property in which it has a proprietary interest.

[202] I turn now to consider the issues of irreparable harm and the balance of convenience.

Will Viking suffer irreparable harm if the CL-215T Property is not returned?

[203] Irreparable harm has been defined as harm that cannot be quantified in monetary terms or harm that cannot be compensated for because, for example, damages will not be collectible. It refers to the nature of the harm rather than its magnitude: *RJR-MacDonald* at para. 64.

[204] In *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 [*Charbonneau*], the Court cited a number of cases discussing the evidence required to establish irreparable harm. In *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333, 1986 CanLII 171 (C.A.), aff'd [1991] 1 S.C.R. 62, 1991 CanLII 109, Justice McLachlin, as she then was, cautioned against applying too stringent a standard and noted that "clear proof of irreparable harm is not

required”: at para. 51. The Court of Appeal has also noted that the potential for irreparable harm is sufficient, it need not be shown that irreparable harm is “certain or highly likely to occur”: *Charbonneau* at para. 59, citing *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd Partnership,* 2011 SKCA 120 at para. 60. However, in *Charbonneau*, Justice Bennett wrote:

> [60] … [T]here surely must be a foundation, beyond mere speculation, that irreparable harm will result. Interlocutory injunctive relief pending the trial of the issues is a significant remedy, and should be invoked only when the test in *RJR-MacDonald* is satisfied on a sound evidentiary foundation.
>
> [Emphasis in original.]

[205] As the Court of Appeal said in *Edward Jones v. Voldeng*, 2012 BCCA 295, an interlocutory injunction is an extraordinary remedy and will rarely be ordered where no irreparable harm is likely: at para. 24.

[206] In this case, Viking submits that the irreparable harm that it may suffer is primarily the potential loss of customers and harm to Viking’s business reputation.

[207] In his affidavit, Mr. Côté explains that Longview Services sold the CL-215T Property to Morocco, through the Canadian Commercial Corporation, as part of a government-to-government contract. He says that the latest amendment to the contract provides that the CL-215T is to be delivered to Morocco by 2024. Mr. Côté says that if Longview Services fails to deliver the CL-215T Property, it is at risk of a damage claim or the termination of the contract.

[208] Mr. Côté says that failure to deliver on the commitment to Morocco will harm Viking’s and Longview Service’s reputation with Morocco, and in the industry more broadly.

[209] While Mr. Côté’s affidavit does not explain why the inability of Longview Services to deliver on the contract with Morocco would cause irreparable harm to Viking, I accept that there is a potential that damage to the reputation of one company in the Viking Group could affect the reputation of other companies in the group. Mr. Lemke’s affidavit about De Havilland’s recent contract and acquisitions

suggest that in the marketplace, the various companies in the Viking Group are viewed interchangeably. Potential loss of clients and damage to business reputation are very difficult to establish conclusively.

[210] Viking will not definitively know whether Morocco will decline to make future purchases from it because it is unable to deliver the CL-215T in accordance with the agreement. It also will not be able to identify potential purchasers who did not purchase aircraft from it because of its inability to deliver the CL-215T to Morocco. However, I accept that the purchase of a waterbomber aircraft, at a cost of many millions of dollars, is not undertaken without considering the vendor's ability to deliver on its commitments.

[211] Cascade does not dispute that the CL-215T has been sold to Morocco and that delivery is due in 2024. I accept that Viking, or the Viking Group, may suffer reputational damage, and perhaps face contractual damage claims, if unable to comply with the contractual terms of the sale to Morocco. In other words, I am satisfied on Mr. Côté's evidence that there is a potential for Viking to suffer irreparable harm that is more than speculative.

[212] The second instance of irreparable harm relied on by Mr. Côté in his affidavit is that several other Waterbomber Aircraft have been sold by Viking and delivered to other customers who are awaiting completion of the AUP to modify their aircraft. He says that Viking is "at risk" of losing revenue and suffering unquantified harm to its reputation due to its failure to deliver the upgrade its aircraft. Mr. Côté says that operators are at risk if the old avionics systems become unrepairable.

[213] I accept that failure to complete the AUP has the potential for reputational harm to Viking, but these damages, if proven, do not flow from the Cascade's retention of the CL-215T Property but rather from the failed AUP, the blame for which, if any, is yet to be determined.

[214] Given the evidence set out in Mr. Lemke's second affidavit about De Havilland's recent partnership with a new avionics system supplier, and the

purchase of two of Cascade's competitors, Viking has not demonstrated how sales to other purchasers are at risk if the CL-215T Property, in Cascade's possession, is not returned to Viking before trial. I do not accept that this evidence establishes the potential for irreparable harm.

[215] The third instance of irreparable harm relied on by Mr. Côté is that the presence of the CL-215T aircraft at Cascade's premises, and its use for tours by school groups and others, threatens its "safety and integrity". In response, Mr. Lemke explains the steps Cascade has taken to ensure the safekeeping of the CL-215T. Nonetheless, it is concerning that as early as July 2023, Mr. Lemke was asking Viking to remove the CL-215T Aircraft from its premises. From the photographs attached to Mr. Côté's affidavit, it appears that the Aircraft is being used by Cascade for social media and public purposes. This was not contemplated by the Integration Agreement.

[216] Related to this, the fourth instance of irreparable harm relied on by Mr. Côté is that social media posts by Cascade with the CL-215T in the background "convey to the market that we continue to pursue a failed program with Cascade" and could "cause confusion in the marketplace as to the status of our upgrade." Although the posts do not identify Viking as the owner of the CL-215T, and there no visible markings in the photographs indicating that the aircraft in the background is a Viking aircraft, I accept that there is potential for confusion in the industry.

[217] To the instances of irreparable harm set out by Mr. Côté, I would add that the value of the CL-215T Property exceeds the claim for damages by about US$10,000,000. Having property of that value withheld, despite Viking's strong *prima facie* case for its return, has the potential to cause irreparable harm.

Does the balance of convenience favour granting the relief?

[218] This part of the test for an injunction requires me to consider the evidence advanced by the parties and to weigh it to determine where the balance lies and whether granting an injunction is just and equitable in the circumstances.

[219] The balance of convenience considers the harm that would be caused to Cascade as a result of granting a mandatory injunction requiring the return of the CL-215T Property and weighs it against the harm Viking will suffer if it is not granted.

[220] The Court in *Canadian Broadcasting Corporation* at 102 sets out the factors to be considered when assessing the balance of convenience:

> the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the status quo; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.

[221] Although Cascade says that if the CL-215T Property is returned to Viking, it will be deprived of its counterclaim for specific performance of the Integration Agreement, based on Cascade's position in response to this application, specific performance of the Integration Agreement is unlikely to be an option to the extent it involves installation of the Collins' B-Kit.

[222] Arguably, Cascade would be able to complete the Integration Agreement with a certifiable B-Kit manufactured by a different supplier but events appear to have moved beyond that possibility as a result of De Havilland's acquisition of MC2 and ADS, companies that provide installation of avionics upgrades and modifications similar to the work done by Cascade.

[223] If Viking terminated its contract with Collins, as Mr. Lemke suggests in his second affidavit, it is no longer in a position to comply with the terms of the Integration Agreement that were based on the Collins' B-Kit. This creates a central issue in Viking's dispute with Cascade.

[224] I have not accepted that Cascade has a lienable or contractual interest in the CL-215T Property or the CL-415 Documents (which were not the subject of the argument before me) for the debt that Viking owes to it. Rather, Cascade has a contractual term entitling it to claim a termination fee where certain conditions are

met. At its heart, this is not a dispute about the CL-215T aircraft itself but about where the fault lies for the failed Integration Agreement. There is no evidence on which I could find that Viking is not in a position to pay damages, although I note that it has not given an undertaking in that respect.

[225] I also do not accept Cascade's argument that Viking's intention to transfer the CL-215T Property to Morocco is fatal to its application for the return of the CL-215T Property. Experts have not yet been retained in the litigation and, it appears from the way in which the dispute has been framed by the parties, the focus will be on the B-Kit manufactured and provided by Collins and the scope of the contractual terms in the Integration Agreement. I cannot find on the materials before me that experts are likely to require access to the CL-215T for the purpose of this dispute.

[226] Section 6 of the Integration Agreement deals with intellectual property. Sections 1.1.1(a)–(b) and (j) respectively provide that: Viking and Cascade will remain the owners of their existing intellectual property and that new intellectual property developed under the Integration Agreement will be owned exclusively by Viking. Under the Integration Agreement, Cascade is not required to assign Viking title to any new intellectual property until the Integration Services are complete.

[227] It is not clear on the record that there is any value to the intellectual property that Cascade has thus far integrated into the CL-215T. On the evidence, the work that Cascade has done has been unsuccessful and has not received regulatory certification. In any event, in July 2023, Cascade returned the CL-415 Aircraft, with and installed A-Kit, without any expressed concern about its integrated intellectual property. As a result, Viking is already in receipt of new intellectual property developed by Cascade. Viking says that it is not interested in receiving another aircraft with a faulty A-Kit and says it is content to have Cascade remove items that it claims contain its intellectual property before the CL-215T is returned.

[228] Cascade submits that if it is required to return the CL-215T to Viking, Viking will install a different B-Kit before it is sold to Morocco thereby interfering with the current state of the CL-215T, and physical evidence relevant to where the fault lies

for the failed Integration Agreement. Cascade says it will be deprived of the ability to retain an expert to inspect and opine on the work it performed, causing it irreparable harm. I do not accept this argument. There appears to be no dispute that the Integration Services performed by Cascade were unsuccessful. Where the fault lies will be the subject of the dispute but physical evidence can be photographed and documented before the CL-215T is returned.

[229] Cascade submits that an order requiring return of the CL-215T Property at this stage of the proceeding has the effect of granting judgment to Viking without a trial or full evidentiary record. Cascade has undertaken to preserve the CL-215T aircraft and suggests that an expedited or a speedy trial is a more appropriate approach.

[230] The litigation in this case is complex and the amounts at stake are considerable. The *Supreme Court Civil Rules* do not contemplate a speedy or expedited trial. It is likely that Collins will be added as a party to this litigation or that separate litigation involving Collins will be tried at the same time as this case. A trial is likely to be many months in the future.

[231] In the circumstances of this case, in which neither party is taking the position that the Integration Agreement has been terminated, and I have found that Viking will suffer irreparable harm, the balance of convenience favours returning the CL-215T Property to Viking.

[232] As I have said, at its heart, this is not a dispute about the CL-215T Aircraft but about Viking's liability to pay damages to Cascade as a result of the incomplete Integration Agreement. At their highest, those damages are significantly less than the value of the CL-215T property.

[233] In this case, damages for the tort of detinue will not suffice because the property in dispute does not consist of ordinary items of commerce. Rather the CL-215G is a specialized aircraft: see *P.S. Sidhu Trucking* at para. 131. Viking has a better right to the aircraft and its associated records and components.

[234] On the one hand, without a lawful right to do so, Cascade is retaining a valuable aircraft as leverage in its dispute with Viking, despite there being no evidence that there is a risk that Viking will be unable to pay the termination fee. On the other hand, Viking is strategically not terminating the Integration Agreement so as not to trigger the termination fee. The CL-215T Property is not at the heart of real issue here.

[235] I conclude that the balance of convenience in this case favours the return of the CL-215T Property to Viking. Viking has a strong *prima facie* case for the return of the CL-215T. Cascade has disclaimed its right to assert a general or a particular lien and has no contractual basis for retaining possession of the CL-215T Property.

Overall Conclusion

[236] For the foregoing reasons, I exercise my discretion to order a return of the CL-215T Property.

[237] I order Viking to post, as security for the return of the CL-215T Property, the sum of US$1,845,000 representing the value of Cascade's outstanding invoices.

Final Matters

[238] Both parties filed objections to the affidavits filed in support of their positions. They did not fully argue the objections before me.

[239] I have considered the objections and have concluded that it is not necessary for me to formally rule on them.

[240] I have not relied on any of the objected-to evidence with the exception of Mr. Côté's description of the seriousness of the fire risk facing Canada and other countries, and the need for the AUP to modernize the Waterbomber Aircraft's avionics system. In my view, the fire risk is something that I can take judicial notice of. In light of the terms of the Integration Agreement, it cannot seriously be in dispute that the AUP was a necessary step. As the overseer of the AUP, Mr. Côté is clearly able to describe AUP, the nature of avionics systems, and the reasons for the AUP.

[241] There is also nothing inappropriate with Mr. Côté summarizing the terms of the Integration Agreement, and what the AUP was intended to address.

[242] Finally, although Mr. Côté does not set out the basis for his information about the delivery of the CL-415 aircraft to Cascade, it is clear on the whole of the evidentiary record that it was delivered to Cascade and that it was legally owned by a third party.

[243] I have not considered the evidence about the parties' settlement discussions that were referred to in the affidavits of both Mr. Côté and Mr. Lemke. I accept that the parties have unsuccessfully tried to resolve their differences. The details of those discussions, what was said during them, and the positions taken in furtherance of them, are not appropriately before me.

[244] I agree with Viking's submission that it is not appropriate, and amounts to oath-helping, for Mr. Bains to say that he reviewed Mr. Lemke's October 17, 2023 affidavit and agreed with its contents. However, I take his statement to mean that he agreed with the facts set out in Mr. Lemke's affidavit.

[245] I have also not considered Mr. Lemke's statements in his second affidavit about his "beliefs" about the reasons for De Havilland's and Viking's actions. He does not set out the basis of his belief, and the paragraphs are speculative and in the nature of argument. They are not evidence that I have considered.

"MacNaughton J."