

**FEDERAL COURT**

BETWEEN:

**THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS**

Applicant

and

**SKYWARD AVIATION LTD., KELLY WESTERN SERVICES LTD. and  
DELOITTE & TOUCHE INC.**

Respondents

**AFFIDAVIT OF KAREN BADGEROW-CROTEAU  
(Sworn May 11, 2005)**

I, Karen Badgerow-Croteau, Managing Director of the Private Pension Plans Division of the Office of the Superintendent of Financial Institutions, of the City of Ottawa, in the Province of Ontario, SWEAR THAT:

1. I am Managing Director of the Private Pension Plans Division of the Office of the Superintendent of Financial Institutions ("OSFI") and as such have personal knowledge, unless otherwise indicated, of the matters addressed in this affidavit.
2. My responsibilities at OSFI include regulating the conduct of employers or plan sponsors and pension plan administrators in respect of pension plans registered under the *Pension Benefits Standards Act, 1985* ("PBSA") and ensuring that the minimum standards set out in the PBSA are met.

## Background

3. OSFI was created in 1987 pursuant to the *Office of the Superintendent of Financial Institutions Act* ("OSFI Act"). One of its responsibilities is the administration of the PBSA and the supervision of federally regulated private pension plans. Currently, OSFI regulates approximately 1200 private pension plans.
4. One of OSFI's objects in administering the PBSA is to supervise pension plans in order to determine whether they meet the minimum funding requirements and are complying with the other requirements of the Pension Benefits Standards Act, 1985 and its regulations and supervisory requirements under that legislation. In carrying out these objects under subsection 4(2.2), paragraph 4(3)(b) of the OSFI Act provides that OSFI shall strive to protect the rights and interests of members of pension plans, former members and any other persons who are entitled to pension benefits or refunds under pension plans. OSFI may order administrators to deliver various reports in order to allow OSFI to assess the viability of the Plans and may direct administrators to contribute to the Plans in order to assure that the Plans are financially viable and that there are sufficient funds available to meet the commitments under the Plans. In the event that OSFI feels that the administrator of a Plan is not complying with its obligations under the PBSA, OSFI may appoint a replacement administrator for the Plan.
5. Section 10 of the OSFI Act provides that a person who is an officer or employee of the Office may exercise any of the powers and perform any of the duties and functions of the Superintendent under the OSFI Act if the person is appointed to serve in the Office in a capacity appropriate to the

exercise of the power or performance of the duty or function. The Superintendent has determined that the Assistant Superintendent, Supervision Sector of OSFI serves in a capacity appropriate to the issuance of directions pursuant to section 11 of the PBSA.

### **Respondent's Pension Plan**

6. Skyward Aviation Ltd. ("Skyward") operates or operated an airline and as such, is a federal undertaking. The documents and reports filed on behalf of Skyward shows that, in respect of its employees, Skyward established a pension plan (the "Plan") in 2001. A copy of the 2001 Plan is attached as Exhibit "A" to this Affidavit. On May 31, 2001, OSFI registered the Plan under the PBSA and issued a Certificate of Registration. A copy of the Certificate is attached as Exhibit "B" to this Affidavit.
7. The Plan is a defined contribution pension plan and it was compulsory for the employees to join this Plan. The Plan provided for 3 categories of membership: Executives, Management employees and Other employees. Only the Executives were not required to make employee contributions to the Plan. The amount of required employee contributions varied with the category of membership and the years of service of the employee. Pursuant to section 7 of the PBSA and the provisions of the original Plan text, Skyward was the administrator of the Plan.
8. Under the terms of the Plan, Skyward was required to make monthly contributions to the Plan's fund for each of its employees. With the exception of the Executive category, Skyward was required to match the amount of the employees' required contributions. In respect of the Executive category, Skyward was required to remit 1% of the Executive's earnings.

9. Under the PBSA, Skyward is required to file with OSFI the plan documents, amendments to the Plan, every document (including agreements) that support the Plan or its fund and certain financial and actuarial information. The filed information includes the agreement with London Life Insurance Company (later known as Great-West/London Life) whereby London Life Insurance Company agreed that it would act as custodian of the Plan's pension fund. A copy of this Agreement is attached as Exhibit "C". Onyx Advice & Counsel Ltd. ("Onyx") was retained by Skyward to act as its pension consultant.
10. In 2002, OSFI was informed by Skyward and its representatives that the Plan was amended and restated effective April 1, 2002 in order to include Kelly Western Services Ltd. ("Kelly") as a participating employer. Effective January 1, 2003, the Plan was again amended and replaced. Pursuant to section 7 of the PBSA, the Plan provided that Kelly was also an administrator of the Plan. A copy of the 2003 amended Plan is attached as Exhibit "D" and a copy of the amendment is attached as Exhibit "E".
11. In February, 2005, Onyx forwarded to OSFI a copy of a letter from Skyward dated February 10, 2005 stating that due to "financial challenges" Skyward was instructing Onyx to immediately file an amendment to the Plan that would reduce the amount of contributions made to the pension fund. The amendment would read: "both employee and employer contributions are reduced to one percent (1%) effective February 16, 2005." A copy of this correspondence is attached as Exhibit "F".

**CCAA application and Interim Receivership**

12. On March 4, 2005, the Skyward Group of Companies, including Skyward and Kelly, filed for creditor protection under the *Companies Creditors' Arrangement Act* ("CCAA"). A copy of this Order is attached as Exhibit "G".
13. Gordon Mosher, Senior Supervisor in the Private Pension Plans Division at OSFI and the Supervisor to which the Plan's supervision has been charged, has informed me and I believe that OSFI was informed of the CCAA proceedings on or about March 31, 2005. Deloitte & Touche Inc. was named the Monitor. On the same date, OSFI was informed by Great-West Life/London Life, the fund custodian, that contributions had not been received in respect of January and February 2005. Attached as Exhibit "H" is the facsimile received from Great-West Life/London Life informing OSFI of the CCAA order.
14. Although section 10 of the PBSA requires the plan administrator to notify OSFI of the failure to remit contributions in respect of the plan in accordance with the Plan's requirements and the PBSA's requirements, I have been informed by Gordon Mosher that no notification was received from either Skyward or Kelly. In addition, I have been informed by Gordon Mosher that Deloitte & Touche Inc. also did not notify OSFI of the failure to remit the required contributions or of the CCAA filing.
15. On April 1, 2005, the Manitoba Court of Queen's Bench amended the CCAA Initial Order. The amendment lifted the stay in respect of regulatory action. Attached as Exhibit "I" is a copy of this order.

16. On April 1, 2005, Kelly's CCAA order was extended. However, the order was not extended in respect of Skyward. A copy of this order is attached as Exhibit "J". On the same day, an Interim Receiving Order was issued in respect of Skyward. Deloitte & Touche Inc. was named the Interim Receiver. A copy of the Receiving Order is attached as Exhibit "K".

### **Direction of Compliance**

17. I have been informed by Gordon Mosher and believe that several attempts were made to discuss Skyward's and Kelly's situation with Deloitte & Touche Inc., in particular, on March 31<sup>st</sup> and April 6<sup>th</sup>, but no discussion of the issue was forthcoming.
18. On April 4, 2005 Ron Youngson, Senior Consultant at Onyx sent an e-mail to Gordon Mosher informing him that the contributions due for January, February and March by Skyward were in the range of \$63,000 to \$64,000. A copy of this electronic mail is attached as Exhibit "L".
19. On April 6, 2005, pursuant to section 11 of the PBSA, a Temporary Direction was issued by the Assistant Superintendent, Supervision Sector of OSFI ordering Skyward and Kelly to cease their failure to comply with the PBSA, the Regulations and the terms of the Plan and, in order to rectify the situation, required Skyward and Kelly, as employers and administrators of the Plan, to immediately remit to the Plan the required employer and employee contributions and, as administrators, to ensure that such remittances were made. Pursuant to section 11, Skyward and Kelly had fifteen days to make written representations but in the meantime the Direction remained in effect. On that same day, a copy of the Temporary Direction was sent to legal counsel for Deloitte & Touche, legal counsel for Skyward and Kelly, Russ Holmes of Deloitte & Touche Inc. and

Brent Warga of Deloitte & Touche Inc. On the same day a facsimile of the Temporary Direction was sent to Rob Dewar, legal counsel for Deloitte & Touche Inc. The following day, facsimile copies were sent to the legal representatives of Skyward and Kelly. Attached as Exhibits "M", "N" and "O" are copies of the Temporary Direction, a copy of the electronic mail distributing the Temporary Direction and copies of the confirmation of the facsimile transmission respectively.

20. On April 7, 2005, a conference call was held between representatives of OSFI and Russ Holmes of Deloitte & Touche Inc. In attendance for OSFI were myself, Gordon Mosher and Carol Taraschuk (Legal Counsel).

During the call OSFI representatives described the background of this matter and the requirements of the PBSA and the Temporary Direction. OSFI representatives stated that both employee and employer contributions had not been remitted, that this amounted to approximately \$60,000 in respect of Skyward and that both Skyward and Kelly as administrators of the Plan bore responsibility to ensure compliance with the PBSA, its Regulations, the Temporary Direction and the terms of the Plan. Mr. Holmes did not deny that these contributions had not been remitted. He also confirmed that as of April 1, 2005, all employees of Skyward had been terminated.

21. On April 7, 2005, the fund custodian informed OSFI by electronic mail that Kelly made the required employer and employee contributions and payments for January and February 2005. Attached as Exhibit "P" is a copy of this electronic mail.
22. By letter dated April 11, 2005, Rob Dewar, legal counsel for Deloitte & Touche Inc., wrote to the Assistant Superintendent, Supervision Sector at

OSFI stating that the Receiving Order gave Deloitte & Touche Inc. the responsibility to realize upon Skyward's assets and distribute the assets in accordance with the law. It was also their position that the order did not permit Deloitte & Touche Inc. to remit required contributions to the Plan "at this time". Further, it was suggested that Deloitte & Touche Inc. proceed with the realization and notify OSFI upon the completion of the realization and the application of the distribution so that OSFI could speak to the matter at that time. Attached as Exhibit "Q" is a copy of this letter.

23. By letter dated April 14, 2005, OSFI's Legal Counsel wrote to Rob Dewar stating that it is OSFI's position that the payments can be made under the CCAA and Interim Receiving Orders and should have been made while Skyward was under CCAA. It also expressed OSFI's view that the directors, officers and agents of Skyward can be personally liable. Attached as Exhibit "R" is a copy of this letter.
24. OSFI's legal counsel received a letter from Rob Dewar on April 20, 2005. The letter stated that the Receiver could not unilaterally make the payments and would within 3 weeks make an application to court for advice and directions. Attached as Exhibit "S" is a copy of this letter.
25. OSFI does not have the payroll records of Skyward and therefore can only give an estimate of the amounts owed.
26. On April 21, 2005, in accordance with section 11 of the PBSA, a letter was sent from OSFI confirming the continuation of the Temporary Direction. Attached as Exhibit "T" is a copy of this letter.
27. By letter dated April 27, 2005, OSFI's Legal Counsel sent a letter to the last known directors and officers of Skyward, of Kelly, the Receiver and the companies' legal counsel informing them of OSFI's view that the directors,



officers and agents are personally liable. Attached as Exhibit "U" is a copy of this letter.

28. I have been informed by Gordon Mosher that on May 9, 2005, the Plan's custodian, Great-West/London Life, informed OSFI that Kelly remitted to the Plan's fund the required employer and employee contributions and payments due and owing in respect of March 2005.

**Funding Requirements**

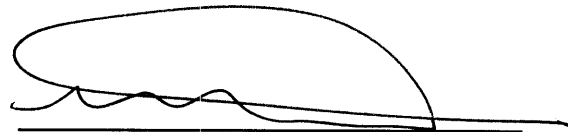
29. As of the date of this Affidavit, OSFI has not received confirmation from Skyward, the Interim Receiver or the custodian that Skyward has complied with the Direction.

30. I make this affidavit bona fide.

SWORN BEFORE ME at the City of )  
Ottawa, in the Province of Ontario )  
This 11<sup>th</sup> day of May, 2005. )



Commissioner for taking Affidavits



KAREN BADGEROW-CROTEAU