

Court File No.:

**FEDERAL COURT**

BETWEEN:

**THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS,**

Applicant

and

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

Respondents

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**NOTICE OF APPLICATION**

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TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following pages.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules, 1998* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules, 1998*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Issued

by: \_\_\_\_\_

(Registry Officer)  
Federal Court of Canada  
363 Broadway, Winnipeg, MB

TO: SKYWARD AVIATION LTD.  
P.O. Box 1207  
Thompson, MB R8N 1P1

AND TO: KELLY WESTERN SERVICES LTD.  
30 Hangar Line Rd.  
Winnipeg, MB R3J 3Y7

AND TO: DELOITTE & TOUCHE INC.  
c/o Hill Abra Dewar  
Litigation Counsel  
2670 – 360 Main Street  
Winnipeg, MB R3C 3Z3  
Robert A. Dewar  
Solicitor for Deloitte & Touche Inc.

## APPLICATION

### THE APPLICANT MAKES APPLICATION FOR:

1. An Order, pursuant to ss. 33.1 of the *Pension Benefits Standards Act, 1985* R.S.C. 1985, c. 32 **(2nd Supp.)**, as amended (the “PBSA”) directing that the

Respondents:

- a. submit to an accounting of all amounts deducted from the remuneration of the employees of Skyward Aviation Ltd. and Kelly Western Services Ltd. and all other amounts due to the pension fund that have not been remitted pursuant to the obligations set out in the PBSA (the “pension funds”);
  - b. forthwith remit to the pension fund all of the required contributions and payments that are due and owing in accordance with the aforementioned accounting, plus interest;
  - c. comply with the PBSA, its Regulations and the Direction of the Superintendent of Financial Institutions; and
  - d. advise OSFI of the current employment status of the employees of Skyward Aviation Ltd. and Kelly Western Services Ltd.
2. Costs; and
3. Such further and other relief as counsel may advise and this Honourable Court deems just.

**THE GROUNDS FOR THE APPLICATION ARE :**

1. The Superintendent of Financial Institutions is appointed pursuant to the *Office of the Superintendent of Financial Institutions Act*, and is entitled to make the claim for relief set out herein.
  
2. Skyward Aviation Ltd. (“Skyward”) is a corporation duly incorporated under and pursuant to the laws of Manitoba, with a registered office address of P.O. Box 1207, Thompson, Manitoba.
  
3. Kelly Western Services Ltd. (“Kelly”) is a corporation duly incorporated under and pursuant to the laws of Manitoba, with a registered office address of 30 Hangar Line Road, Winnipeg, Manitoba.
  
4. Deloitte & Touche Inc. is a corporation duly incorporated under and pursuant to the laws of Manitoba that has been appointed as the Interim Receiver in respect of Skyward and Monitor in respect of Kelly.
  
5. In or about 2001, Skyward established a pension plan for the benefit of their employees and/or servants (the “Plan”). In or about 2002, the Plan was amended to include Kelly as a participating employer. For the purposes of the Plan, Skyward was the agent of subsidiary and/or affiliated employers

participating in the Plan. In accordance with section 7 of the PBSA, the terms of the Plan provide that Skyward and Kelly are administrators of the Plan;

6. The Plan specified the terms of the required contributions and vesting periods for executives, management employees and other employees, and contributions that were to be remitted by Skyward and Kelly.

7. At all material times hereto, and pursuant to the Plan and the PBSA, Skyward and Kelly were required to remit the pension funds on a regular basis:

- a. The employees' contributions were deducted and required to be remitted on a monthly basis;
- b. Skyward's and Kelly's contributions, as employers, were to be remitted within 30 days after the end of the month for which contributions were payable; and
- c. Upon the termination of the Plan, Skyward and/or Kelly respectively would be required to pay all contributions and the outstanding costs of administering the Plan, including the costs of termination and windup.

8. On or about March 4, 2005 Skyward and Kelly filed for creditor protection pursuant to the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 (the "CCRA"). Protection was not extended to regulatory actions and Crown Priorities, and more particularly, in respect of the relief claimed in this Application

9. Deloitte & Touche was appointed as Monitor for both Skyward and Kelly. On April 1, 2005, the CCAA protection was extended for Kelly but a Receiving Order was issued for Skyward and Deloitte & Touche was named as Interim Receiver for Skyward. As such, Deloitte & Touche owes a duty to account for the contributions owed.

10. On or about April 6, 2005 the Superintendent issued a Direction requiring Skyward and Kelly to remit to the Plan's fund the amounts due and to continue to remit to the fund, in accordance with the PBSA, its regulations and the terms of the Plan. As an administrator of the Plan, Kelly is also responsible to ensure that all payments are required to be remitted to the Plan's fund, including any costs associated with the termination, in whole or in part, of the Plan.

11. With the exception of Kelly who remitted contributions in respect of January, February and March 2005, the Respondents have acknowledged their failure to remit the required contributions and payments, which includes both the employer contributions and amounts deducted from the employees' remuneration, to pension funds, but have in fact failed and/or refused, and continue to fail and/or refuse to remit the required contributions or payments to the pension funds that are due and owing pursuant to the PBSA, the Direction and the Plan for the months of January, February and March 2005.

12. Sections 7, 8, 9, 11, 29, and 33.1 of the PBSA;
13. Rules 3, 128, 130 and 424 of the Federal Courts Rules, 1998; and
14. Such further and other grounds as the Applicant may advise, and this Honourable Court permits.

**THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the application:**

1. The affidavit of Karen Badgerow-Croteau, to be filed;
2. Such further and other documents as the Applicant may advise and this Honourable Court admits.

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DATE

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John H. Sims, Q.C.  
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