**Date: 20080307**

**Docket: T-301-02**

**Citation: 2008 FC 325**

**Ottawa, Ontario, March 7, 2008**

**PRESENT: The Honourable Madam Justice Snider**

**BETWEEN:**

**SKYWARD AVIATION LTD.**

**Applicant**

**and**

**MINISTER OF TRANSPORT**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

## I. Background

[1] The Applicant, Skyward Aviation Ltd. (Skyward), operated as a commercial air carrier providing scheduled and charter air services in Manitoba and Nunavut. Skyward, like all those operating an air transport service, was required to hold and comply with the provisions of its Air Operator Certificate (AOC). In the summer of 2000, the Minister of Transport (the Minister) conducted an audit of Skyward's operations and found a number of alleged deficiencies. As a result, on September 20, 2000, the Minister served Skyward with a Notice of Suspension (Notice)

indicating the Minister had decided to suspend Skyward's AOC. The Notice listed a number of conditions for reinstatement and indicated that the effective date of the suspension was October 25, 2000.

[2] Although Skyward disagreed with the grounds provided in the Notice, it chose to comply with the conditions for reinstatement, rather than lose its AOC and, consequently, its ability to operate its business. As a result, the Minister rescinded the Notice on October 23, 2000, before it was to come into effect.

[3] Skyward continued to object to the conditions imposed by the Minister and requested that the Civil Aviation Tribunal (Tribunal) review the action of the Minister. In other words, Skyward sought a review of the alleged deficiencies found by the Minister that formed the basis of the Notice. In a decision dated January 18, 2002, the Tribunal determined that it did not have jurisdiction to review the grounds for suspension since the Notice had been rescinded prior to its coming into force. Skyward now seeks judicial review of the Tribunal's decision.

## II. Issues

[4] The issue raised by this judicial review is straightforward: did the Tribunal err in concluding that it had no jurisdiction to conduct a review of the Notice of Suspension?

[5] As a preliminary matter, the Minister contends that Skyward's application for judicial review is moot.

[6] For the reasons that are set out herein, I conclude that: (a) the application is not moot; and (b) the application should succeed.

## III. Statutory Framework

[7] In addressing the merits of this application, it is helpful to canvass the statutory scheme relating to the Tribunal, as it existed at the time of the Notice and subsequent review by the Tribunal. I begin with the restriction set out in s. 57 of the *Canada Transportation Act*, S.C. 1996, c. 10, that no person may operate an air service unless that person holds a "Canadian aviation document". A "Canadian aviation document" is defined in s. 3(1) of the *Aeronautics Act*, R.S.C. 1985, c. A-2 as am. by R.S.C. 1985, c. 33 (1st Supp.), s. 1; S.C. 1992, c. 1, 4 (the Act) as "any licence, permit, accreditation, certificate or other document issued by the Minister".

[8] Specifically with respect to an air transport service, s. 700.02(1) of the *Canadian Aviation Regulations*, S.O.R./96-433, provides that "no person shall operate an air transport service unless the person holds and complies with the provisions of an air operator certificate that authorizes the person to operate that service". An AOC may be issued subject to certain conditions.

[9] Where the Minister decides to suspend or cancel a Canadian aviation document on the ground that an operator "ceases . . . to meet or comply with the conditions subject to which the [Canadian aviation document] was issued", he must notify the operator (Act, s. 7.1(b)). The notice requirement is met by the service of a Notice of Suspension that complies with the regulations and other requirements set out in s. 7.1(2). Of specific relevance to this case, the Notice must indicate

"the conditions subject to which the document was issued that the Minister believes are no longer being met or complied with" (Act, s. 7.1(2)(a)(ii)). Further, the Notice must state the date, "being thirty days after the notice is served or sent" before which a request for a review of the decision of the Minister is to be filed.

[10] The rights of an operator who wishes to have the decision of the Minister reviewed by the Tribunal and the review procedures to be followed are set out in s. 7.1(3) to (9) of the Act. The subsections of s. 7.1 most relevant to this Application are as follows:

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| 7.1 (3) Where the holder of a Canadian aviation document or the owner or operator of any aircraft, airport or other facility in respect of which a Canadian aviation document is issued who is affected by a decision of the Minister referred to in subsection (1) wishes to have the decision reviewed, he shall, on or before the date that is thirty days after the notice is served on or sent to him under that subsection or within such further time as the Tribunal, on application by the holder, owner or operator, may allow, in writing file with the Tribunal at the address set out in the notice a request for a review of the decision. | 7.1 (3) L'intéressé qui désire faire réviser la décision du ministre dépose une requête à cet effet auprès du Tribunal à l'adresse et pour la date limite indiquées dans l'avis, ou dans le délai supérieur éventuellement accordé à sa demande par le Tribunal. |
| (8) On a review under this section of a decision of the Minister to suspend, cancel or refuse to renew a Canadian aviation document, the member of the Tribunal conducting the review may | (8) Le conseiller peut confirmer la mesure ou renvoyer le dossier au ministre pour réexamen. |
| | (9) En cas de renvoi du dossier au ministre, la mesure cesse d'avoir effet, sauf décision contraire du ministre, après réexamen; celui-ci est tenu, si le document d'aviation canadien visé est expiré, de le renouveler dès que possible après le renvoi, sauf décision contraire de sa part. |

determine the matter by confirming the suspension, cancellation or refusal to renew or by referring the matter back to the Minister for reconsideration.

(9) Where a matter of suspension or cancellation of or refusal to renew a Canadian aviation document is referred back to the Minister for reconsideration under subsection (8),

(a) the suspension or cancellation shall cease to be of any force or effect until the Minister decides otherwise as a consequence of the reconsideration; or

(b) the Minister shall, as soon as practicable after the referral of the matter back to the Minister if the document concerned has expired, renew the document that he had refused to renew unless the Minister decides not to renew the document as a consequence of the reconsideration

## IV. Issue #1: Should the application be dismissed for mootness?

[11] A number of other events have transpired since Skyward's application for judicial review was filed. Since these facts are relevant to the issue of mootness, I summarize them briefly in the following paragraphs. Of particular significance are the following:

- In January and February 2005 Skyward was served with two Notices of Suspension pursuant to the *Aeronautics Act*, R.S.C. 1985, c. A-2 (the Current Act); Skyward is in the process of seeking a review of those Notices by the Transportation Appeal Tribunal of Canada (TATC), the successor to the Tribunal.

- In April 2005 Skyward was placed into receivership and many of its assets, including its aircraft, were sold;

- On July 6, 2005, Skyward's Air Operator Certificate was cancelled on the basis that it no longer operated a commercial air service;

- On June 2, 2006, Skyward was discharged from receivership; and

- On May 19, 2006, Skyward's name was changed to 2060582 Manitoba Ltd. (for ease of use, I will continue to refer to the corporation as Skyward).

[12] The parties are in agreement that the test for mootness is that set out by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. Briefly stated, to find an issue to be moot, the Court must first determine whether there is a live controversy. Secondly, even where the issue may not be live, the Court should consider whether it should exercise its discretion and hear the case in any event.

[13] I turn to the first part of the test. Is there a live controversy in the case at bar? The Minister submits that there is not, and argues that any decision of the Court with respect to Skyward's judicial review can no longer have a practical effect on the parties. In particular, the Minister points out that Skyward has no aircraft and no longer operates as an air carrier. Notwithstanding the Minister's submissions, I am satisfied that there is a live controversy in the case at bar.

[14] First, I find that the Minister's characterization of Skyward as "no longer operat[ing] as an air carrier" to be somewhat of a simplification. While it is clear from a review of the record that Skyward went into receivership and no longer maintains an AOC, it is equally clear that Skyward is a subsisting corporation (under a different name) and still in existence as of January 2008. Accordingly, Skyward maintains some status for which it may pursue its application for judicial review.

[15] Second, I agree with Skyward's assertions that there continues to be a live issue between the parties with respect to Skyward's application for judicial review. Skyward has always maintained that the Minister erred in issuing the Notice. Although subsequent events have led Skyward to believe that the Notice forms part of a pattern of misbehaviour, those events have not changed

Skyward's original position that the alleged deficiencies in its operations as outlined in the Notice were wrong. The Minister, for its part, states that even if Skyward were successful on its application "on a…referral back to…the Transportation Appeal Tribunal of Canada…no decision could have any meaningful impact on the airline".

[16] I disagree. Upon the coming into force of the *Transportation Appeal Tribunal of Canada Act*, 2001, c. 29 (TATC Act), the Tribunal was succeeded by the Transportation Appeal Tribunal of Canada (TATC). Section 32(1) of the TATC Act gives the TATC, as the successor to the Tribunal, the jurisdiction to continue proceedings begun under the Tribunal. Assuming this Court finds that the Tribunal erred in ruling that it did not have jurisdiction, it is plausible that the TATC would find that the Minister erred in issuing the Notice and refer the matter back to the Minister for reconsideration pursuant to s. 7(8)-(9) of the Act. Should such a series of events transpire, it would not only vindicate Skyward's original assertion of no-wrongdoing but assist Skyward in pursuing a civil remedy against the Minister. Indeed, for Skyward to seek any civil remedy against the Minister for mistreatment based on the Notice, it is arguable that it is required to seek judicial review first (*Canada v. Grenier*, 2005 FCA 348).

[17] In sum, I am satisfied that the issue before the Court is not moot and that the Court should proceed to consider the merits of Skyward's application for judicial review.

## V. Issue #2: Did the Tribunal err in concluding that it had no jurisdiction?

[18] Skyward submits that the Tribunal erred in its determination that it had no jurisdiction to review the Notice. Before this Court, the Minister takes no position on this issue. However, before the Tribunal, the Minister's final position was in support of the Tribunal having jurisdiction. In spite of submissions advocating jurisdiction by both parties before the Tribunal, the Tribunal took a contrary view of the relevant provisions of the Act. The basis of its decision was that s. 7.1 of the Act did not apply to give a right of review where the Notice had been rescinded.

### A. *Standard of Review*

[19] The parties are in agreement that the question of whether or not the Tribunal erred in finding it did not have jurisdiction to review the Notice is a question of pure law or statutory interpretation which is subject to the correctness standard of review (see *Canada (Attorney General) v. Woods*, 2002 FCT 928 at para. 10; *Air Nunavut Ltd. v. Canada (Minister of Transport)*, [2001] 1 F.C. 138 at para. 31 (T.D.)).

[20] This judicial review application turns on the meaning of s. 7.1 of the Act. I agree with the parties that this question should be reviewed on a standard of correctness.

B. *Analysis*

[21] The proper approach to statutory interpretation was set out by the Supreme Court in *Re Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27 at 40 and 41 :

> Although much has been written about the interpretation of legislation ..., Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[22] Guided by this framework, my task cannot be limited to attempting to interpret the individual words or phrases used in the relevant provision; rather, I must have regard to the context in which the words are placed, the object of the Act and the intention of Parliament.

[23] These particular provisions have not been the subject of any jurisprudence.

(1) <u>The Entire Context</u>

[24] One of the key arguments of Skyward is that the restrictive interpretation of the Tribunal's jurisdiction results in a situation where it is never able to review the decision of the Minister that Skyward had failed to comply with its AOC conditions. This argument relates to the "entire context" in which the legislative provisions must be examined. Integral to this analysis is the nature of the decision by the Minister. A review of the reasons provided by the Tribunal demonstrates that

the Tribunal considered that there was only one decision – the decision to suspend. However, when exercising its authority under the Act, the Minister's decision to suspend is, in fact, more complex. The first decision made by the Minister was the determination that Skyward's operations did not comply with its AOC. The second decision was that the penalty or sanction to be imposed was suspension of Skyward's AOC. In addition, the Minister determined that Skyward's suspension would not immediately come into force.

[25] The importance of the nature of this multi-part decision can be seen when a holder of an AOC receives a Notice. In this situation, the Minister will have determined that an operator has breached one or more conditions of its AOC and that the sanction to be imposed is a suspension. On the basis of this two-pronged decision, the operator will lose its AOC unless it: (a) rectifies the alleged breach(es) to the satisfaction of the Minister, prior to the time when the suspension is to come into effect; or, (b) successfully applies to the Tribunal for a review of the Notice.

[26] It is obvious that a review of the Notice would entail a full review of the reasonableness of all of the Minister's findings. The Tribunal's jurisdiction would be exercised on two fronts, by reviewing and determining whether the alleged contravention of the AOC took place and by reviewing the appropriateness of the sanction (suspension) imposed by the Minister. However, in the case before me, it was not possible for the Tribunal's review to be completed in the time period before the suspension was to come into effect. The Tribunal could not have been expected to complete a review of the decision given the short time frames involved in the suspension and under the Act.

[27] Given the possible delay involved, waiting for a review to be completed is simply not an option for most operators; if the review cannot be heard prior to the 30 day time limit set out in the Notice, the suspension will take effect and the operator will lose his or her AOC and be unable to continue to operate. Thus, an operator in receipt of a Notice will almost certainly comply with the conditions for reinstatement set out in the Notice, regardless of whether the Minister's findings have any merit or whether the Minister acted in good faith and on the basis of all the information before it. On the specific facts of this case, Skyward was, for all practical purposes, forced to comply with the Minister's wishes. Nevertheless, it consistently expressed its disagreement with the merits of the underlying conditions for reinstatement.

[28] The matter does not end with the rescission of the Notice. The operator must continue to operate in accordance with the Minister's findings or risk the issuance of another Notice. With no opportunity for review of the Minister's decisions by the Tribunal, the operator is forced into compliance, regardless of the merits and regardless of whether the deficiencies are supportable on the evidence in the first place. As a result of this unusual characteristic of the decision-making process, an operator is seriously affected, on an on-going basis, by the underlying non-compliance determination. The alleged deficiencies are much more than reasons in the usual sense.

[29] Thus, without access to the Tribunal, the operator is at the mercy of the Minister. This is the interpretation given to s. 7 of the Act by the Tribunal. Is this interpretation consistent with the principle of statutory interpretation that the words of an Act are to be read in their entire context? I do not find that it is. In my view, the Tribunal erred by failing to have regard to the entire context.

(2) The Grammatical and Ordinary Sense

[30] Through the prism of the context described above, I turn to the words of s. 7.1 of the Act. Do the words of s. 7.1 remove the right to a review where a previously issued Notice has been rescinded?

[31] The most important provision to my analysis is s. 7.1(3); this is the provision that gives the operator access to a review by the Tribunal. What is the meaning of the phrase "Where the holder of a Canadian aviation document …who is affected by a decision of the Minister referred to in subsection (1) wishes to have the decision reviewed…" in s. 7.1(3) of the Act? On the one hand, if Skyward is affected by a decision of the Minister referred to in subsection 7.1(1) of the Act it has a right of review pursuant to s. 7.1(3) of the Act. On the other hand, if it is shown that Skyward is not affected or the decision by which Skyward is affected does not fall into the definition of a decision as per s. 7.1(1) of the Act, then Skyward has no right of review.

[32] In its reasons, it is apparent that the Tribunal interpreted the terms "affected" and "decision . . . referred to in subsection (1)" very narrowly. The tribunal saw the term "decision" as limited to the suspension. In the Tribunal's view, once the decision to suspend was "withdrawn", there was no longer a "decision within the meaning of subsection (1)" and, thus, Skyward was no longer "affected" by a decision. While I acknowledge that the words of s. 7.1(3), in isolation, may bear such a narrow interpretation, I do not agree that this reflects the correct interpretation of s. 7.1(3).

[33] Subsection 7.1(1) of the Act is triggered where "the Minister decides…to suspend…a Canadian aviation document". Once the decision is made, a Notice must be served on the Operator. In the case before this Court, the Minister made such a decision to suspend the AOC. The rescinding of the Notice does not change the fact that a decision to suspend was made. The only question is whether the "decision" disappears because Skyward chose to meet the demands of the Minister to ensure its continued operation. In my view, it does not. So long as the Minister continues to hold that Skyward was in breach of its AOC conditions and requires Skyward to comply with its demands, the decision to suspend exists. Only the implementation of the Notice is suspended.

[34] As discussed above, Skyward continues to be affected by the Minister's actions and decision to issue the Notice. The Minister has never acknowledged that the underlying reinstatement conditions were unnecessary and Skyward has never agreed that it violated the terms of its AOC. In other words, Skyward continued to be affected by the "decision . . . referred to in subsection (1)" long after the Minister rescinded the notice of suspension.

[35] Further support for a broader interpretation of s. 7(3) is seen in the very general words used in the French language version of the provision. In the French version of s. 7(3), a review is triggered upon the filing of a request for a review by "L'intéresse qui désire faire réviser la decision du minister…". Loosely translated, any party interested in the matter may ask for a review of the decision. I can see no words that would remove the right of "l'intéresse" to a review where the Minister rescinds the Notice.

[36] In short, s. 7.1(3) does not state that a decision has to come into force, only that the decision affect the operator. In this case, it is evident that an operator who is required to comply with the conditions for reinstatement that were set out in the Notice continues to be affected by the decision to suspend.

[37] A further review of the balance of the subsections of s. 7 and other related provisions, does not, in my view, limit the accessibility to a review.

(3) Object of the Act and Intention of Parliament

[38] The overall object of the Act is air safety. How does the Tribunal fit into that overall objective?

[39] As pointed out by Justice Noël, in the case of *Civil Aviation Tribunal (Re)*, [1995] 1 F.C. 43 at 53-54 (T.D.) (the *CAT Reference*), the Tribunal was established on June 1, 1986, as a quasi-judicial tribunal, pursuant to Part IV of the Act. Its creation gave effect to one of the recommendations embodied in the Dubin report on aviation safety:

> An effective enforcement process must give due regard to the rights of those against whom administrative action is taken. At present, there is no effective recourse for those against whom administration action is taken and who desire to challenge the propriety of the sanction. It is essential, therefore, to make provision for the right of an appeal from all administrative penalties. In order to fully protect the rights of those affected by disciplinary action, the creation of a Civil Aviation Appeal Tribunal is required. (Report of the Commission of Inquiry on Aviation Safety, the Honourable Mr. Justice Charles L. Dubin, October, 1981, vol. 2, at 498). [Emphasis added.]

[40] At the time when the Tribunal was created, major amendments were brought to the Act in order to clearly define the powers of enforcement conferred upon the Minister and to provide a right to an independent review with respect to administrative penalties imposed by the Minister in conjunction with alleged violations of the Act.

[41] As evidenced by a review of the Commons Debates that took place at that time, the new Tribunal was to provide an important balancing function in the overall regulatory scheme. See, for example, the comments of the Honourable Don Mazankowski, Minister of Transport, during the Commons Debates on the proposed amendments to the Act set out in Bill C-36.

> The proposals for more vigorous enforcement, however, will be balanced by a method of review of administrative enforcement decisions. The establishment of an independent civil aviation tribunal, as recommended by Mr. Justice Dubin, will provide a vehicle for such a review.
>
> . . .
>
> The aim of the tribunal is to provide a system whereby these matters can be decided in an expeditious and informal manner by persons who have a technical knowledge of all factors involved. (*House of Commons Debates*, 3 (April 15, 1985) at 3729 (Hon. Don Mazankowski)).

[42] Although the *CAT Reference* is distinguishable on its facts, the case contains some useful statements of principle. The Court in the *CAT Reference* was considering two questions referred by the Tribunal. The first of those questions was whether the Minister was entitled to determine that the holder of a Canadian aviation document had violated or contravened a regulation or order enacted pursuant to Part I of the Act without suspending or cancelling the relevant Canadian aviation

document or imposing a monetary penalty. In answering this question in the negative, the Court commented on the scheme of the Act as follows:

> In my view, therefore, the Minister is not empowered to decide that a violation has taken place and to register this violation as having been committed in a document holder's enforcement record without resorting to the prescribed procedure set forth in the Act. The scheme of the Act is such that the commission of an infraction can only be considered to have been established for purposes of the Act after the interested party has been afforded a right to an independent review (*CAT Reference*, above at 66-67). [Emphasis added.]

[43] The principle that is stressed in the *CAT Reference* is the right of an operator to an independent review of decisions of the Minister. This principle is also highlighted in the Parliamentary Debates that took place at the time of the legislative amendments that brought the Tribunal into existence. Consistent with the purposes for which the Tribunal was established, that right should be available where decisions of the Minister have continuing effect on an operator. This right to a review "by persons who have a technical knowledge of all factors involved", should not be extinguished by an overly restrictive interpretation of the enabling legislation.

[44] Applying this principle to the facts of this case, I note that Skyward's alleged infractions were found by the Minister to have been established for the purposes of issuing a Notice of Suspension. That is, the alleged breaches of the AOC were "established for purposes of the Act". Even though the actual decision to suspend was withdrawn by the Minister, the alleged breaches continued to exist and impact the operations of Skyward. In these circumstances, allowing Skyward the right of an independent Tribunal review of the alleged breaches is consistent with the principles set out in the *CAT Reference* and with the intention of Parliament. The power of the Minister to impose conditions in the interests of air safety is balanced by the right of Skyward to have the

conditions reviewed by the Tribunal. Indeed, given the particular circumstances surrounding the rescinding of the Notice, I believe that it would be contrary to the intention of the legislation to remove the right of review for the underlying decision of the Minister.

## VI. Conclusion

[45] In sum, I conclude that the correct interpretation of s. 7.1 of the Act incorporates the following elements:

- The Minister's decision includes all aspects of the Minister's determination that led to the issuance of the Notice of Suspension and is not limited simply to the Notice itself.

- As an operator who was served with the Notice and who decided to comply with re-instatement conditions with which it did not agree rather than losing its AOC, Skyward continued to be affected by the decision in spite of the rescission of the suspension.

- The Tribunal may conduct a review of the re-instatement conditions to assess whether, on the evidence before it, the Notice should be confirmed, even though it has been rescinded. That is, the Tribunal may determine that the Minister did not err in its decision that Skyward was in breach of the terms of its AOC.

- If the Tribunal determines that any or all of the re-instatement conditions cannot be sustained on the evidence before it, the matter can be sent back to the Minister for

> reconsideration. While the Minister would not be determining whether a Notice of Suspension should issue, he would be reconsidering whether Skyward was in breach of the conditions of its AOC at the time the Notice was issued. This is not just an academic exercise; any reconsideration would have the potential for clearing Skyward's record.

[46] Reading the words of s. 7.1 in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament leads to the conclusion that the Tribunal erred in its interpretation of s. 7.1 of the Act.

[47] The application for judicial review will be allowed and the matter sent back to the Tribunal for reconsideration, on the basis that it has jurisdiction to review the Notice.

[48] Skyward asked that it be allowed to make submissions on costs after the decision of this Court is issued. Accordingly, Skyward will have until March 30, 2008, to file submissions on costs, such submissions not to exceed three double-spaced pages. The Minister will have a further 15 days to file reply submissions.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that**

1. The application for judicial review is allowed and the decision of the Civil Aviation Tribunal is quashed;

2. The matter is referred back to the Transportation Appeal Tribunal of Canada, as successor to the Canadian Aviation Tribunal, to be determined in accordance with these reasons for judgment; and

3. Skyward will have until March 28, 2008, to make submissions as to costs, such submissions not to exceed four double-spaced pages and the Minister will have a further 15 days to file reply submissions, not to exceed four double-spaced pages.

"Judith A. Snider"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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