

**IN THE MATTER OF THE *PRIVATE TRAINING ACT*, [S.B.C. 2015], C. 5
AND IN THE MATTER OF
an appeal to the Commissioner by Blue Bird Flight Academy Inc.**

BETWEEN:

Blue Bird Flight Academy Inc.

APPELLANT

AND:

The Registrar, Private Training Institutions Branch

RESPONDENT

Counsel for the Appellant:

John Boon

For the Respondent:

Monica Lust

1. Blue Bird Flight Academy Inc (hereinafter referred to as "BBFA") appeals to me, the Commissioner appointed by Order in Council under the Private Training Act, [S.B.C. 2015], c. 5 (hereinafter referred to as the "PTA"). The appeal is from the reconsideration of the suspension and certificate cancellation ordered by the Registrar and is pursuant to s. 50 of the PTA.
2. The PTA governs the many and various schools in the Province of British Columbia that offer post school training for trades and language skills. BBFA was certified under the PTA to offer flight school training at various levels. The PTA is administered by the Private Training Institutions Branch (the "PTIB"). The certification had an expiry date of March 31, 2018 and thus BBFA was obliged to renew it in accordance with the PTA and PTA Regulations (the "PTR").
3. On October 6, 2017, PTIB provided BBFA with detailed information regarding the recertification process, including deadlines for providing its student data report which was December 31, 2017 and financial statements which was January 31, 2018. These are reporting requirements under the PTR and all institutions certified under the PTA and PTR are required to comply.
4. On December 18, 2017, the PTIB sent a reminder to the Institution and reiterated the applicable deadlines for the student data report and financial statements.
5. On December 27, 2017, a member of the PTIB spoke to person(s) at BBFA and followed up with an email reminding BBFA of the December 31, 2017 deadline. On December

- 29, 2017, PTIB staff left a voicemail and emailed BBFA with a reminder of the December 31, 2017 deadline.
6. On January 19, 2018, another voicemail message and email was sent reminding BBFA of the January 31, 2018 deadline to provide its financial statements. Attached to the email was a document outlining the financial reporting requirements. The email reminded BBFA that the Registrar may issue a compliance order or administrative penalty, suspend or cancel the certificate of an institution that fails to meet the requirements of the PTA and associated regulations.
 7. On January 29, 2018, staff at PTIB left a voicemail message and an email to remind the institution about the January 31, 2018 deadline to provide its financial statements.
 8. On February 2, 2018, PTIB staff emailed BBFA a Final Notice advising that the financial statements had not been received and giving BBFA until February 13, 2018 to provide them, failing which, the Registrar would issue a Compliance Order.
 9. On February 16, 2018, not having then received the statements, the Registrar issued a Compliance Order, citing a contravention of s. 51 of the PTR and ordered BBFA to provide financial statements meeting the requirements set out in s.51 and s.52 of the PTR no later than February 23, 2018. The Compliance Order provided that should BBFA fail to comply, further action may be taken, including suspension or cancellation of BBFA's certificate. As of the date of the suspension, BBFA had not provided its financial statements.
 10. On February 20, 2018, PTIB staff emailed BBFA to advise that the student data report had not been received. BBFA was given until February 23, 2018, to upload the student data report through the PTIB portal. As of the date of the suspension, BBFA had not provided the student data report.
 11. On February 22, 2018, PTIB staff emailed BBFA an important notice advising that BBFA's pre-authorized debit (PAD) withdrawal in the amount of \$562.29 had been returned by BBFA's financial institution due to insufficient funds. PTIB staff advised that failure to pay the amount due by March 1, 2018 would result in a Compliance Order.
 12. On February 28, 2018, BBFA was sent another reminder of the March 1 deadline to pay the outstanding amount.
 13. On March 7, 2018, the Registrar issued a Compliance Order for failure to provide \$562.29 in payment of fees and payments due to the Student Tuition Protection Fund in contravention of s. 46(2)(b) of the Fees and Student Tuition Protection Fund Regulation ("Fees Regulation"). BBFA was ordered to make the payment no later than March 14, 2018, or face further enforcement action by the Registrar. As of the date of the Suspension decision, BBFA had not made the payment.
 14. Also on March 7, 2018, PTIB staff emailed BBFA a letter regarding five student complaints relating to tuition refunds. The letter said "it appears" that BBFA had enrolled students that did not meet admission requirements in its Commercial Pilot License program, namely a Transport Canada Private Pilot License, contrary to s. 31(1) of the PTR. PTIB staff provided BBFA with an opportunity to respond prior to the Registrar making a determination on whether BBFA was in contravention. As of the date of the Suspension Decision, BBFA had not provided any response or information related to tuition refunds.

15. On March 16, 2018, PTIB staff emailed BBFA a Final Notice listing four requirements that BBFA was obliged to meet by March 23, 2016, failing which, the Registrar would move to suspension. The four requirements were:
 1. Provide student data reports
 2. Provide financial statements meeting the requirements set out in s. 51 and 52 of the PTR
 3. Provide \$562.29 in payment of fees and payments due to the Student Tuition Protection Fund and
 4. Provide written evidence that each of the five students were refunded \$5,000.
16. BBFA was given an opportunity to respond, but failed to do so. As of the date of the Suspension Decision, BBFA had failed to meet the above listed requirements.
17. On March 26, 2018, the Registrar sent BBFA her decision to suspend its designated certificate and, again, stated the four outstanding requirements. That notice gave BBFA until April 3, 2018 to remedy its non-compliance in order for the suspension to be lifted. It also warned that non-compliance could result in certificate cancellation. Finally, the notice indicated that a request for reconsideration could be made. BBFA never replied in writing to any of the correspondence from the Registrar until April 4, 2018 when it made the request for reconsideration of the suspension.
18. On April 4, 2018, BBFA submitted a request for reconsideration of the decision to suspend its certificate and remedied two of the four outstanding requirements.
19. On April 20, 2018, the Registrar sent to BBFA a notice that two conditions were still not met (no financial statements and no student refunds). BBFA was given to April 23, 2018 to comply otherwise cancellation would ensue.
20. On April 27, 2018, having received no compliance with the two outstanding issues, the Registrar issued an immediate cancellation of BBFA's certification via letter (couriered and emailed).
21. On May 9, 2018, BBFA filed its submission on the reconsideration application. In that submission it said that financial statements "are now filed" (see para.28.2). I note that in its Appeal Submission, BBFA says they were filed May 18, 2018. The submission references both the request for reconsideration of the suspension and the appeal from the cancellation order.
22. On May 18, 2018 the Registrar issued her decision on reconsideration, denying same. She also noted that "to date ... PTIB has not received the financial statements".
23. Based upon BBFA's Appeal Submission, it is likely that the financial statements were sent to PTIB on May 18, on the day of the Reconsideration Decision. PTIB seems to concede the statements were received but stresses it was after the cancellation decision (para. 4.8).
24. BBFA submitted its appeal to me on May 25, 2018. The Registrar responded on June 7, 2018 and BBFA replied to this on June 11, 2018.

ISSUES ON APPEAL AND AN ANALYSIS OF THOSE ISSUES

25. Did PTIB give proper notice to BBFA of its non-compliance and of its need to comply (and a corollary issue as to whether the Registrar used "progressive enforcement" prior to suspension and cancellation)?
26. BBFA complains, among other things, that it did not receive "many" of the emails and correspondence sent by the PTIB to it, in particular it did not receive the suspension letter. It also says that PTIB should have taken more serious steps to bring non-compliance to its attention by telephoning representatives of BBFA and/or arranging for an in-person meeting. The Registrar's response pointed out that s. 62(2)(a) and (b) of the Act allows for mailed correspondence and emailed correspondence (with a deemed date of receipt for each).
27. BBFA concedes that it had multiple conversations with PTIB staff during January and February 2018 and at no point did it raise any concerns about PTIB's method of communication or indicate that it was not receiving email communications (see Reconsideration Submission, para. 4.7). It also appears from BBFA's submission that it "was trying its best to comply" with PTIB demands, and that it was aware of the deficiency requirements (para. 12.14).
28. Notwithstanding, BBFA down-plays the significance of the issue by saying (para 3.4): "We see no need to spend valuable time considering what was not received". Rather, it submits that it is the nature of the alleged compliance shortfalls that are in issue. Then, in the Appeal Submission it revives the argument and says that "A phone call or personal meeting would have been more appropriate" (section 18).
29. I have concluded that PTIB at all times conducted its communications with BBFA in accordance with the Act. I find that BBFA well knew what was required and there was no obligation nor need for PTIB to give further warnings by telephone or by a personal meeting, particularly when BBFA had not responded to the various demands for compliance.

DID PTIB PROVIDE PROGRESSIVE ENFORCEMENT?

30. The issue is whether the PTIB employed principles of administrative fairness prior to the suspension and cancellation by providing clear notice of the contraventions, what was required by way of remedial action, and the potential consequences of not meeting the requirements.
31. BBFA submits that the Registrar's actions were not progressive and the Registrar should have, as an exercise of discretion, taken interim measures rather than the "enterprise killing" step of suspension and cancellation, and that extreme penalties are only justified if there are no other options.
32. The Registrar submits that it was clear in each successive communication that if the issues were not adequately addressed, the consequences would become increasingly more severe.
33. I have set out the history of the communications directed to BBFA by PTIB which is replete with warnings and indeed with many extensions to encourage compliance. I conclude that there has been no administrative unfairness in the approach taken by the Registrar and PTIB.

WHAT ARE THE ISSUES OF NON-COMPLIANCE AND HOW THE REGISTRAR DEALT WITH THEM IN THE SUSPENSION DECISION (MARCH 26), THE CANCELLATION DECISION (APRIL 27), AND THE RECONSIDERATION DECISION (MAY 18), AND WHAT IS IN ISSUE IN THE APPEAL TO ME?

34. The suspension decision listed four areas of non-compliance and what the Registrar decided on each of them. The four areas are:
- (a) Student data
 - (b) Payment of \$562.29 to the Student Tuition Protection Fund (paid February 18 but returned NSF)
 - (c) Financial statements
 - (d) Tuition refunds
35. The student data and the NSF cheque had been corrected post suspension but prior to the reconsideration and prior to the cancellation decision (they were corrected prior to April 20, 2018). Therefore, those two grounds were not relied on by the Registrar in the cancellation decision. However, BBFA refers to all four issues in the appeal to me which is expressed to be from both the reconsideration decision and the cancellation decision. I note as well that the Registrar also refers to all four areas, to show the correctness of the suspension reconsideration, and cancellation decisions. The Registrar acknowledges that only the financial statement and the tuition refund issues were used as the evidence of non-compliance in the cancellation decision. In her reasons upholding the suspension, the Registrar said that the fact that the student data and NSF cheque issues were remedied after the suspension is not relevant to the reconsideration. I note that pursuant to s. 47 of the Act, the Registrar has the power only to reconsider a suspension. There is no jurisdiction to reconsider a cancellation decision.
36. For the purposes of this appeal, I find that the four original issues relied upon by the Registrar are involved in the appeal of the reconsideration decision but only the financial statements and tuition refunds issues are involved in the cancellation decision.

THE SUSPENSION AND RECONSIDERATION DECISIONS – THE FOUR REQUIREMENTS

37. There is no dispute that BBFA did not comply with all four and complied with two of them post suspension and before the reconsideration decision. The Registrar says that evidence of post suspension remediation is irrelevant to the merits of the suspension and of the reconsideration of it. However, s. 47(3) of the Act allows the Registrar to reconsider based upon error of law, failure to comply with natural justice, and evidence being available that was not available at the time the decision was made. As well, s. 47(6) allows the Registrar to consider information not before the Registrar when the suspension decision was made.
38. The Registrar decided the post correction evidence on two of the four requirements was not relevant to her reconsideration of the suspension and argues, in effect, that such evidence is not new evidence and that s. 47(3)(c) only means evidence that was available (but not submitted) at the time the suspension decision was made. The Registrar does not address s. 47(6), “information that was not before the Registrar at the time the original decision was made”. I am of the view that, given the effect of a suspension on BBFA, the words allowing for new evidence and information should be

given a broad interpretation. I also find that the Legislature must have intended that there should be different meanings for those two phrases and intended a broad interpretation, otherwise why would the word "information" appear in a stand-alone section of the Act. In my respectful view, even if the Registrar is correct that "evidence" in s. 47(3)(c) means "fresh evidence" (as our courts have defined it), "information" in s. 47(6) allows for post suspension evidence of compliance. As well, the Registrar in her appeal submission accepts (para. 4.4) that post-suspension evidence would be considered to lift the suspension in the event of full compliance after the suspension was imposed and that she would not have proceeded to cancellation.

39. I find that the wording of s. 47(6) is broad enough to allow the Registrar to conclude that the suspension decision was correct when it was made, but to also allow the Registrar to take into account post-suspension remediation.
40. As a result, I find that the Registrar did not properly exercise her discretion in that she did not take into account the evidence that two of the four issues had been corrected post suspension but before reconsideration.

THE CANCELLATION DECISION – THE TWO REQUIREMENTS NOT FULFILLED PRIOR TO CANCELLATION.

The Financial Statements

41. It is not disputed that the financial statements were not filed prior to the reconsideration and cancellation. They were required to be filed by January 31, 2018, but PTIB extended that to February 13, then to February 23, and finally to March 23. In the March 26 suspension letter, PTIB said the suspension would be lifted if they were filed by April 3. In the letter giving notice of possible cancellation (April 20), PTIB said if not filed by April 23, there would be cancellation. There appears to be agreement that they were filed May 18, the same day the reconsideration decision was sent out.
42. The Registrar, in her appeal submission, accepts they were filed but says it is irrelevant as post cancellation correction evidence is not relevant. Although there is no express right in the Act for the Registrar to take such evidence into account, I have the ability to do so pursuant to s. 50(5).
43. The financial statements were, by the date of the last deadline before suspension (March 23) late by less than two months and by the deadline date of the notice of possible cancellation (April 23), late by less than one month.
44. Finally on this issue, BBFA argues that the Registrar should have taken independent steps to learn from other sources the financial status of BBFA without filing its financial statements and student data. The Registrar says there is no onus upon her to do so and I find she is correct in that view.

The Student Refunds

45. Three issues arise in respect to the student refund claims:
 - (a) By s. 31(1) of the PTR, it only applies to an "approved program of instruction";
 - (b) By s. 31(1)(a) of the PTR, it only applies where a student is enrolled in such a program without having met the admission requirements for the program; and

- (c) Was it a proven claim and was BBFA given sufficient notice of the evidence relied upon in order to disprove it and was the claim properly adjudicated
46. With respect to (a), BBFA says the money was not for an approved program but was for "housing and did not involve approved programs". The Registrar has not directly responded to this issue.
47. With respect to (b), did the students fail to meet the admission requirements? The Registrar has said that the admission requirement was the lack of a private pilot license apparently on the assumption the students were in a program of commercial pilot training. BBFA says the students were in a private pilot training program.
48. I cannot find in the *Act* or the PTR (or any of the material submitted by the Registrar) where the Registrar's requirement comes from. There is no evidence of such a requirement (and a failure to meet it). It seems to be evident from the Registrar's reply submission where at para 7.22 she states, "it may be that the arguments included in the Appellant's submissions in respect of the refund issue have merit", that the Registrar does not disagree with BBFA.
49. Insofar as (c) is concerned, BBFA says it was not given a chance to respond to all the evidence but in any event it was merely a claim set out in a letter from PTIB. BBFA points out that no dispute resolution process, be it within the *Act* or otherwise, was ever conducted and thus the refund issue remains a contentious issue. At this juncture, BBFA says there is no "clear and unequivocal determination that monies paid are refundable". I agree.
50. I have pointed out that the Registrar concedes that BBFA's position "may have merit" but says that "these arguments were not brought to the attention of the Registrar". I accept that BBFA did not respond to this issue in any meaningful way but it was still up to the Registrar to be correct in her determination that refunds were owing. As stated earlier, whether refunds are owing is an issue that has to be resolved separately and cannot be relied upon by the Registrar to effect suspension and cancellation.

THE STATUTORY INTERPRETATION ISSUE

51. BBFA has made extensive submissions that the object and purpose of the *Act* and PTR have to be interpreted differently than the way the Registrar has interpreted them. BBFA says that in effect the Registrar should not have focussed entirely on the plain words of the *Act* and PTR but should have factored into her analysis the overall intention of the legislation in respect to issues of non-compliance and the consequences to stakeholders such as BBFA of a cancellation.
52. BBFA's main submissions on this issue are:
- (a) The Legislature did not intend that s. 47(3) should block all traditional grounds to challenge a decision of the Registrar such as abuse of discretion (unreasonableness, irrationality, consideration and irrelevant factors). *Baker v. Canada* 1999 2 SCR 817, is cited for the proposition that the duty of fairness is variable and depends on an appreciation of the context of the statute and rights affected.
- (b) There is nothing in s. 36 or 37 to support the Registrar's conclusion (on the reconsideration) that post-suspension remediation of non-compliance is

irrelevant to the exercise of discretion on reconsideration and all that is relevant is whether the decision was reasonable at the time it was made. The Registrar had a duty to consider all relevant factors existing when the reconsideration issue was being decided. If not, there could be a suspension for one very minor infraction. The Registrar's approach makes the concept of reconsideration meaningless.

- (c) There is nothing in the *Act* or PTR on the issue of the PTIB's progressive enforcement policy. An extreme penalty for a minor matter(s) is not progressive. Substantial penalties must not be levied unless the action is so serious the underlying purpose of the regulation cannot otherwise be achieved. Reasonable exercise of discretion requires *de minimus* restrictions.

53. The Registrar's position is as follows:

- (a) The Registrar accepts that traditional common law grounds for challenging a decision exist via s. 47(3)(a) and (b) of the *Act* (error of law and failure to observe principles of natural justice).
- (b) The reasonableness of both the suspension and the cancellation must be considered within the context of the regulatory framework and the conduct of the institution. The contraventions were not minor or technical. BBFA's lack of response and the areas of non-compliance raised concerns about the ability of the Institution to meet its obligations to students.
- (c) Enforcement action does not depend upon risk to students.

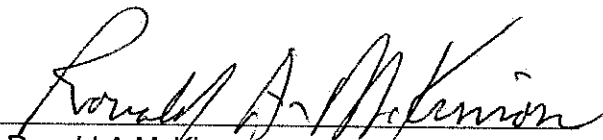
CONCLUSION

- 54. The *Interpretation Act* RSBC 1996 c. 238 provides in s. 8 that "every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". In *Re: Rizzo & Rizzo Shoes* (SCC) the court determined that "when interpreting legislation, the words of a provision must be interpreted by giving them their ordinary and grammatical meaning when read in harmony with the scheme and intent and objects of the legislation".
- 55. It seems to me that the Legislature, in enacting the PTA and PTR, aimed to create a scheme whereby students would be provided with a program designed to meet their objectives and the institutions providing those objectives would be governed by provisions designed to ensure that compliance.
- 56. I do not think that the Legislature intended for the *Act* and the PTR to result in the extremely serious step of certificate suspension when there had been partial compliance before a decision upholding a suspension and full compliance on the day of that decision.
- 57. I have concluded that the Registrar, using s. 47(3)(c) and 47(6) of the *Act*, should have taken into account in the reconsideration decision the fact that two of the four areas of non-compliance had been remedied prior to the reconsideration decision. As well, the Registrar should never have used the student refund issue as a basis for the suspension and the cancellation. That leaves the issue of the financial statements.
- 58. The financial statements were not filed until after the suspension, cancellation and reconsideration decisions were made. Therefore, the Registrar had no jurisdiction to

take into account the fact that they were filed after the date of the Registrar's last act, that of upholding the suspension, however, my jurisdiction to do so is broad by s. 50(5) and I can take into account that they were filed a fairly short time after they were required to be filed. My broad jurisdiction comes from s. 50(5) of the Act which states:

The Commissioner may consider evidence that is not part of the record as the Commissioner considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

59. I conclude that a consideration of the evidence the financial statements were filed May 18, 2018, is reasonably required for a full and fair disclosure of all matters related to this appeal. Having said that, I recognise that it is important to ensure the PTIB is able to properly function if deadlines prescribed by the Act are ignored. It will always be a matter of balancing the conduct of the certificate holder against the need of the PTIB to ensure that stakeholders comply with deadlines.
60. Given the broad jurisdiction given to me under s. 50 and accepting as I have the student tuition refund issue cannot be relied upon as a ground for suspension or cancellation and having concluded that the only established breach was late filing of financial statements, I find that the penalty imposed is disproportionate to the infraction given the fact that they were filed soon after the deadline and that the Legislature did not intend to have such a serious consequence for the infraction in this case.
61. The statutory purpose of the Act is to ensure that punishment must be proportional to the infraction(s). In this case, I find that the consequences to BBFA in respect to the financial statement issue was not proportional to the infraction.
62. Insofar as post-compliance conduct is concerned, the Registrar submits that a suspension and cancellation have ongoing legal effect and that a number of consequences happen as a result. I understand this argument to mean that even if the Registrar was to accept post suspension and post cancellation compliance, it could not do so retroactively. It seems to me that is precisely what would happen had the Registrar reversed her decision based upon post compliance conduct. As there was no evidence of full compliance by the time of the suspension, cancellation and reconsideration decisions, there was no basis for the Registrar to reverse her decisions. However, I have that power under s. 50(5) of the Act.
63. Therefore, the appeal is allowed pursuant to s. 50(6)(b). The suspension and cancellation decisions are set aside, returning BBFA to its pre-suspension and cancellation status.
64. I wish to conclude these reasons by issuing a caution to BBFA and other certificate holders under the PTA. I do not intend for these reasons to be interpreted that non-compliance with the PTA and PTR does not matter. To the contrary, in another case based on different facts, a suspension or cancellation could very well be upheld.


Ronald A McKinnon
Commissioner