Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
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OSB Newsletter

2004 4

A Word from the Superintendent of Bankruptcy

In the last issue of the OSB Newsletter, we included a short reader survey. Thank you to those who filled it out and sent it back to us. For those who did not have a chance to complete it, we would still like to hear from you and it's never too late to send us your ratings and comments. All comments are useful and appreciated. Some suggestions are being addressed in this issue, namely a change of address form which is now placed at the very end of each issue in addition to the table of contents which you will always find on the first page. The section on caselaw summaries has expanded. It is the most popular item according to survey results.

Another request that keeps recurring in the surveys is to increase the frequency of the Newsletter. We will certainly try to do this. Our goal will be to go from 3 to 5 issues a year.

You will also find in this issue a complete analysis of the 2003 insolvency statistics which was prepared by our Economic Analysis Section. You will notice that after a short lull, file volumes increased by 6% in 2003. Several economic factors have surely contributed to this overall increase. Despite the fact that Canada is nowhere near the rate of insolvencies experienced by our neighbours south of the border, one must question the ability of consumers and, in turn, of companies to maintain the accelerated growth of consumer credit.

The Chairman of our Management Advisory Board (MAB) has issued the first ever Chairman's Report detailing some of the MAB's activities since its inception in 1998. Generally the Report indicates the OSB progress of these past years. It reports the financial pressures that we face and notes the need, in the medium term, to re-examine the financial framework governing the OSB if the Office is to keep on fulfilling its mandate and meet the expectations of numerous stakeholders. The Chairman's Report can be found on the OSB's Website at ***http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/en/br01405e.html***

We are making good progress with e-filing and more and more trustees are taking advantage of it. Over 40% of summary administrations which are now being filed electronically. Development of Phase 2, which will allow the e-filing of Division II proposals ("consumer proposals"), is progressing well and should be launched before summer.

We hope you will enjoy this issue and do not hesitate to send us your comments and suggestions for the Newsletter so we can better meet your expectations.

INSIDE THIS ISSUE

ERRATUM

In the last issue (2003-4), on the chart in the section "Oral Boards 2003" (page 7), the City of Edmonton should read **Halifax**. We apologize for the mistake.

DID YOU KNOW?

There are 109 Bankruptcy Registrars throughout Canada. It is important to keep in mind that most Bankruptcy Registrars assume tasks in areas other than bankruptcy and insolvency.

Three Registrars share the title of longest serving Registrars in Canada: M[e] Chantal Flammand and M[e] Luc Hinse of Quebec as well as M. Larry Ring, Q.C of Manitoba. The three were appointed in 1977.

The breakdown of Registrars per province as well as the average years of service per province are as follows.

Province	Number of registrars	Average years* of service
Y.T.	0**	0
N.W.T.	4	1.25
B.C.	26	8
Alta	7	14
Man.	5	13
Sask.	1	9
Ont.	3	11
Que.	59	11
N.B.	1	5
N.S.	1	less than 1
N.L.	1	4
P.E.I.	1	less than 1

* As at October 2003
** Yukon has recently appointed a Registrar

The OSB Student Work Program

The Program

The OSB has, within its headquarters, developed a work program aimed at future professionals, with a focus on law students. The goal of this program is to recruit students, provide them with work experience during their studies with the possibility of offering them positions within the OSB once their studies are completed. For those that will eventually end up undertaking careers in the private sector, the work program provides them with a better understanding of insolvency law and gives them a chance to become familiar with the OSB as a regulatory agency.

The Work

There is a wide range of tasks that the participating students can expect to encounter during their stay in the work program.

At first, specific projects may be assigned to students in areas of debtor education, while some may start off by assisting in the day to day functions of administering the Professional Conduct Hearing Record Registry.

After some experience is gained, students then move on to more advanced projects which may require them to look at insolvency files from which they extract data to do trend analysis. They also prepare the caselaw summaries for the *OSB Newsletter*.

Once students have completed the bankruptcy and insolvency course (during their third year of law school), they do research projects and train new students.

The Environment

At the present time, there are 11 law students and 1 translation student occupying positions within this work program. Each student brings his or her own qualities which provides for a mutually beneficial team oriented environment. The work program is also geared towards giving the students the appropriate training, whether it be from working closely with senior officers or attending conferences, which makes it a very worthwhile and challenging experience.

How to apply

Interested students must apply to FSWEP at ***www.jobs.ca*** The OSB Student Work Program Manager will use this program to get lists of eligible candidates when positions become available. This is also the database used by other federal government departments to recruit their students.

Additional information can be obtained by e-mailing the OSB Student Work Program Manager, Vivian Cousineau, at ***cousineau.vivian@ic.gc.ca*** or by contacting her at 613-941-2694.

ISSN 1705-5245
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Demographic profile of bankruptcy trustees in Canada

***In this article**, we describe the changes in various demographic characteristics relating to Canadian trustees-in-bankruptcy over the last 12 years. The information[1] presented in this article only deals with trustees who administered[2] one or more insolvency files under the BIA. However, if any licensed trustees have not administered any files during a given year, they have not been counted in the statistics presented in this article. Age, gender, field of study and workload are some of the characteristics discussed.*

In 1992, 642 trustees administered insolvency files in Canada. This annual figure peaked at 807 in 1998 and then gradually dropped to 749 in 2003. Between 1992 and 2003, the percentage of women administering insolvency files increased from 8% to 14%.

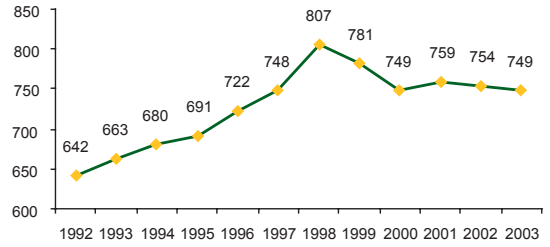
Ontario has the highest number of trustees in Canada. Between 1992 and 2003, Ontario's share of licensed trustees rose from 38% to 41%. This increase was offset by a decline in the number of licensed trustees in Western Canada.

During the last 12 years, the average age of trustees has increased by almost five years, from 45.4 in 1992 to 50.2 in 2003. In comparison, the average age of Canadians increased by 2.6 years during the same period. It thus appears that the trustee community aged twice as fast as the general population during this period. On average, bankruptcy trustees in Canada are 59 years old when they stop practising after an average of 22 years in the profession.

During the 1992-2003 period, the percentage of trustees whose main field of study was law remained steady at around 2%, while the percentage of trustees whose main training was in accounting or administration declined from 90% to 75%. This drop was offset by an increase in the number of trustees whose main field of study was other than law, accounting or business.

In this 12-year period, the highest number of new trustee licences issued by the OSB in a year was 63 in 1996. Since then, the number of new licences issued in a year gradually dropped to 35 in 2002 before climbing back to 48 in 2003. In 2001 and 2002, the number of licences that trustees did not renew was

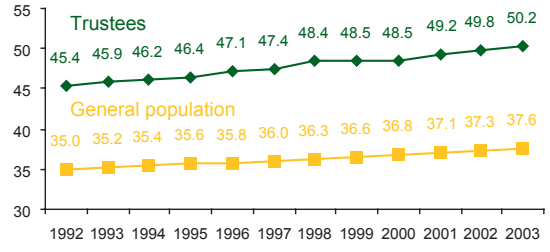
Number of trustees administering insolvency files, Canada, 1992–2003



Geographical breakdown of trustees, 1992 and 2003

	1992 Number	%	2003 Number	%
Atlantic	40	6.2%	45	6.0%
Quebec	174	27.1%	205	27.4%
Ontario	242	37.7%	307	41.0%
Manitoba/ Saskatchewan	40	6.2%	38	5.1%
Alberta	64	10.0%	70	9.3%
British Columbia	80	12.5%	84	11.2%
Canada	642		749	

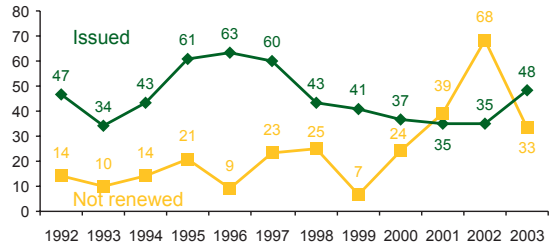
Average age of trustees and the general polulation, Canada, 1992–2003



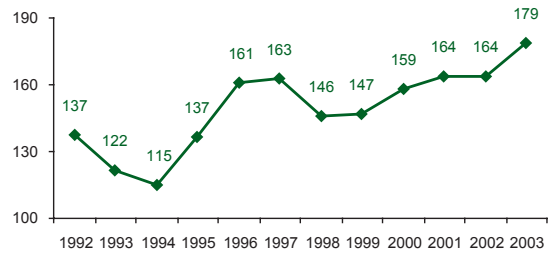
[1] All the statistics in this article come from the OSB's Impact database, except for the data on the average age of Canadians, which comes from Statistics Canada.

[2] Trustees who opened or closed one or more insolvency files during the reference year.

Number of new licences issued by the OSB and not renewed by the trustees, Canada, 1992–2003



Annual average number of new files opened per trustee, Canada, 1992–2003



higher than the number of new licences issued. This can be explained by the fact that 2002 was the year the OSB stopped providing free licence renewals for trustees aged 65 and over. Fortunately, this situation seems to have been only temporary and in 2003, there was again a higher number of new licences issued than licences not renewed.

Over the last 12 years, the annual average number of new files opened per trustee increased by 30.4%, from 137 in 1992 to 179 in 2003. This increase was largely due to the result of an increase in the number of new summary files and non-corporate proposals. The average[3] number of new summary files opened per trustee rose from 139 in 1992 to 170 in 2003, while the average number of new non-corporate proposals rose from 7 in 1992 to 35 in 2003. In contrast, the average number of new non-corporate ordinary files and corporate files[4] opened per trustee declined from 16 to 4 and from 8 to 7 respectively.

[3] The average per file type corresponds to the total number of files opened for that type divided by the number of trustees who opened files of that type. We also have to note that, by using a different denominator to calculate the mean for each file type, the sum of the four means cannot equal the mean for the total number of files.

[4] Bankruptcies and proposals filed by corporations.

In conclusion, here are the main points of this demographic profile:

- The average age of trustees has increased by 5 years over the last 12 years; this is twice as fast as the increase in the age of Canadians in general.
- The trustees' primary training is increasingly within a field other than law, accounting or business.
- The annual average number of new files opened by trustees has risen by slightly over 30% in the last 12 years. However, this increase has been found mainly in new summary files and non-corporate proposals.

Insolvency in Canada in 2003

Overview

In 2003, the number of new insolvency cases rose by 6.3%. This increase follows a drop of 1.0% in the previous year. In 2003, the number of consumer insolvencies rose by 7.8%, whereas the number of business insolvencies declined by 6.1%.

Table 1: Insolvency in Canada, 2002–2003

	2002	2003	Change (%)
Total	104,798	111,415	6.3%
Consumers	93,439	100,745	7.8%
Bankruptcies	78,232	84,251	7.7%
Proposals[1]	15,207	16,494	8.5%
Businesses	11,359	10,670	-6.1%
Bankruptcies	9,472	8,844	-6.6%
Proposals[2]	1,887	1,826	-3.2%
Corporations	2,963	2,960	-0.1%
Individual businesses[3]	8,396	7,710	-8.2%

[1] Divisions I and II consumer proposals.

[2] Division I corporate proposals and Divisions I and II individual business proposals.

[3] The term "individual business" refers to unincorporated businesses, as opposed to corporations.

The increase in consumer insolvency was undoubtedly owing to the rapid rise in the debt-to-income ratio[4] noted since early 2002. During the 1999-2001 period, this ratio hovered between 97% and 99% of the disposable income, before reaching 100% in the second quarter of 2002. Since then, the debt-equity ratio has risen steadily, reaching 106% in the third quarter of 2003.

In 2003, the slowdown in economic activity, caused by different punctual events (SARS, mad cow, power outage) and the unprecedented increase in the exchange rate, had an impact on commercial insolvency. Not all branches of industry were affected in the same manner. Export-oriented businesses, businesses operating in the primary sector as well as businesses in the accommodation and food service sector have been particularly affected by the slowdown.

Insolvency in Canada's six major regions in 2003

In 2003, British Columbia was the only region to post a drop (-2.0%) in the total number of insolvencies. The biggest increases were in the Atlantic (10.9%), Ontario (10.6%) and Manitoba/Saskatchewan (8.3%) regions. The total number of insolvencies per year rose by 5.3% in Alberta and by 2.8% in Quebec.

Reflecting the trend in the total number of insolvencies, consumer insolvency rose in every region except British Columbia in 2003. The number of consumer insolvencies per thousand population 18 years of age and over reached 4.1 this year, an increase of 0.3 over the previous year. This ratio was the highest in the Atlantic region at 4.7 and lowest in British Columbia at 3.2.

On the other hand, business insolvency declined in every region, except Manitoba/Saskatchewan where it rose by 4.5%. It is also important to highlight the 17.5% drop observed in Alberta, in the wake of the 18.5% hike posted the previous year.

Insolvency in Canada's major economic sectors in 2003

The number of business insolvencies rose in six of the eight main sectors of economic activity in Canada in 2003. However, the drop in the service sector more than offset the growth in the six sectors where the level of insolvency increased.

[4] Indebtedness is measured by the ratio of consumer and mortgage credit to personal disposable income.

Table 2: Insolvency by region, 2003–2004

	2002	2003	Change (%)
Atlantic			
Total	8,431	9,347	10.9%
Consumer	7,714	8,693	12.7%
Business	717	654	-8.8%
Quebec			
Total	28,400	29,200	2.8%
Consumer	25,482	26,341	3.4%
Business	2,918	2,859	-2.0%
Ontario			
Total	37,924	41,928	10.6%
Consumer	34,467	38,531	11.8%
Business	3,457	3,397	-1.7%
Manitoba/Saskatchewan			
Total	6,186	6,699	8.3%
Consumer	5,521	6,004	8.7%
Business	665	695	4.5%
Alberta			
Total	11,795	12,417	5.3%
Consumer	9,513	10,532	10.7%
Business	2,282	1,885	-17.4%
British Columbia			
Total	12,062	11,824	-2.0%
Consumer	10,730	10,644	-0.8%
Business	1,332	1,180	-11.4%

Table 3: Insolvencies in Canada's major economic sectors, 2002–2003

Economic sectors	2002	2003	Change (%)
Primary	512	617	20.5%
Manufacturing	1,053	1,085	3.0%
Construction	1,594	1,663	4.3%
Transportation and communications	1,220	1,159	-5.0%
Wholesale/ retail trade	2,302	2,313	0.5%
Finance, insurance and real estate	323	358	10.9%
Services	3,165	2,237	-29.3%
Accommodation and food/beverage services	1,190	1,238	4.0%
Total	11,359	10,670	-6.1%

The results in the services sector can be explained by domestic demand, bolstered by consumer spending that remained strong throughout the year. Moreover, this sector is one of the least affected by the exchange-rate fluctuations that were such a marked feature of Canada's economic conditions in 2003.

The 20.5% rise in bankruptcy in the primary sector was primarily the result of the single case of mad cow disease that totally paralyzed Canada's beef exports. In fact, agriculture accounted for 62% of the rise in insolvency in the primary sector in 2003.

Two phenomena might explain the 3% rise in insolvency in the manufacturing sector in 2003. First, the rise in the value of the Canadian dollar limited the exports. Second, the power outage in Ontario in August, which resulted in production stoppages lasting up to a week in some companies, had a negative impact on revenues.

In the accommodation and food/beverage services sector, insolvencies rose by 4.0% in 2003, after a sharp 20.1% decline in 2002. In 2003, two factors discouraged foreign tourists from coming to Canada: first, the SARS epidemic and second, the higher Canadian dollar, which made Canada a relatively more expensive destination, especially for our neighbours to the south.

Conclusions

In 2004, the overall economic climate should improve, as well as the labour market situation. Interest rates should remain at a low level, contributing to a rapid growth in mortgage and consumer credit. For a third consecutive year, disposable income should increase at a slower rate than credit. Consequently, we should see an increase in the debt-to-income ratio in 2004. These factors should result in an increase in new personal insolvency filings for 2004, which could surpass the increase seen in 2003. Strong economic growth in the United States, anticipated for 2004, should soften the negative impact of an increase in the exchange rate on the Canadian GDP. Thus, export-oriented sectors should fare better in 2004 than in 2003. If no punctual events affect the Canadian economy in 2004, we anticipate a decrease in new commercial insolvency filings.

Insolvency Case Law

Our surveys show that readers hold a particular interest for caselaw summaries. Below are a few which we felt were worthwhile noting. If you have any decisions that you feel might be of interest to other readers, please submit them to the coordinator who will ensure that all the summaries that are submitted will be written in both official languages.

Of course, such summaries are not substitutes for the actual decisions.

In the Matter of the Proposal of l'Académie de golf Le Voltigeur Inc. and Primeau Proulx & Associés

Conflict of interest • Disqualification of the lawyer

Superior Court of Quebec
Honorable Jacques Dufresne

Citation: [2003] J.Q. no. 3376(QL).

Facts: The debtor (Académie de golf Le Voltigeur) filed a proposal in which the law firm representing the trustee acted as the debtor's legal counsel helping to put together the proposal and was a creditor, and therefore, voted on the proposal in that capacity. Following the trustee's decision to deny two creditors the right to vote on the proposal, they filed an application for review of the trustee's decisions pursuant to section 108 of the *Bankruptcy and Insolvency Act* (BIA), and a motion requesting the disqualification of the trustee's lawyers for conflict of interest.

Issue: Were counsels for the trustee disqualified from representing the trustee before the Bankruptcy Superior Court?

Decision: The court found that considering the circumstances of the case, it is difficult to conclude on the lawyers' ability to represent the sole interest of the trustee for whom they appeared and therefore, allowed the declaration requesting disqualification.

Discussion: According to section 3.06.07 of Quebec's *Code of Ethics of Advocates*, a lawyer is in a conflict of interest where, in particular:

> *3. He acts as the advocate of a syndic or of a liquidator, except as an advocate of a liquidator appointed under the* Winding-up Act *(R.S.Q., c. L-4), and represents the debtor, the company or the partnership that is winding up, a secured creditor or a creditor whose claim is contested/.../*

In his analysis, Justice Dufresne concluded that the fact that the lawyers are both the debtor's and trustee's counsel as well as creditors in the proposal gave rise to a reasonable apprehension of perceived conflict of interest, and therefore granted the motion.

Stanislas Van Duyse and Druker & associés (Trustee) vs. Attorney General of Canada

Debtor discharge

Montreal Bankruptcy Court
Registrar Pierre Pellerin

Citation: *Stanislas Van Duyse and Druker & associés vs. Attorney General of Canada* [2003], n 500-11-018474-029.

Facts: In this case, the debtor filed an application for discharge but one of his creditors, *Canada Revenue Agency* (CRA), to whom he owed $47,642.34, opposed his discharge. The debtor, Mr. Van Duyse only had two creditors, CRA and Revenu Québec to whom he owed $59,765. Since the date of the assignment (June 2, 2002), the debtor paid into the estate a total of $22,535. It is Mr. Van Duyse's fourth bankruptcy in less than 20 years. He had one in 1985, another in 1988 and one in 1996.

Mr. Van Duyse is a physician and a member of the Collège des médecins du Québec since 1972. His annual income for 2003 was estimated at $193,933. From 1997 to 2001, Mr. Van Duyse's gross income remained over $181,605, annually.

Issue: Should Mr. Van Duyse be discharged of his fourth bankruptcy and if so under what conditions?

Decision: Registrar Pellerin granted a conditional discharge requiring that the bankrupt pay $25,000 to the estate within three months of the order. It should be noted that the amound fixed for the discharge of the debtor combined with payments made to the estate, is equivalent to the debt owed to the opposing creditor CRA.

Discussion: In his defense, the bankrupt argued that he was recovering from a depression and that an illness forced him to reduce his work pace. He also established a link between these elements and his separation from his wife, which occurred in 1994, followed by a divorce in 1996. Moreover, his new wife claimed to have suffered in 1999 a financial loss of $100,000 forcing Mr. Van Duyse to move out of his $3,200/month luxurious apartment in August 2002 .

According to the Registrar, this is not an insolvency that was caused by a sudden decline in income. The debtor's income for the past five years had remained relatively stable. He came to the conclusion that Mr. Van Duyse acted like a debtor whose priorities were misplaced. The Registrar also believed that he would risk trivializing the discharge process in these circumstances if he allowed the debtor to be discharged from his fourth bankruptcy without contributing substantially to the estate.

In the Matter of the Bankruptcy of Parshan Sahota

Fraudulent debt • Non dischargeable debt

Ontario Superior Court of Justice
Honorable Justice Harriet E. Sachs

Citation: *Lifemax Natural Foods Ltd. (Trustee of) v. Sahota* [2003] O.J. No. 5016 (QL).

Facts: Lifemax Natural Foods Ltd, a company of which Mr. Sahota was the administrator and controlling mind, declared bankruptcy. Mr. Sahota transferred four stores belonging to Lifemax, to a "Numbered Company". The transfer was made without consideration and no title was contractually transferred. The Numbered Company had sold two of the four stores for less than the market value without notifying Lifemax and without paying the sale proceeds to Lifemax. The other two stores were seized for failure to pay rent. The inventory of the four stores was sold as well. The Numbered Company did not inform Lifemax about its administration of the four stores. The proceeds of the sales of the two stores were used to pay back $100,000 to the Royal Bank in respect of a debt from another company controlled by Mr. Sahota. In 1998, the Court ordered Mr. Sahota to pay $100,000 as damages to the trustee

of Lifemax on the grounds that Mr. Sahota had breached his fiduciary duties in misappropriating the property of Lifemax for his own benefit. Subsequently, Mr. Sahota made an assignment in bankruptcy.

Issue: Was the debtor's conduct, while acting in a fiduciary capacity, akin to fraud, embezzlement or breach of trust so that the debt arising from this conduct survives the debtor's discharge?

Decision: Considering Mr. Sahota's conduct, his debt falls under the provisions of paragraph 178 (1)(d) of the *Bankruptcy and Insolvency Act* (BIA), which states that an order of discharge does not release the bankrupt from any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity.

Discussion: In his defense, Mr. Sahota argued that in order for a debt to survive the discharge, there must be evidence that he benefited personally from the conduct. According to him, his conduct was open, subject to scrutiny, and all the proceeds from the sale went to a secured creditor. The debtor further argued that his conduct did not affect the interest of any other persons.

In response to these arguments, Justice Sachs found that a direct personal benefit is not a necessary ingredient under paragraph 178(1)(d) of the BIA and that it was also well established in fact that Mr. Sahota had benefited indirectly from his conduct. Justice Sachs also states that the conduct was improper in two ways, the first being that Mr. Sahota failed to account for funds and property entrusted to a fiduciary, and the second being that it was conduct that involved an inappropriate dealing with trust property. Therefore, following *Simone v. Daley* ((1999), 43 O.R. (3d) 511), this conduct is clearly a breach of fiduciary duty.

Bankruptcy of William Demare and Dawn Demare

Statutory lien • Precedence of BIA over provincial legislation • Setting off pre and post bankruptcy debts

Court of Queen's Bench of Manitoba
Registrar Errick Harrison

Citation: [2004] M.J. No. 40

Facts: On February 20, 2003, the bankrupts made an assignment into bankruptcy. On February 27, 2003, Manitoba Family Services and Housing made a direct deposit to the bankrupts' joint account at one of the branches of Westoba Credit Union Ltd. which was in an overdraft state prior to the said deposit. Westoba claimed to be a secured creditor over the deposited sums and consequently has priority by virtue of a statutory lien granted to all credit unions within Manitoba under section 44 of the *Credit Union Act* (CUA). To summarise, Westoba was claiming a lien on sums acquired by the debtor after their assignment.

Issue:

a) May a credit union offset a post-bankruptcy deposit against a pre-bankruptcy overdraft?

b) Does the priority which Westoba is claiming in accordance with section 44 of the CUA take precedence over the scheme of distribution order pursuant to section 136 of the *Bankruptcy and Insolvency Act* (BIA)?

c) Can the CUA lien provisions provide to Westoba or to other credit unions the status of "secured creditor" as defined in the BIA?

Decision: Westoba Credit Union Ltd. may not offset the post-bankruptcy deposit against the pre-bankruptcy overdraft. Westoba has exercised a remedy in contravention of s. 69.3(1) of the BIA because the deposit was the property of the bankrupts which is divisible amongst their creditors in accordance with section 67 (1) c) of the BIA. Westoba is not a secured creditor and was ordered to pay the trustee in bankruptcy the sum of $307.06.

Discussion: The registrar explained that one cannot claim the existence of a statutory lien on property which did not exist at the time of the bankruptcy. The account in question had no positive balance at the time of bankruptcy, and as registrar Harrison explains a lien must be founded on real or personal property. The registrar indicated that a statutory lien with no property foundation at the time of the bankruptcy cannot come into effect by the deposit of monies by a third party into the bankrupt's account after the date of the bankruptcy. The monies must be in the account of the debtor at the time of bankruptcy in order for the lender to invoke a statutory lien.

Furthermore, the Registrar concluded that section 44 of the CUA, which creates statutory liens for credit unions, did not provide Westoba the status of secured creditor as defined by the BIA. In fact, the Supreme Court of Canada stated in *Husky Oil Operations Ltd. v. Canada [1995] 3 S.C.R. 453* that provinces cannot create priorities that change the distribution order pursuant to the BIA. As the federal law takes precedence over the provincial law. In bankruptcy, it is section 136 of the BIA that determines the status and the priority of

a claim, not section 44 of the CUA. The priority of section 44 of the provincial law is incompatible with the priorities stated at paragraph 136(1) a) to j) of the BIA.

The definition of secured creditor that must be noted is that of the BIA with regards to bankruptcy and not the definition of the provincial law. In fact, provinces cannot modify definitions that are issued in federal laws. Westoba does not qualify as a secured creditor under section 2 of the BIA.

In the Matter of the Consumer Proposal of Toni Le

Trust • Property of the Debtor

Registrar Laycock
Judgment Rendered April 21, 2004

Citation: [2004] A.J. No. 460

Facts: Mr. Toni Le filed a consumer proposal on March 18th, 2002. Mr. Le continued to make his monthly payments until August 19th, 2003 when he made a voluntary assignment using a different trustee. At the time of the assignment, the trustee in the proposal still held a certain amount of money which had not yet been distributed to the creditors. A representative of Superintendent of Bankruptcy, as well as the trustee in the proposal made a joint application before Registrar Laycock for directions on how to handle the remaining funds in the proposal.

Issue: (1) Were the sums held by the trustee in the proposal, the property of the debtor? If so, (2) Did these sums (held by the trustee for the creditors of the proposal) constitute a trust?

Decision: The sums held by the trustee of the proposal remain the property of the debtor, but this sum constitutes a trust and could not be distributed to the creditors of the bankruptcy by virtue of paragraph 67(1) a) of the *Bankruptcy and Insolvency Act* (BIA). As a result, the trustee in the proposal could proceed with the distribution of the sums to the creditors of the proposal.

Discussion: Registrar Laycock indicated that if the sums paid to the trustee in the proposal were the property of the debtor at the date of the bankruptcy then these sums became vested in the trustee in bankruptcy pursuant to section 71(2) of the BIA. The Registrar added that despite the fact that these sums were the property of the debtor, they could not be distributed amongst the bankruptcy creditors if these sums were being held in a trust pursuant to paragraph 67(1) a) of the BIA.

The Registrar first concluded that the sums held by the trustee in the proposal remained the property of the debtor by relying on *Allflex Co*. (1962) 3 C.B.R. (N.S.) 80 and *Re J. LeBar Seafoods Inc*. (1981) 38 C.B.R. (N.S.) 64. The Registrar noted that section 136(2) of the BIA does not convey a property interest from the debtor to the trustee, but is merely a scheme of distribution for the trustee to follow.

Secondly, despite the fact the sums remained the property of the debtor, they could not be distributed to the creditors of the bankruptcy because the Registrar concluded that the sums that were being held constituted an implied trust, and should therefore, be distributed to the creditors in the proposal.

Professional Conduct Matters

In accordance with the *Policy on Publicizing Professional Conduct Matters*, we publish as they become available, summaries of decisions on professional conduct. Of course, such summaries are not substitutes for the actual decisions and those interested in learning more about the decisions in this area should consult the full text on our Web site (***http://osb-bsf.gc.ca***) under the heading "Trustees" and the sub-heading "Licensing and Professional Conduct".

Any questions regarding the publication of these decisions should be addressed to the Clerk of the Hearing Record Registry, Vivian Cousineau. She can be reached by regular mail at 301 Elgin Street, 2nd Floor, Ottawa, Ontario, K2P 2N9, by phone at (613) 941-2694, by fax (613) 946-9205 or by e-mail at ***cousineau.vivian@ic.gc.ca***

In The Matter of Éric Métivier

Mr. Jean-Claude Demers,
Delegate of the Superintendent

Decision on the sanction dated January 28, 2004.

The delegate of the Superintendent, Jean-Claude Demers, rendered his decision on the professional conduct of the trustee Éric Métivier.

Having been seized of the agreement reached between the parties and considering that the trustee had not been involved in any prior professional conduct matters, the Superintendent's delegate

suspended the licence of the trustee, Éric Métivier, for the period of one (1) month, starting on March 15, 2004. He also restricted the licence of Éric Métivier for a period of two (2) months, beginning after the suspension mentioned above, by limiting new filings only to cases where the debtor is an individual.

James Gordon Touchie and J.G. Touchie & Associates Ltd

Decision on the merits

The Honourable Benjamin J. Greenberg, Delegate of the Superintendent January 30, 2004

The Honourable Benjamin J. Greenberg, the Superintendent's delegate, issued a decision determining the merits of allegations of wrongful doing with regards to the professional conduct of James Gordon Touchie, individual trustee, and J.G. Touchie & Associates Ltd, corporate trustee.

The report of the Senior Analyst/Professional Conduct, Ann Speers, concerning the above mentioned, was sent to the Superintendent on November 6, 2001.

The object of this decision was to judge the merits of the allegations against the trustees. There were 3 types of allegations.

The first type of allegation was based on the administration of Perfection Dairy Foods Limited and of McKay's Diary Ltd. The trustees are criticized for not keeping the administrations of both files, in many aspects, separate.

The second type of allegation related to the consolidated trust account of the summary administration estates and the consolidated trust account of the consumer proposal files. The main focus was on bank reconciliation.

The third type of allegation is based on the failure by the trustees to cooperate with representatives of the Office of the Superintendent of Bankruptcy during the investigation.

The delegate found many of the allegations contained in the Senior Analyst's report to be founded. The decision on the sanction(s) imposed on the trustees has yet to be rendered.

In the Matter of the Disciplinary File of Trustee Jacques Roy

Jurisdiction of the delegate to hear a motion on the constitutionality of sections 14.01, 14.02 and 14.03 of the BIA

The Honourable Lawrence A. Poitras, Delegate of the Superintendent December 10, 2003

Facts: The trustee Jacques Roy, by motion filed on November 11, 2003, asked the delegate to declare inoperative sections 14.01, 14.02 and 14.03 of the *Bankruptcy and Insolvency Act* (BIA) with regards to the trustee and as consequence, that a stay of proceedings be ordered. More specifically, the trustee argued that these sections of the BIA provide no structural safeguards in order to ensure a fair and impartial trial, this being contrary to the principles of fundamental justice.

Issue: Does the Delegate have jurisdiction to determine the compatibility of sections 14.01, 14.02 and 14.03 of the BIA with the *Canadian Charter of Rights and Freedoms* and with *the Canadian Bill of Rights*?

Decision: Motion of the Senior Analyst dismissed. The Delegate of the Superintendent, as a member of an administrative tribunal, is implicitly authorized by the Act to decide questions of law which are addressed to him, and therefore, has jurisdiction to hear the trustee's motion.

Discussion: In his decision, the delegate referred to the recent unanimous decision of the Supreme Court (*Nova Scotia (Workers' Compensation Board) v. Martin* [2003] S.C.J. No.54), which established a new approach in determining an administrative tribunal's power to examine the compatibility of legislative provisions with the Charter.

According to the decision rendered by Justice Gonthier in the case of *Martin*, the court must first verify if the administrative tribunal has an explicit or implied jurisdiction to decide questions of law arising from the challenged provisions. The explicit jurisdiction must be found in the dispositions of the act granting authority. The implied jurisdiction must stem from an analysis of the entire act.

Secondly, if it is concluded that the administrative tribunal has satisfied the criteria regarding jurisdiction,

then a presumption will be made indicating that it also has jurisdiction to decide over constitutional questions.

In addition, a decision emanating from an administrative tribunal regarding charter questions is subject to judicial review to which the standard of review is correctness. A general declaration of inoperability made by an administrative tribunal does not bind other decision makers who latter address similar issues within or outside the context of this administrative tribunal. Only when a court of justice gives a formal declaration of inoperability can a statutory disposition be considered inoperable in its general application.

Based on this analysis, the delegate came to the conclusion that he has implicit jurisdiction to hear the trustee's motion.

In the Matter of the Disciplinary File of Trustee Jacques Roy

Constitutionality of sections 14.01, 14.02 and 14.03 of the BIA

Decision of the Honourable Lawrence A. Poitras, Delegate of the Superintendent February 16, 2004

Facts: The trustee, Jacques Roy, filed a motion seeking to declare inoperative sections 14.01, 14.02 and 14.03 of the *Bankruptcy and Insolvency Act* (BIA) and to quash pending proceedings. The delegate made a preliminary decision confirming his jurisdiction to hear this motion.

Issue: Are there sufficient reasons to declare inoperative sections 14.01, 14.02 and 14.03 of the BIA?

Decision: The motion to declare inoperative sections 14.01, 14.02 and 14.03 of the BIA is dismissed and the case will be heard on its merits.

Discussion: The contract does not support the argument that the delegate can be removed and/or does not enjoy sufficient financial security. It mentions that the agreement can be terminated and the delegate dismissed, but only for just cause and not at the pleasure of the executive.

As to the argument about the delegate's impartiality, it was raised after the deceased delegate, Mr. François Rioux, rendered a decision in which he gave permission to a third party to be heard. The delegate did not support this argument since Mr. Rioux gave the opportunity to the parties to oppose the testimony of the third party at the hearing, allowing the procedural fairness to be met.

The trustee argues that the addition of the principle in the legislation, under which the Superintendent can impose disciplinary measures even after the trustee's discharge, does not apply to files that were closed prior to the effective date of this new legislation. Despite the non-retroactivity of the new legislation, the delegate came to the conclusion that the old section of the act implicitly states that a trustee is not discharged of the disciplinary measures which the Superintendent can possibly impose to him under subsection 14.01 (1) of the BIA.

The trustee argues that the requirement of having to pay back an amount to the estate, imposed under section 14.01 of the BIA, is really used to indemnify the Superintendent and not the bankruptcy estate. The delegate rejects this argument after reviewing the terms of the BIA in English and French.

In the Matter of Professional Discipline Proceedings Under the *Bankruptcy and Insolvency Act* Respecting Sam Lévy & Associés Inc., a Corporate Licenced Trustee, and Sam Lévy, an Individual Licensed Trustee

Jurisdiction of the delegate to hear a motion on the constitutionality of sections 14.01, 14.02 and 14.03 of the BIA

Decision rendered by the Honourable Fred Kaufman Q.C.,
Delegate of the Superintendent of Bankruptcy
December 4, 2003

Facts: On the day that hearings in the matter were to be commenced, the counsel for the trustees produced a motion, without notice, to declare sections 14.01, 14.02 and 14.03 of the *Bankruptcy and Insolvency Act* (BIA) inoperable, and that a stay of proceedings be declared. After hearing the trustees' arguments as to his jurisdiction, the delegate adjourned and rescheduled the hearing. When the hearing was resumed, counsel for the Senior Analyst argued that the delegate did not have jurisdiction to entertain the motion of the trustee, nor rule on the contents.

Issue: Does the delegate have jurisdiction to hear and decide the motion regarding the constitutionality of sections 14.01, 14.02 and 14.03 of the *BIA*?

Decision: The delegate dismissed the Senior Analyst's motion since he is impliedly authorized to decide questions of law. The next step would be to hear the motion on the merits.

Discussion: The trustee stated that the key case in deciding whether or not he has jurisdiction is the recent unanimous decision of the Supreme Court of Canada in *Martin* (see summary of Jacques Roy). By restating the motives of this decision, the delegate undertook a comparison of the regime of the Nova Scotia *Worker's Compensation Act* with the regime of the *BIA*. Despite some differences, he concluded that the judgement on *Martin* is sufficiently broad to cover hearings held by the Superintendent or his delegate in virtue of sections 14.01, 14.02 and 14.03 of the BIA. The tribunal convened, which is an administrative tribunal, is impliedly authorized to decide questions of law, and is therefore competent to hear the trustee's motion.

In addition, he adds that section 14.02(5) of the BIA provides the safeguard that if he was to err in his present decision or future decisions, those could be revised by the Federal Court.

In The Matter of the Professional Discipline Proceedings Pursuant to the Bankruptcy and Insolvency Act Respecting Sam Lévy & Associés Inc., A Corporate Licensed Trustee, and Sam Lévy, an Individual Licensed Trustee

Constitutionality of sections 14.01, 14.02 and 14.03 of the BIA

Decision rendered by the Honorable Fred Kaufman,
Delegate of the Superintendent of Bankruptcy
December 19, 2003

Facts: The respondents (Sam Lévy & Associés Inc.) brought an application to declare articles 14.01, 14.02 et 14.03 of the *Bankruptcy and Insolvency Act* (BIA) inoperative and to quash ongoing proceedings. The respondents claimed apprehension of bias by arguing that the Superintendent of Bankruptcy "may" combine his investigator, plaintiff and judge functions. From the point of view of the senior analyst, it is necessary to focus on what happens in practice, rather then resolve the issue in the abstract.

Issue: Given the dual capacity of the Superintendent of Bankruptcy or the selection process of his delegate, is there a reasonable apprehension of bias?

Decision: The application was rejected. The trustees did not prove that there was a reasonable apprehension of bias.

Discussion: Although it is true to affirm that the superintendent cumulates the functions of investigator, prosecutor and judge, it is nevertheless necessary to clarify the clauses of the law from the practical situation. Upon reading the contract of delegation, judge Kaufman concludes that the agreement may be terminated and the delegate dismissed, but only for valid reasons. The contract of judge Kaufman thus present certain safeguard elements owing to the fact that the contract cannot be terminated by the simple liking of the superintendent.

Here are a few statistics on professional conduct that we thought might be of interest to our readers:

Year	Number of files sent to the Superintendent for hearing purposes	Number of files where a final decision has been rendered
1993	2	0
1994	5	3
1995	2	3
1996	3	1
1997	0	3
1998	6	1
1999	5	2
2000	10	5
2001	10	8
2002	2	6
2003	4	4
2004	2	1
Total	**51**	**37**

There are currently 14 files before the Superintendent or his delegates.

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