Office of the Superintendent of Bankruptcy Canada
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OSB Newsletter

A Word from the Superintendent of Bankruptcy

The summer months were busy ones for the OSB. After extensive consultation with various stakeholders, the Banking Directive came into force on December 1st, 2004. The Insolvency Practice Committee (IPC) has been working diligently on this and other Directives and I would like to take this opportunity to thank all of the members for their involvement on this committee.

On August 16, we held our very first Academics Meeting which was chaired by Janis Sarra, Assistant Dean of the Faculty of Law at the University of British Columbia. In organizing such a meeting, the OSB is hoping to develop a network of academics, establish some common ground, discuss some priorities in the area of research to be considered by the OSB, establish a selection and evaluation process for such research projects and, finally, establish a strategic plan to foster research and link it to public policy development. This meeting was an excellent start to accomplishing these objectives and we intend to host further meetings for these purposes. We will keep updating you on this important initiative in future issues of the OSB Newsletter.

It has now been over a year since we launched the Initiative on the Orderly and Timely Administration (IOTA) of insolvent estates. Thus far, the results are encouraging. Between July 9, 2003, and November 3, 2004, 12,949 summary and 969 ordinary estates were closed. It is estimated that, with the closing of these files, 12.56M$ was made available to creditors. Of the 97 trustees who were part of IOTA, 4 have been subject to conservatory measures. Seventy are now meeting the 10/40% standard. The next step for IOTA will be to integrate this initiative with the OSB's ongoing supervision programs.

INSIDE THIS ISSUE

On November 15, 16 and 17, the Registrars Conference was held in Quebec City. Twenty-three registrars from across the country attended this event. These conferences allow the registrars to continue developing a network amongst themselves and discuss common issues ranging from unrepresented litigants to court procedure and operations.

The winter promises to be just as busy for us. We will continue, along with our colleagues in the Corporate and Insolvency Law Policy Directorate at Industry Canada, with our work on legislative reform. In parallel, it is expected that Parliament will debate the private member's bills recently tabled in the House of Commons.

Bill C-236, sponsored by NDP member Alexis McDonough, proposes to amend the *Bankruptcy and Insolvency Act* (BIA) with respect to student loans, reducing from 10 years to 2 years the period that debtors must wait to become eligible for a discharge of their student loans.

Bill C-281, sponsored by NDP member Pat Martin, proposes to amend the BIA and related legislation to

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enhance the protection of wage earners by providing the employees of a bankrupt a super priority for all amounts owed on account of wage arrears, vacation pay, severance pay, pension contributions and pension liablilities. Mr. Martin was scheduled for debate in the House of Commons on December 3, 2004.

We will also continue our work with the Joint Committee of the Canadian Association of Insolvency and Restructuring Professionals (CAIRP), the Canada Revenue Agency (CRA) and the OSB. In addition, we will also be working with Human Resources Development Canada (HRDC) on the issue of employment insurance debt resulting from overpayment.

This is a short list of some of the issues and initiatives the OSB will be focussing on in the coming months. I strongly encourage you to continue reading this Newsletter to receive more detailed information on these and other topics. As usual, your comments and suggestions are always welcome.

I would also like to take this opportunity to wish you all health and happiness in 2005.

Registrar WebBoard

Since May 21, 2004, the Registrar WebBoard has been active. The WebBoard, which can be accessed only by registrars, allows registrars to network amongst themselves. The WebBoard also includes useful information, such as a list of all registrars and their contact information, as well as policy statements, statistics, position papers and Directives issued by the Superintendent, and decisions regarding trustee professional conduct matters.

Registrars are strongly encouraged to post items they would like to share with their colleagues. Comments are always welcome, as are suggestions to improve the WebBoard. These can be directed to Vivian Cousineau at (613) 941-2694 or by email at ***cousineau.vivian@ic.gc.ca*** Technical support is also available by calling Alex Montgomery at (613) 948-5005 or by email at ***montgomery.alex@ic.gc.ca***

DID YOU KNOW?

The position of Superintendent of Bankruptcy has existed since 1932. It is a Governor in Council appointment made by Order in Council. According to our archives, there have been 14 Superintendents of Bankruptcy since its creation. Here is a list of the individuals who have held the position and when they were appointed:

Name	Date appointed
W. J. Reilly	September 14, 1932
E. H. Coleman	October 17, 1946
Robert Forsyth	April 3, 1947
Thos D. Macdonald	March 8, 1949
A. J. MacLeod	March 25, 1950
A .H. M. Laidlaw	December 22, 1954
J. S. Larose	October 7, 1955
Roger Tassé	April 2, 1965
Raymond Landry	July 24, 1968
Jacques B. Brazeau	September 6, 1979
Yves Pigeon (acting, 1982-1985)	November 28, 1982
Walter Clare	August 4, 1990
George Redling	June 23, 1992
Marc Mayrand	May 1, 1997

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Comparing the Credit Card Balances of Canadian and American Bankrupts

This article compares the profiles of Canadian and American bankrupts[1] whose files contain credit card debt. We are particularly interested in the debts on credit cards issued by banks (VISA, MasterCard, etc.).[2] The information regarding Canadian bankrupts comes from information filed with the OSB's electronic filing system during 2003. To make the data comparable, the monetary values were converted into American dollars.[3]

At the time their bankruptcy file was opened, the vast majority of Canadian bankrupts (67.1%) had credit card debt in their files.[4] This rate is still much lower than the rate reported in the American study where almost 90% of the bankrupts in the sample taken had bank credit card debt.

On average, Canadian bankrupts had a balance of $7,808 on their credit cards when their bankruptcy files were opened, compared to over $17,738 for American bankrupts. Indeed, this difference is also reflected in the fact that over 80% of Canadian bankrupts had credit card balances of less than $10,000, whereas this was true for only 47.1% of American bankrupts (see Table 1). At the other extreme, 3.6% of Canadian bankrupts declared bankruptcy having balances of at least $25,000 on their credit cards, whereas 24.3% of American bankrupts were in this situation.

Does household size correspond to higher rates of credit card debt? The data suggest that it does not. In fact, the data for both Canadian and American bankrupts indicate no direct link between credit card debt and household size (Table 2). For example, for Canadian bankrupts, the average credit card balance for households consisting of just one person is $7,896, whereas the average balance for households of six people and over is $8,091. Among American bankrupts, the situation is even more surprising, since, while the average credit card balance for a single-person household is $17,510, it is only $11,697 for households of six people and over.

The connection between bankrupts' monthly income and level of credit card debt is much clearer, as shown in Table 3. For both Canadian and American bankrupts, credit card debt levels generally increase with monthly income. Canadian bankrupts with a monthly income of between $1 and $999 have an average balance of $7,010 on their credit cards, whereas this figure is

Table 1
Credit-card debt, by range

Debt amount	Canadian bankrupts	American bankrupts
$0	32.9%	11.7%
$1 - $4,999	32.0%	20.7%
$5,000 - $9,999	15.4%	15.3%
$10,000 - $24,999	13.1%	28.5%
$25,000 - $49,999	2.9%	17.1%
$50,000 - $74,999	0.5%	4.7%
$75,000 & over	0.2%	2.5%

Table 2
Average amount of credit-card debt, by household size

Household size	Canadian bankrupts	American bankrupts
1	$7,896	$17,510
2	$8,317	$19,758
3	$7,225	$16,490
4	$7,219	$17,627
5	$7,831	$17,066
6 & over	$8,091	$11,697

[1] The data for the United States are from "Credit Card Debt in Chapter 7 Cases," *ABI Journal*, December/January 2004, p. 20.

[2] As opposed to credit cards from other issuers like The Bay, Sears, Petro-Canada, etc.

[3] The conversion to American currency was made using the average exchange rate in effect in 2003: $1 US = $1.401008 CAD.

[4] In practice, more than 80% of the bankrupts in our sample had balances owing on their credit cards, all issuers considered.

Table 3
Average amount of credit-card debt, by monthly income

Monthly income	Canadian bankrupts	American bankrupts
$0	$10,366	$22,687
$1 - $999	$7,010	$14,298
$1,000 - $1,999	$7,655	$14,707
$2,000 - $2,999	$10,168	$15,850
$3,000 - $3,999	$13,552	$19,387
$4,000 - $4,999	$11,561	$21,050
$5,000 - $5,999	$26,494	$26,153
$6,000 & over*	—	$41,978

*In the Canadian sample, no bankrupt had a monthly income over $6,000.

Table 4
Average amount of credit-card debt, by gender and marital status

Gender/Marital status	Canadian bankrupts	American bankrupts
Male		
Married	$9,440	$19,987
Divorced	$9,257	$19,589
Separated	$8,676	$17,968
Single	$7,076	$16,281
Widow	$10,394	$24,745
Female		
Married	$8,250	$15,383
Divorced	$7,613	$15,717
Separated	$7,009	$17,733
Single	$6,188	$13,745
Widow	$8,615	$16,052

$14,298 for American bankrupts. Canadian bankrupts with monthly incomes of $5,000 to $5,999 have an average credit card debt of $26,494, compared to $26,153 in the case of their American counterparts. It is interesting to note that bankrupts declaring zero monthly income when opening a bankruptcy file are not necessarily those with the lowest credit card balances. Canadian bankrupts with zero monthly income had an average balance of $10,366, which is a higher level of debt than that of bankrupts declaring a monthly income of between $2,000 and $2,999. On the American side, the average balance was $22,687 for bankrupts declaring zero monthly income. In the United States, this level of credit card debt amongst bankrupts is exceeded only by those with monthly incomes of $5,000 and over.

Table 5
Average amount of credit-card debt, by age

Age	Canadian bankrupts	American bankrupts
19 - 24	$3,453	$7,962
25 - 34	$5,591	$12,231
35 - 44	$7,884	$16,273
45 - 54	$9,044	$20,898
55 - 64	$10,676	$22,352
65 & over	$9,998	$27,787

When average credit card debt is compared by gender and marital status, the only apparent observation is that women generally have lower average balances than men (see Table 4). This is true for both Canadian and American bankrupts.

When bankrupts' gender is ignored and marital status alone considered, it is single people that have the lowest average balances, whereas widowers and widows have the highest.

Average credit card balances generally increase with age for both Canadian and American bankrupts (see Table 5). Bankrupts aged 19 to 24 represent the group with the lowest average balances: $3,453 for Canadian bankrupts and $7,962 for their American counterparts. Average balances increase to $10,676 for Canadian bankrupts in the 55-64 age group, before dropping to an average of $9,998 for the 65-and-over age group. In the case of American bankrupts, average balances peak in the 65-and-over group at $27,787.

In conclusion, two observations can be made from this comparison between Canadian and American bankrupts in terms of credit card balances at the time bankruptcy files were opened. The first obvious one is that the debt level of American bankrupts is noticeably higher than that of their Canadian counterparts. On the other hand, despite this difference between their respective debt levels, it appears that the trends linking socio-economic characteristics and average credit card debt are generally the same for bankrupts in both countries.

Proposal Success Rate, Duration and Reasons for Failure

In this article, we provide a descriptive analysis of the success rate and duration of proposals, as well as a review of the reasons why some proposals are unsuccessful. This analysis is based on the proposals filed with the OSB since 1995. The results pertain to three types of debtors: consumers, incorporated businesses and unincorporated businesses.

Proposal success rate

Between 1995[1] and 1997, the success rate for proposals was relatively stable for the three types of debtors: about 62% for consumer files, about 58% for unincorporated businesses and about 26% for incorporated businesses.

Despite the apparent stability of these rates, the OSB should continue to monitor the situation. The explosive growth in the number of proposals submitted to the OSB began in 1998 and the Office needs to ensure that this growth does not come at the cost of a lower success rate. If this were to happen, it could indicate that some individuals or businesses, for various reasons, have made the wrong choice in opting for the proposal approach and should have declared bankruptcy instead. In these circumstances, the OSB will need to understand the reasons why these individuals or businesses chose the wrong option.

Duration of proposals and reasons[2] for failure

The duration of a proposal corresponds to the time between the file's opening and closing. For successful proposals, the average duration was 37 months, compared with 12 months for proposals that failed. Average duration varies considerably among debtor types. In the case of successful files, the average duration was 31, 32 and 38 months for incorporated businesses, unincorporated businesses and consumers respectively. In the case of unsuccessful files, the average durations were respectively 5, 10 and 13 months for the same groups.

Proposal duration and reasons for failure are closely linked. In the case of consumers, the average duration is longer than for the other two types of debtor. The reason for this difference is that, in 75% of unsuccessful consumer proposals, failure is caused by deemed annulment of the proposal due to payment default, suggesting that the terms of the proposal were complied with for a time. For most of the other reasons for the failure of consumer proposals, the proposal concerned was technically constituted, but, in practice, there were either no terms set or no agreement on the terms of the proposal. Among the other reasons for unsuccessful consumer proposals were approval declined by creditors (14%) and withdrawal of the proposal and voluntary assignment before approval (8%).

In the case of unincorporated businesses, deemed annulment because of payment default is the main reason (38%) for failure of proposals, followed by approval declined by creditors (37%). Other reasons include annulment of the proposal (13%), voluntary assignment (8%), failure to file a cash flow statement (2%) and approval rejected by the court (2%).

In the case of incorporated businesses, most of the reasons for failure come into play very soon after the proposal is filed. Annulment of Division 1 proposals is the reason why 34% of proposals by incorporated businesses fail. The other reasons include voluntary assignment (22%), approval refused by creditors (20%), deemed annulment for payment default (13%), failure to file a cash flow statement (7%) and approval rejected by the court (3%).

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[1] The information in certain IMPACT files predating 1995 may be missing or incomplete, which could produce inaccuracies in the calculation of the proposal success rate for 1993 and 1994. For the years from 1998 to 2003, there are too many files still open for the success rate to be calculated.

[2] The statistics on the duration of proposals and the reasons for failure were estimated on the basis of all the proposal files opened since 1995 and closed by the end of December 2003. This represents a total of just over 54,000 files.

Conclusions

To conclude: Despite a stable success rate during the 1995–1997 period, the OSB will need to regularly monitor changes in this indicator so as to see that the rapid growth in consumer proposals is not accompanied by a lower success rate.

The duration of files that end in success or failure is longer for consumers than for incorporated businesses. This is because deemed annulment due to payment default is the reason why 75% of consumer proposals fail.

Dealing With Debt: A Consumer's Guide

For a number of years now, the Office of the Superintendent of Bankruptcy (OSB) has published its guide ("Dealing With Debt: A Consumer's Guide") free of charge. This bilingual booklet, which aims at helping individuals manage their finances, has become the most requested brochure at Industry Canada.

The booklet enables consumers to familiarize themselves with a few danger signals related to financial difficulties and lists several possible solutions regarding debt problems. However, it focuses more on consumer proposals and bankruptcy while specifying their advantages and disadvantages so that any person wanting to overcome debt can make an informed choice in his or her approach.

"Dealing With Debt: A Consumer's Guide" is updated regularly by the OSB to ensure its compliance with the provisions of BIA as well as with other regimes concerning insolvency.

To place an order for "Dealing with Debt: A Consumer's Guide", fill out the attached form at the end of this newsletter, which is addressed to the Information Distribution Centre of Industry Canada. It is also available on the web at ***www.osb-bsf.gc.ca***

The table below shows the number of distributed English copies per fiscal year for the last 5 fiscal years.

	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004
Trustees	46,949	42,240	50,181	53,360	45,476
Community Services and counsellors	5,823	3,917	3,900	7,368	3,005
OSB	1,701	9,876	12,078	12,602	2,400
Individuals	1	3	9	2	4
Government	496	711	541	560	535
Others	4,052	1,295	2,755	950	720
Total	**59,022**	**58,042**	**69,464**	**74,842**	**52,140**

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 of the summaries that are submitted are presented in both official languages.

Please note that such summaries are not substitutes for the actual decisions.

In the Matter of the Bankruptcy of Klaas Engels

Implicit Non-solicitation Clause

Ontario Court of Appeal
Decision of Judges Cronk, Goudge and Rosenberg

Citation: Engels v. Merit Insurance Brokers Inc. and Richard Killen & Associates Ltd(Trustee).
Docket: CA C39690

Facts: In 1994, the appellant/purchaser and the respondent/bankrupt merged their insurance brokerage firms with no express non-solicitation clause in the agreement act . In 1997, the respondent made an assignment in bankruptcy and was discharged in 1998. Following conflicts with the respondent, the appellant arranged to have the bankruptcy re-opened in 2000 without notifying the bankrupt. Richard Killen & Associates Ltd. were appointed as the new trustee. The trustee accepted the appellant's offer to purchase the respondent's business. The bill of sale indicated that the purchase was made on an "as is where is basis" and makes no reference to the non-solicitation of clients by the bankrupt. Upon learning of the sale, the respondent/bankrupt commenced proceedings to have the sale set aside. The parties settled and, as a result of the settlement, the transfer of the business to the appellant was declared valid. The respondent then sought a motion to confirm his ability to compete with the appellant for the business of former clients, which was granted. This is the decision under appeal.

Issue: In an involuntary alienation of assets of bankruptcy, should a non-solicitation clause be read into either a bill of sale from the trustee, or a consent order, when it is not expressly said or written therein?

Decision: Appeal is dismissed. Engels can solicit the former clients in his book of business.

Discussion: The appellant argues that the book of business comes with the right to solicit business from the respondent's clients. An industry practice makes the sale of the book of business conditional to a non-solicitation covenant. Hence, the appellant argues that this implicit non-solicitation clause should be seen as a part of his agreement with the trustee and binding on the bankrupt.

The Court notes that, neither the bill of sale, nor the Consent Order mentions the solicitation of clients. The exclusivity sought by the appellant was not mentioned expressly in the agreement with the trustee, nor in the Consent Order. Jurisprudence supports that in an involuntary alienation of assets, such as in a bankruptcy, there is no common law obligation for the bankrupt not to compete and solicit former clients. This proposition is not absolute, but applies in this case seeing the prior agreements between the parties and the dealings in regards to this matter.

Crystalline Investments Ltd. v. Domgroup Ltd.

Commercial Lease Termination • Assignee's Contractual Obligations

Supreme Court of Canada
Decision of Judges McLachlin and Binnie, Deschamps, Fish, Iacobucci, LeBel and Major

Facts: Domgroup Ltd. enters into long term lease agreements with Crystalline Investments Ltd. and Burnac Leaseholds Ltd. Before the end of the leases, Domgroup Ltd. assigns the leases to a sub-lessee, Coastal Foods Limited (later becomes Food Group Inc.) The latter tenant becomes insolvent and files a proposal under the *Bankruptcy and Insolvency Act* (BIA), thus repudiating the commercial leases under section 65.2 of the BIA . After receiving compensation for six months rent pursuant to section 65.2(3) of the BIA, the landlords file motions as against the original tenant (Domgroup Ltd.) to be paid for outstanding rent pursuant to an assignment clause in the leases. The landlords' appeal against the summary judgment dismissing their actions is granted as Carthy J.A. concludes that the rights between the landlords and the original tenant are unaffected by the proceedings

taken by the insolvent sub-lessee. Hence, Domgroup Ltd.'s appeal to the Supreme Court of Canada.

Issues:

1 Do the terms of the reorganization by the insolvent assignee, where it purported to repudiate the leases under section 65.2 of the BIA , affect the obligations between the landlords and the original tenant?

2 Does the common law Indemnification Right frustrate the BIA?

Decision:

1 The appeal is dismissed and costs awarded to the respondents. The insolvency of the assignee and order made pursuant to the BIA do not affect the landlords who can continue to look to the original tenant for enforcement of the leases. The order affects the insolvent assignee and its creditors, including the original tenant and assignor of the leases, but does not reach the landlords.

2 The possibility that an original tenant obtains the right to make a claim to participate in the proposal proceedings as an unsecured creditor, as stipulated in sections 179 and 62 of the BIA, is not contrary to the BIA.

Discussion: After a narrow reading of section 65.2, the Court concludes that nothing in the Act protects third parties such as assignors from the consequences of an insolvent's repudiation of a commercial lease. The Court indicates that when a lease is assigned, the landlords' privity of contract continues and the original tenant remains liable. In England, the *Landlord and Tenant (Covenants) Act 1995* enables the original tenant who assigns a lease to rescind his obligations regarding the covenants. There is no legislation to that effect in Canadian law. The Court then addresses the uncertainty resulting in the case *Cummer-Yonge Investments v. Fagot* (1965) by comparing it to a similar decision *(Stacey v. Hill)* in the UK. The result of this comparison is the conclusion that a disclaimer/repudiation of a lease should not relieve either an assignor or a guarantor from their contractual obligations.

The appellant submitted that if it is ruled that the original tenants are obligated towards the landlord, the consequence of such a ruling would negate the effects of section 65.2 BIA. Section 65.2 BIA would become ineffective because such a ruling would allow the original tenant to exercise his rights as an unsecured debtor in the proposal of debtor(assignee). The Court rejected this argument, indicating firstly that the legislator chose to preserve the liabilities of alternate debtors but allowed these debtors to maintain the right to indemnity, and secondly these indemnifications are contingent claims which are provable and, if not disallowed, dealt with by following the scheme of the BIA.

In the Matter of the Bankruptcy of Paul Careen and Michelle Careen

Date of Bankruptcy • Bankruptcy Precedence

Newfoundland and Labrador Supreme Court Decision of Judge Russell

Reference: 2004 NLSCTD 132

Facts: Quinlan Ltd. commences a claim against Paul and Michelle Careen, who are ordered to pay $60,000 into Court pending the disposition of the trial. On January 29, 2002, Quinlan is awarded $192, 508, including the immediate payment of the $60,000 "in trust". Quinlan's solicitor then attends the Court seeking the payment of the aforementioned $60,000, but the Registrar is not able to complete the mandatory certificate until the following morning. That same day(January 29), after Quinlan's solicitor attends the Court seeking payment , the Careens complete an assignment into bankruptcy. On January 30, 2002, the Official Receiver reviews and accepts the assignment documents. The trustee then delivers copies of the assignment and the notice of stay of proceedings to all parties involved, but the funds are paid to Quinlan's solicitor, in trust for Quinlan. The Trustee submits that since the money was paid into Court and not physically paid to the plaintiff before the bankruptcy, the assignment into bankruptcy takes precedence over these funds pursuant to section 70(1) of the *Bankruptcy and Insolvency Act* (BIA). Hence, he applies for an order declaring that the payment of the $60,000 "in trust" is in violation of section 70(1) of the BIA and therefore void as against the Trustee.

Issues:

a) What is the exact date and time that the bankruptcy occurs?

b) Does the date and time of bankruptcy have implications in the case at bar?

c) Were the funds the property of the bankrupts at the time of bankruptcy?

Decision: The funds were not property of the bankrupts at the time of bankruptcy; hence, section 70(1) of the BIA is not applicable and the order for payment stands.

Discussion: The Trustee submits that the bankruptcies were in effect prior to the time that the $60,000 was to be paid out of Court; hence, the order was not completely executed by payment and is not covered by the exception in section 70(1) of the BIA. Quinlan submits that the date of Bankruptcy occurs when the trustee indicates his formal acceptance of the appointment. The Court indicates that, at the time when the certificate of appointment was forwarded and received by the trustee, the Superintendent's policy was to record the date of bankruptcy as being the date when the Superintendent received the assignment documents (January 29). However, since July 15, 2002, the policy is that the bankruptcy is recorded at the time when the Official Receiver accepts the assignment documents (January 30). The Court accepts the Superintendent's submission that the trustee shall accept the appointment once the assignment documents have been received and accepted by the Official Receiver. In the case at bar, the Court puts emphasis on determining whether of not the funds were property of the bankrupts at the time of bankruptcy. The Court takes into account the fact that prior to the Careens bankruptcy, the plaintiff had obtained an order out of funds and had done everything in order to obtain payment.

Section 70(1) BIA indicates that the assignment has precedence "against the property of a bankrupt". In the case at bar, the Court established that when the plaintiff obtained an order for "immediate payment", the funds in trust were "earmarked" for him. Hence, at the time of bankruptcy, the funds in Court were not the property of the bankrupts.

In the Matter of Restaurants Fiorentino Inc.

Commercial Lease Termination • Stay of Proceedings of Eviction

Superior Court of Quebec
Decision of the Honourable Judge Chaput

Facts: Two lease agreements regarding commercial space in a food court are signed between the applicant and the debtor. Following the debtor's default in payment, the applicant moves to terminate the leases. The parties reach a settlement in which it is recognized that sums of money are owed to the applicant and a payment plan is put into place to remedy that situation. The settlement includes a clause stipulating that any subsequent default in regards to payment of rent or the forementionned payment plan will result in the termination of the leases. Another clause also indicates the debtor's contentment to forgo her right to section 1883 of the *Civil code of Québec* (CCQ), which would usually allow a tenant to remedy to a default in payment in order to avoid being evicted. The Court approves the transaction. However, the debtor then fails to make payments for the months of December 2003 and January 2004. On January 29, the debtor is put in default and asked to leave the premises and on February 16, she files a notice of intention to make a proposal. The trustee then files a motion to stay the eviction proceedings as against the debtor, indicating that her insolvency is due to her obligations towards another restaurant. The applicant moves to terminate the leases and have the trustee's motion for a stay of proceedings dismissed, pursuant to section 69 to 69.4 of the *Bankruptcy and Insolvency Act* (BIA).

Issues:

1 Can the applicant terminate the leases, despite the notice of intention filed by the debtor, as indicated in section 65.1 of the BIA?

In the event of an affirmative answer:

2 Should the trustee's motion for the stay of proceedings of eviction as against the debtor, pursuant section 69.1 of the BIA, be granted?

Decision: The Court grants the applicant's motion and terminates the leases entered into with the debtor. In addition, it authorises the applicant to proceed with the means of eviction.

Reasons: The applicant contends that, under the transaction approved by the Court, the leases are terminated immediately after a default in payment on December 1, 2003. The leases being terminated, the debtor instantly loses the right to occupy the premises. Section 65.1 BIA prohibits someone from terminating a lease when an insolvent person files a notice of intention to make a proposal as a result of a default in payment. However, in the case at bar, the request for termination is not the result of the notice being filed, since termination has already occurred automatically. Consequently, it is appropriate to lift the stay of proceedings for the repossession of the properties (eviction), despite section 69.1 of the BIA. The Court is of the opinion that the termination of the lease occurred immediately after the debtor failed to fulfill her obligations towards the landlord.

In the Matter of the Proposal of Paul Duglas Young and in the Matter of the Proposal of Kathleen Ann Young

Trustee Fees • Fee Factors

Court of the Queen's Bench of Manitoba
Registrar Lee
March 4, 2004

Facts: The Superintendent of Bankruptcy attaches a comment letter to the trustee's statements of receipts and disbursements raising concerns with the delay in completing the debtors' proposal and requests that the taxation proceed with notice to his office. The delay was determined to be caused by the events as follows. The Bank of Nova Scotia had registered a security interest in regards to the financing of a car; therefore, files a claim as a secured creditor. However, the statement of affairs shows this claim to be unsecured. The trustee, relying only on the debtors' belief that no security was registered against the vehicle, conducts no Personal Property Registry search. Following these events, the bank waits almost a year to file its proof of claim. The trustee does not follow through with payment of dividends, causing the debtors significant prejudices.

Issue: What is the proper compensation that should be awarded to the trustee?

Decision: The registrar decides that the compensation requested by the trustee should be reduced by 500$ considering the quality of his work.

Discussion: Section 50.(5) of *The Bankruptcy and Insolvency Act* imposes upon the trustee an obligation to verify thoroughly whether the debtors' debts are secured or not. The trustee acts irresponsibly by relying solely on the debtors' statements to determine the status of various debts. In order to establish the proper amount of the trustees' compensation, the registrar considers numerous factors:

1 Time spent on the debtor's file

2 Reasonableness of the work performed

3 Degree of skill required and provided

In the Court's opinion, the trustee's performance is of low standard, incurs extra work, delays and contributes to other negative consequences for the debtors.

In the Matter of the Bankruptcy of William Gary Lowe

Registrar's Jurisdiction to Eliminate Interest Payments on Student Loan

Alberta Court of Queen's Bench
Decision of Judge Romaine

Reference: 2004 ABQB 255

Facts: In January 1998, months after completing his undergraduate degree, Mr. Lowe files for his second bankruptcy. The principal amount of the loan at the end of his studies is $13,935. He is discharged from bankruptcy in March 2000. Pursuant to section 178(1)(g) of the *Bankruptcy and Insolvency Act* (BIA), a debt owed in relation to a Canada student loan survives a discharge if the bankruptcy occurs within ten years of the date the Bankrupt completes his or her studies. [Note: although an application can be made ten years after the assignment into bankruptcy, at the time Mr. Lowe filed for bankruptcy, 178(1.1) BIA read two years]. In 2003, the Bankrupt makes an application pursuant to section 178(1.1) of the BIA for an order that section 178(1)(g) not apply; therefore, releasing him from his debt. Principal and interest on the student loan stood at approximately $20,000. The Registrar did not absolve the bankrupt of full responsibility, but relieved him from the interest payments. The Registrar stated that, since he had the power to provide a discharge from bankruptcy on certain conditions, he had the power to "forgive this loan on certain conditions." The Attorney General of Canada appeals the Registrar's decision.

Issue:
1 Did the Registrar act within the limits of his jurisdiction when eliminating the interest payments on the loan?

2 Were the requirements of good faith and financial difficulty outlined in section 178(1.1) of the BIA met by the Bankrupt?

Decision: The appeal is allowed on the basis that the Registrar erred in law in exercising his discretion to eliminate interest on the student loan.

Reasons: A Registrar does not have jurisdiction to grant partial relief or to reduce the quantum of a student loan. Jurisdiction under this subsection is limited to granting, dismissing or adjourning the application. Section 178(1.1) provides some relief after the passage of time, but some conditions must be met. First, the bankrupt has acted in good faith and second, he or she has experienced and will continue to experience

financial difficulties to the extent that he or she will be unable to pay the loan. The Court examined the bankrupt's financial situation and discovered that the latter's average annual income for the last three years was approximately $120,000. In addition, while he had been repaying his provincial student loan, he never made a voluntary payment on his Canada Student Loan. Hence, the Court is not satisfied that either the good faith or the financial difficulty requirements were met by the bankrupt. It is to be noted that the Court rejects the Attorney General's application seeking an order that the Bankrupt be precluded from reapplying for relief under section 178(1.1) of the BIA, since the bankrupt's situation may change in the future.

In the Matter of the Bankruptcy of Gail Sharon Monteith

Undivided Half Interest in Principal Residence • Exempt Assets • Property Acquired Prior to Discharge

Saskatchewan Court of Appeal
Decision of Judges Gerwing, Jackson and Lane

Reference: Monteith, Re. 2004 SKCA 63

Facts: Ms.Gail Monteith and Mr. Terry Monteith separate on May 9, 1995. They agree that Ms. Monteith take custody of the kids and that Mr. Monteith assume responsibility for the mortgage payments and household service accounts. Mr. Monteith does not carry out his obligations with regards to the mortgage payments and household expenses. Ms. Monteith therefore commences an action against her spouse in order to obtain compensation. Ms. Monteith makes an Assignment in bankruptcy on August 14, 2002. On September 5, 2002, she obtains a judgement in her favour awarding her Mr. Monteith's half interest in their matrimonial home, along with his half interest in the household furnishings. The trustee brings before the Court a motion for an order declaring him the owner of the half matrimonial home and half the household furnishing acquired by Ms. Monteith after her assignment into bankruptcy. The trial judge rejects the trustee's motion who then appeals the decision before the Saskatchewan Court of Appeal.

Issue: Must property exempt pursuant to section 67(1)(b) of the *Bankruptcy and Insolvency Act* (BIA) — as per *Saskatchewan Exemptions Act*, R.S.S. 1978, c. E-14 — but acquired after the date of the bankruptcy be realized for the benefit of the creditors? In other words, when there is a conflict between section 67(1)(b) of the BIA and section 67(1)(c) of the BIA, which of the two has precedence?

Decision: Justices Gerwing, Jackson and Lane decide that the half the interest in the residence and the furniture acquired by Ms. Monteith after her assignment in bankruptcy are exempt assets.

Discussion: It is indicated in subsection 67(1)(c) of the BIA that all of the properties that the bankrupt possesses or will posses before his discharge are properties that are divisible among his creditors. On the other hand, section 67(1)(b) of the BIA indicates that certain properties are exempt from seizure. Counsel for the trustee argues that in the event that a bankrupt acquires goods before his discharge, subsection 67(1)(c) of the BIA should be interpreted to take precedence over subsection b) of that same section. In other words, if property is acquired after the bankruptcy, it is no longer important to determine whether said property is exempt, because, in accordance with section 67(1)(c), the newly acquired property is vested in the trustee for distribution amongst the creditors.

The court rejects this interpretation and explains that an exempt asset is not defined according to the period of acquisition but according to its nature. By analyzing the wording of other subsections of paragraph 67 (1) and of section 68 of the BIA, the Court is not ready to reach the conclusion that an exempt asset could be divisible among creditors because it is acquired after the bankruptcy. Relying on legal doctrine and case law, the Court explains it is not accurate to conclude that subsection (c) of section 67 of the BIA has precedence over subsections (a), (b) and (1)(b) of the same section.

In support of their argument, the trustee's counsel highlights the *Goertz (Trustee of) v. Goertz* [1996] 2 W.W.R. 372 (Sask. C.A.) case. In that case, the debtor transfers his homestead interest to his wife before the date of his bankruptcy. The trustee seizes the property under paragraph 91(2) of the BIA because there was a settlement of the property five years before the date of the bankruptcy. The judge later on states that the property is not exempt because, at the time of the bankruptcy, the property did not belong to the bankrupt. The Court explains that *Goertz* must be read while keeping in mind the case of *Royal Bank of Canada v. North American Life Assurance Co. Et al. (Ramgotra)*, [1996] 1 S.C.R. 325, a judgement rendered after *Goertz*. In *Ramgotra*, Justice Gonthier clearly states that, even if the property in question is vested in the trustee, that same trustee must respect the

fact that this property is defined as exempt property. Sections 91 and 67 of the BIA are therefore to be interpreted as two completely different steps. Regardless of how the property is vested in the trustee, the trustee must still respect the exempt nature of the property.

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 the Disciplinary File of Ernest Leyshon-Hughes, Trustee

Disciplinary Measure

Decision of the Honourable Fred Kaufman, C.M., c.r.
Delegate of the Superintendent of Bankruptcy
June 29, 2004

Facts: The Senior Analyst — Disciplinary Affairs, submits a report on January 3, 2000 pertaining to the professionnal conduct of the bankruptcy trustee Ernest Leyshon-Hughes. The trustee does not contest the facts revealed in the report. The two parties therefore make an agreement. The Superintendent's delegate confirms nine allegations taken from the report to sanction the trustee for his professional misconduct.

Violations:

1 The trustee is in default of depositing cash receipts to estate accounts within the prescribed time limit.;

2 The trustee is in default of diligently reconciling the Consolidated Bank Account;

3 Failure to post checks written on a timely basis pursuant to Directive #5, paragraph 9(B);

4 The trustee is in default of paying interest in an ordinary estate;

5 The trustee is in default of abiding by the Act during the distribution of dividends to the creditors;

6 The trustee is in default during the taking of possession and control of assets, in the follow up on potential estate assets and in the verification of the Statement of Affairs;

7 The trustee is in default relatively to his inventory taking obligation;

8 The trustee is in default of diligently closing the bankruptcy estate files;.

9 The trustee is in default with respect to the chronological classification of files, which has caused an ageing of the files;

Sanctions: The trustee's licence is limited for a period of three months. He cannot be appointed as a trustee to administer a new bankruptcy file, proposal, receivership or act as an interim receiver. The trustee must also successfully complete an ad hoc oral exam before a board of examiners. The themes of his exam are "personal insolvencies" as well as bankruptcy and insolvency legislation particular to the province of British Colombia.

In the Matter of Disciplinary Proceedings Regarding James Gordon Touchie and J.G. Touchie & Associates Ltd

Decision on the Sanctions

Decision of the Honourable Benjamin J. Greenberg
Delegate of the Superintendent of Bankruptcy
August 5, 2004

Facts: The Senior Analyst-Disciplinary Affairs submits a report on November 6, 2001, pertaining to the professional conduct of the bankruptcy trustee James Gordon Touchie and the corporate trustee J.G. Touchie & Associates Ltd. (trustees). The Superintendent's delegate confirms some allegations which are taken from the report to sanction the trustee and trustees for their professional misconduct.

Allegations:
Issues regarding the administration of certain estates:

- taking large unauthorized draws of fees; not proven and dismissed
- not maintaining on an ongoing basis a monthly list of all individual estates; not proven and dismissed

Complaints regarding the Consolidated Bank Account (CBA):

- reconciliations the CBA; sanctioned
- failing to efficiently and expeditiously deal with NSF cheques, stale-dated cheques; sanctioned
- posting and allocation of interest earned to individual estates; withdrawn.

Complaints alleging that the trustees failed to cooperate with the auditor and the Senior Analyst; sanctioned.

Sanctions:

A The licence of James Gordon Touchie, trustee in bankruptcy, is suspended for a period of six weeks, during which time he will not be permitted to be appointed and/or act under the BIA.

B James Gordon Touchie is required to close and tax the estates referred to in the allegations.

C The licence of J.G. Touchie & Associates Ltd., the corporate trustee, is restricted for a period of one month to the administration of estates to which it has been appointed prior to the start of that period.

D Following a forementioned restriction period, the licence of J.G. Touchie & Associates Ltd. is restricted for an additional period of one month with regards to the judicial district of Moncton, with the same conditions applied as in paragraph C of the Sanctions.

Reasons: Other than failing to cooperate with the Superintendent's representatives, the Trustees failings do not involve wilful misconduct. They are of an administrative nature. The delegate then points out that although the Senior Analyst decided to withdraw a complaint, she failed to inform the Trustees, who were not aware of this decision until the day of the merits hearing. Hence, in the sanctions, the delegate takes into consideration this failure to inform resulting in needless preparation by the trustee. Despite the withdrawal and dismissal of some complaints at the merits hearing, the Senior Analyst persisted in not altering her original recommended sanctions. However, at the hearing, she advised the trustee and the delegate that she had unilaterally modified her recommendations by diminishing the requested suspensions and by adding the requirement that the trustee close and tax the estates referred to in the complaints.

The delegate also considers observations made in the decision on the merits of this case, as reported January 30, 2004. In that decision, the delegate had indicated that the vocabulary used by the Senior Analyst in her report, gave the "impression to a reasonable and informed reader that the author of the report believed that some element of dishonesty existed, involving misappropriation or defalcation of funds, or worse". Regardless of the fact that counsel for the Senior Analyst opened the merits hearing by stating that there was no indication of dishonesty on behalf of the trustees, the delegate indicates that more appropriate language would have been called for in order to avoid the trustees having to labour under a cloud of suspicion of dishonesty for so long. The delegate indicates that "when the time comes to determine the sanction(s) to be imposed, we will be mindful of that unfairness."

The delegate also takes into account arguments made by the trustee to the effect that he is a first time offender and that he did not personally benefit as a result of the issues in the case at bar since he was obliged to deposit a sum of money into the CBA's to make up the "variances" following a verification of the balances. It is also argued that the creditors did not suffer any losses.

Another factor taken into consideration is that "a disciplinary sanction must not be tailored to reflect only the specific needs and situation of each trustee, but should also take into account the integrity of the bankruptcy and insolvency system". With regards to the latter statement, it is noted that some of the complaints are serious infractions that have a direct impact on the integrity of the system and negatively affect the general public's perception and confidence. Furthermore, taken into account is the fact that since the corporate trustee operates satellite offices throughout the Maritimes, any sanction with regards to the corporate licence would deprive that population of services.

In the Matter of Professional Conduct Proceedings Under the Bankruptcy and Insolvency Act Respecting Jean-Guy St-Georges, an Individual Licensed Trustee, and St-Georges Hébert Inc., a Corporate Licensed Trustee

Delegate's Jurisdiction • Constitutionality of sections 14.01, 14.02 and 14.03 of the BIA • Burden of Proof

Decision of the Honourable Perry Meyer, Delegate of the Superintendent of Bankruptcy May 3, 2004

Facts: At the preliminary hearing held March 22 and 23, 2004, the trustees file a claim to declare sections 14.01, 14.02 and 14.03 of the *Bankruptcy and Insolvency Act* (BIA) inoperative against them. The intervener, the Attorney General of Canada, challenges the delegate's jurisdiction to hear the said motion. The trustees also asked the delegate about the burden of proof to apply at the hearing on the merits.

Issues: (1) Does the Superintendent's delegate have jurisdiction to assess the constitutionality of its enabling statute? (2) Are sections 14.01, 14.02 and 14.03 of the BIA inoperative against the trustees? (3) What is the rule regarding the application of the burden of proof at the hearing on the merits?

Decision: First, the delegate takes the position that he has jurisdiction to hear the trustees' motion. He then declares sections 14.01, 14.02 and 14.03 of the BIA applicable to the trustees. Finally, the delegate decides to use the rules listed by the Honourable Benjamin Greenberg in *Sztern* regarding the application of burden of proof.

Discussion: With respect to the argument that the delegate of the Superintendent of Bankruptcy does not have jurisdiction to assess constitutional and Charter issues, the Honourable Perry Meyer refers to the decision of the Supreme Court in *Martin*. He also relies on the decisions of his colleagues, the Honourable Fred Kaufman in *Sam Lévy & Associates* and the Honourable Lawrence A. Poitras in *Jacques Roy*. He finds that he does not have jurisdiction to declare sections 14.01, 14.02 and 14.03 of the BIA to be unconstitutional, but that he may nevertheless declare these sections inoperative against the trustees. Therefore, the following decision-makers would not be bound by his decision.

The delegate refers to the decision of the Court of Appeal of Quebec in *Métivier c. Mayrand* in 2003 and to those of his colleagues Kaufman and Poitras in order to make a decision on whether the said sections are ineffective against the trustees. To say that the delegate's appointment does not guarantee independence, the trustees must prove that the said appointment raises reasonable apprehension of bias, which they did not do in the case at bar. With regards to the combining duties of the Superintendent of Bankruptcy, the delegate, through an analysis of the disciplinary proceedings in practice and not in theory, comes to the conclusion that these proceedings guarantee the delegate's independence and impartiality. Therefore, the disciplinary proceedings do not raise apprehension of bias.

Regarding the burden of proof, the Senior Analyst will first have to prove the accuracy of the report. Afterwards, the trustees will need to contradict the report's allegations by proving that they are not linked to facts brought in evidence by the Senior Analyst.

Preliminary Decision Concerning the Professional Conduct of Jean-Guy St-Georges, an Individual Licensed Trustee, and St-Georges Hébert Inc., a Corporate Trustee

Motion for adjournment

Decision of the Honourable Perry Meyer, Delegate of the Superintendent of Bankruptcy June 28, 2004

Facts: On June 2, 2004, the trustee files a motion to adjourn the hearing scheduled to begin on May 31, 2004. By filing this motion, the trustee seeks to suspend the hearing until the Federal Court renders a decision concerning the judicial review of a judgement delivered by the above-mentioned delegate.

Decision: The delegate does not grant the trustee's motion to adjourn the disciplinary hearing.

Discussion: The delegate starts by making an analysis of the recent case law relating to the same subject. He notices that certain factors must be taken under consideration in order to determine the validity of his claim for adjournment, including the complexity of the case, the size of the file, the preparation time for the hearing, the major expenses, the existence of conservatory measure and the public interest.

The delegate does not believe that it would be fair to grant an adjournment because he ascertains that, in the case at bar, the public interest is not sufficiently safeguarded by the conservatory measures. "The

individual trustee in this case is now working as a consultant/employee for another trustee to whom the files have been transferred and will apparently continue to do so. It appears that an early hearing on the merits will not cause any substantial prejudice and will even be greatly to his benefit if he is exonerated. The costs involved are far less significant than in *Levy*, and could easily have been mitigated by the Trustees, by proceeding on the merits in June as originally agreed, where the same constitutional arguments could have been raised by them, and by their then taking only one proceeding in the Federal Court dealing with all the issues at the same time." Also, in the spirit of the *Bankruptcy and Insolvency Act*, the disciplinary hearing should proceed in a speedy and expeditious manner.

In the Matter of Professional Discipline Proceedings Under the Bankruptcy and Insolvency Act Respecting Todd Y. Sheriff, an Individual Licensed Trustee, and Segal & Partners, Inc., a Corporate Licensed Trustee

Motion for adjournment

Decision of the Honourable Fred Kaufman, Delegate of the Superintendent of Bankruptcy June 10, 2004

Facts: A report concerning allegations pertaining to Todd Y. Sheriff and Segal & Partners, Inc. (trustees) is submitted by a Senior Analyst. During the hearing before the Superintendent, the latter orders a second report. The latest report provides "information about the failure of the trustees to carry out their statutory duties properly in the administration of the estates under the Act". During the hearing regarding the first report, the Trustees move for the proceedings to be dismissed, alleging failure of the Senior Analyst's to comply with procedural guidelines. The motion is granted in part with the result that the Senior Analyst is ordered to resubmit an amended version of the second report. The decision is rendered without consideration to the allegations in the second report. Following the hearing before the Superintendant, the trustees learn of undisclosed evidence on the part of the Senior Analyst. Thereafter, the trustees move to have the first proceedings stayed; however, the motion is denied. An application for judicial review of the decision is subsequently presented to the Federal Court by the trustees.

Although a second report had been ordered, positions pertaining to the first report continued to be heard by the Superintendent. In the case before the delegate, regarding the second report, the trustees request that the proceedings instituted against them in regards to the second report be stayed until the application for judicial review of the first case is settled by the Federal Court. They also argue that a reasonable person may have an apprehension of bias on the part of the delegate who now knows a great deal about the previous case involving the same parties. Furthermore, the trustees state that the failure to disclose all relevant information pertaining to both instances demonstrates "a pattern of conduct" on the part of the Senior Analyst.

Issue: Should the proceedings instituted against the Trustees be stayed pending judicial review of the Federal Court?

Decision: The arguments presented by the trustees do not constitute grounds to stay the proceedings.

Discussion: The delegate finds that the two cases "are unrelated save that they concern the same parties", consequently it would not be appropriate that the proceedings be stayed. In regard to the allegation of apprehension of bias as a result of the delegate being familiar with the prior case involving the parties, the latter states that he is "capable, by reason of [his] training and experience, not to be influenced in any way by what transpired in [the prior] case". The arguments regarding "consistent conduct" of non disclosure are set aside. The delegate must determine if there was failure to disclose in this particular case, independently of what happened in the first case. In the case at hand, a binder of relevant documents was disclosed only after the Trustees learned of its existence during cross-examinations for judicial review. While the allegations concerning the lack of timely disclosure are accepted, they do not constitute grounds to stay the proceedings.

The argument that the delegate should follow the precedent he set with his decision *In the Matter of Professional Conduct Proceedings Respecting Sam Lévy & Associés Inc. and Sam Lévy* is also dismissed. The delegate distinguishes the aforementioned case with the case at bar. In *Lévy*, the trustees faced more than 100 allegations, the Superintendent had enjoined them from taking any new cases, and the hearing was estimated to have lasted at least four weeks; hence, burdening the parties with enormous costs. In the case at bar, there are fewer allegations, the estimated time for the hearing is two weeks, and there is no order restricting the trustees' activities.

In the Matter of Professional Discipline Proceedings Under the Bankruptcy and Insolvency Act Respecting Todd Y. Sheriff, an Individual Licensed Trustee, and Segal & Partners, Inc., a Corporate Licensed Trustee

Court's Document Review • Privilege of Documents in Possession of the Senior Analyst

Decision of the Honourable Fred Kaufman, Delegate of the Superintendent of Bankruptcy

Reference: 2004

Facts: By an interlocutory decision (the "decision") dated June 10, 2004, it was decided that the issue of privilege with respect to documents in the possession of the Senior Analyst would be discussed once these documents had been furnished by counsel for the Senior Analyst and reviewed by the delegate. Following the decision, the Crown maintains its privilege over the documents and states that they will not be disclosed. As an alternative to producing the documents, a detailed description of six documents is submitted. Counsel for the trustees objects to this submission, as the "normal process" established by the case law over privilege claims requires that the documents in question be reviewed by the Court. Counsel for the Senior Analyst argues that the delegate is not obligated to review the documents, as Rule 30.04(6) of the *Ontario Rules of Civil Procedure* provides that "[w]here privilege is claimed for a document, the court *may* inspect the document to determine the validity of the claim".

Issue: Can counsel for the Senior Analyst claim privilege for the documents in his possession, or must he produce these documents for the delegate's appreciation.

Decision: The claim of privilege over the documents is maintained.

Discussion: The delegate agrees with the trustees' argument that the process established by the case law is the appropriate method in order to resolve privilege claims; however, he states that "a less formal procedure" may be utilized. The delegate accepts the detailed description of the documents in question in lieu of production of the documents. He opines that examination of the documents is unnecessary, as it is clear after review of the description that the Senior Analyst is entitled to claim solicitor-client privilege for four documents and litigation privilege with respect to the two other documents.

Although the present decision is contrary to the delegate's previous decision where it was decided that the Senior Analyst would furnish the documents in question, the description of documents was not available at the time of the Decision. In addition, the parties have not suffered any harm or injustice as a result of the documents not being produced. Furthermore, pursuant to section 14.02(2) of the *Bankruptcy and Insolvency Act*, the delegate is not bound "by any legal or technical rules of evidence" and he is obligated to deal with matters "as informally and expeditiously as the circumstances and a consideration of fairness shall permit".

In the Matter of Professional Conduct Proceedings Under the Bankruptcy and Insolvency Act Respecting Samuel L. Lévy, a Licensed Trustee, and Sam Lévy & Associés Inc., a Corporate Licensed Trustee

Motion to Adjourn Hearing

Decision of the Honourable Fred Kaufman, Delegate of the Superintendent of Bankruptcy May 4, 2004

Facts: A hearing was set to start on May 31, 2004, to hear the merits of allegations found in the disciplinary report. However, on December 4, 2003, the delegate denies the motion of the Senior Analyst who challenges the delegate's jurisdiction to hear constitutional issues. On December 30 of the same year, the Senior Analyst requests a judicial review of the aforementioned decision before the Federal Court of Canada. On December 19, 2003, the delegate denies the trustee's motion to declare sections 14.01, 14.02 and 14.03 of the *Bankruptcy and Insolvency Act* (BIA) inoperative against him. The trustee challenges the delegate's decision before the Federal Court of Canada on January 12, 2004.

Since delays in proceedings before the Federal Court of Canada will be significant, counsel for the Senior Analyst suggests to proceed as planned in the ordinary course of the disciplinary hearing, which is to say to meet the date of the hearing of the merits.

Issue: Must the delegate conduct the hearing on the merits on the professional conduct of the trustees despite the motions presented before the Federal Court of Canada to set aside preliminary decisions?

Decision: The hearing, which was scheduled to begin on May 31, 2004, is cancelled and rescheduled at a later date, which will be determined after the decisions of the Federal Court of Canada have been rendered.

Discussion: Counsel for the Senior Analyst as well as counsel for the Department of Justice argue that the matter is in the hands of the delegate and ready to be heard. Waiting could have an impact on possible evidence. Counsel also suggest that if the trustees wanted to quash proceedings, they would have sought an order before the Federal Court of Canada in this matter.

For their part, trustees argue that the delegate has jurisdiction to adjourn the hearing. They also add that to proceed with the hearing on the merits would lead to additional costs. According to them, it is important to keep in mind that they could succeed in the Federal Court.

The delegate finds that issues brought forward to the Federal Court are very serious and could have repercussions. Moreover, since conservatory measures are currently applied against trustees, the public is protected and therefore, there is no urgent need to proceed with the hearing. Finally, the delegate takes into consideration hearings-related costs and the fact that these hearings could be found irrelevant if the Federal Court sets aside preliminary decisions.

In the Matter of Professional Discipline Proceedings Under the Bankruptcy and Insolvency Act Respecting Jacques Roy, an Individual Licensed Trustee

Motion for adjournment

Decision of the Honourable Lawrence A. Poitras,
Delegate of the Superintendent of Bankruptcy
June 29, 2004

Facts: A complaint is filed with the Office of the Superintendent of Bankruptcy with respect to the applicant trustee. The trustee files a preliminary exception asking the delegate to rule that sections 14.01, 14.02 and 14.03 of the *Bankruptcy and Insolvency Act* (BIA) are of no force and effect with respect to him. A motion to dismiss the preliminary exception is made on behalf of the analyst, who argues that the delegate does not have jurisdiction to decide on the constitutionality of sections 14.01 and 14.02 of the BIA. The motion to dismiss is denied. The delegate rules that "sitting as an administrative tribunal", he has the inherent authority to hear the preliminary exception. The delegate dismisses the preliminary exception and determines that the case be heard on the merits as soon as possible. The trustee then applies to the Federal Court for a request to reverse the decision of the delegate. Unless it is given priority, it is unlikely that the Federal Court will hear the appeal before 2005.

The trustee argues that the merits of this case cannot be heard as long as the Federal Court has not ruled on his motion to reverse the decision of the delegate pertaining to the preliminary exception and the *Sam Lévy* case which also deals with the jurisdiction of the delegate. The trustee claims that if the Federal Court allows the appeal, "in view of circumstances and equity" the hearing on the merits of the case should be adjourned to a later date.

Issue: Should the delegate allow the trustee's application to stay the suspension of sections 14.01 and 14.02 of the BIA until the Federal Court decides on the constitutionality of these provisions? If the application is allowed, would the delegate be acting as if sections 14.01 and 14.02 of the BIA were of no force and effect as long as the Federal Court has not ruled on their constitutionality?

Decision: The trustee's application is dismissed. Proof and hearing of the questions set out in the notice of hearing are set for the first days on which counsel are available.

Discussion: Sections 14.01 and 14.02 of the BIA have been declared constitutional by the Quebec Court of Appeal in *Métivier v. Mayrand*. With regard to the suspension application, the applicable case law supports the dismissal of such application. Pursuant to the BIA, the delegate has a statutory obligation to "deal with matters set out in the notice of hearing as informally and as expeditiously as the circumstances and a consideration of fairness permit". Furthermore, the length of the present case and the necessity to protect the public interest favour continuing proceeds without undue delay.

In *Sam Lévy*, the hearing was adjourned given that the decision of the delegate regarding his authority to hear the trustee's motion on the constitutionality of sections 14.01 and 14.02 of the BIA was appealed before the Federal Court by the Attorney General of Canada and that the expected length of the hearing on the merits was in excess of four weeks.

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