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

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

2005 – 7

OSB Newsletter

A Word from the Superintendent of Bankruptcy

After several years of consultation, a Senate Committee Report and a Memorandum to Cabinet, Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, was tabled before the House of Commons on June 3rd, 2005. You can access a copy of the Bill at our Website: ***www.osb-bsf.ic.gc.ca***

We do not expect the Bill to be referred to Committee before the fall but we will keep you informed in due course. Check the next edition of the OSB Newsletter for a detailed summary of the Bill.

In the past several months, the OSB has undertaken a major review of all of its activities as part of a reorganization exercise. This reorganization will contribute to building OSB's strengths so it can become a leader and model regulator and assume the full scope of its mandate. It will facilitate the pooling of resources on a regional basis and provide greater flexibility to deal with local realities. It is not driven by a need for reductions and no office closures will take place as a result of this initiative.

As part of this exercise, we are looking at a new model for service delivery. The model entails reorganizing directorates in headquarters to reflect the priority that OSB places on Information Services & Products, Regulatory Affairs, and Compliance and the creation of three regions: the West, Ontario, and the East. We will also focus on retooling our Corporate Services and building an Internal Evaluation capacity to ensure coherent service delivery across the country.

We believe that our staff has many strengths and talents, and we hope that these strengths and talents will be put to optimal use through the new service delivery model.

INSIDE THIS ISSUE

Over the coming months, we will be keeping you informed of major changes as they are implemented.

In the last Newsletter, I gave readers a quick debrief of the Academics' meeting held in August 2004. As a result of this meeting, the OSB accepted academic proposals for research funding contracts. We are extremely pleased to announce that the OSB will be providing funding for research papers on the following topics:

(1) An International Comparative Study of the Personal Liabilities of Insolvency Administrators

(2) Has Access to Credit for Low-Income Households Increased?

(3) How Are Particular Exemptions and Exceptions Handled in Various Countries?

(4) An International Comparative Analysis of Counselling

(5) Growing Old Gracefully: An Investigation Into the Growing Number of Bankrupt Canadians Over the Age of 55

(6) An Empirical Analysis of the Efficiency of Reorganization Procedures Under the BIA and the CCAA

(7) Measuring Outcomes Under CCAA

CONTINUED ON PAGE 2

We anticipate providing you with more details on the final reports by the end of 2005 and publishing them on our Website.

We would like to thank all those who submitted research proposals. We look forward to seeing the outcome of these studies.

In this issue, you will find a review of the 2004 insolvency statistics, a short article on the OSB's Debtor Compliance Initiative and, of course, the ever popular caselaw summaries. These summaries, which it is worth noting, are prepared by some of the law students in the OSB Student Program. These summaries have been very well received by the insolvency community, and we've been asked by various organizations for permission to reproduce them in some of their own material. We are glad to see that this segment, which was suggested by our readers, is such a success. In fact, we are about to issue *The Insolvency Caselaw Digest for 2004*, a collection of about 50 insolvency related decision summaries, which due to a lack of space, could not be included in the OSB Newsletter. Stay tuned for this upcoming document.

We have also recently published a revised version of *The Inspectors' Handbook*. An item in this Newsletter will inform you on how to get copies.

In continuing with it's *Government On-line* objectives, the OSB will be launching Phase III of the e-filing initiative this Fall. We hope that this phase will be as successful as the previous two. As indicated in my presentations to trustees across Canada during the CAIRP Continuing Education Seminars in May, we anticipate that e-filing will become mandatory one year following the launch of Phase III.

Once again, if you have any questions, comments or suggestions on this Newsletter, please do not hesitate to send them in to the Newsletter Coordinator. Whenever possible, we will try to incorporate your ideas in our newsletter to keep you better informed.

Investigations Group, Debtor Compliance: 49 Files Investigated in Less Than Two Years

Since it's creation in 2003, the Investigation Group, Debtor Compliance — a three-year pilot project created by the Office of the Superintendent of Bankruptcy — has, in under two years, investigated no fewer than 49 cases of allegations of breaches of the *Bankruptcy and Insolvency Act* (BIA). The deficits in these files amount to more than 25 million dollars.

The Group's investigations deal with a variety of cases, notably offences associated with credit card abuse, fraudulent disposition of property, fraudulent obtaining of credit, fraudulent transfer of property and the destruction of books and documents related to the bankrupt's affairs.

To date, the members of the Investigation Group have submitted 28 files to Crown prosecutors, of which 18 went to provincial prosecutors for Criminal Code charges, and 10 to the federal prosecutor for charges under the BIA. The prosecutors have already filed charges in 17 cases, with a total of 231 charges against the debtors. The other files are still being reviewed by the prosecutors.

Of these 17 cases, two have led to convictions against the debtor. In the first case involving charges of fraud and uttering forged documents, the bankrupt was handed an 18-month suspended sentence. The first 12 months were to be served at home with the bankrupt being allowed to leave the house only for medical reasons, legitimate work or community service for a total of 200 hours. The sentence also included a probationary period of three years to keep the peace and not to possess any credit cards.

In the second case involving the fraudulent obtaining of credit, the bankrupt was fined $2,400, to be paid over 18 months. He was also put on probation for 18 months, during which time he must keep the peace, not enter any casinos, submit to a program for compulsive gamblers, and not indulge in any games of chance whatsoever.

In the other 15 files, legal proceedings are ongoing. We will update you on the results in future issues of the OSB Newsletter. For further information, you may contact the Director of the Investigations Group, Mr. Réal Poirier, at (450) 671-8821.

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Insolvencies in Canada in 2004

Overview

In 2004, the number of new insolvency cases filed with the OSB dropped by 0.4% to 110,940. This decrease contrasts with the 6.3% increase recorded in 2003. This year, consumer insolvencies grew by 0.3%, with 101,084 new consumer cases. In 2004, business insolvencies were down by over 6.0% for the third year in a row. During 2004, the number of new business cases filed with the OSB was 9,856, down by 7.6% compared with the previous year.

Two economic factors limited the growth of consumer insolvencies in 2004. A third factor could have triggered a more significant increase, if it had not been for such a good performance by the first two factors. The first positive factor was the creation of 228,000 jobs, all full-time, during 2004. The second factor was that, contrary to financial market expectations, the 5-year mortgage interest rate only grew modestly, by 0.1 percentage point, between the third quarter of 2003 (6.3%) and the third quarter of 2004 (6.4%). The third factor was the higher debt ratio, which rose by 6.2 percentage points to 113.7% during the third quarter of 2004, compared with 107.5% in the third quarter of 2003.

The decrease in business insolvencies was also part of the favourable economic climate. In 2004, the gross domestic product (GDP) was up 2.7%, compared with a 2.0% increase in 2003. Stronger domestic demand in the U.S., coupled with a strengthening global demand, resulted in Canadian exports growing by 9.0% in spite of a 7.7% appreciation in the Canadian currency. The value of the Canadian dollar was $0.82 US in December 2004, compared with $0.76 US in December 2003. Another major factor was the drop in the cost of business financing. This cost, which is measured by the 90-day commercial paper interest rate, declined by 0.5 percentage points between the third quarter of 2003 (2.8%) and the third quarter of 2004 (2.3%).

[1] Consumer proposals under Divisions I and II.

[2] Corporate proposals under Division I and sole proprietorship proposals under Divisions I and II.

[3] Sole proprietorship means a non incorporated business as opposed to a corporation.

Table 1: Insolvencies in Canada, 2003–2004

	2003	2004	Change (%)
Total	111,415	110,940	-0.4%
Consumer	100,745	101,084	0.3%
Bankruptcies	84,251	84,426	0.2%
Proposals[1]	16,494	16,658	1.0%
Business	10,670	9,856	-7.6%
Bankruptcies	8,844	8,128	-8.1%
Proposals[2]	1,826	1,728	-5.4%
Corporations	2,960	2,781	-6.0%
Sole proprietorships[3]	7,710	7,075	-8.2%

Table 2: Insolvencies, regions, 2003–2004

	2003	2004	Change (%)
Atlantic			
Total	9,347	10,092	8.0%
Consumer	8,693	9,466	8.9%
Business	654	626	-4.3%
Quebec			
Total	29,200	29,390	0.7%
Consumer	26,341	26,840	1.9%
Business	2,859	2,550	-10.8%
Ontario			
Total	41,928	42,453	1.3%
Consumer	38,531	39,341	2.1%
Business	3,397	3,112	-8.4%
Manitoba/Saskatchewan			
Total	6,699	6,405	-4.4%
Consumer	6,004	5,778	-3.8%
Business	695	627	-9.8%
Alberta			
Total	12,417	11,924	-4.0%
Consumer	10,532	10,065	-4.4%
Business	1,885	1,859	-1.4%
British Columbia			
Total	11,824	10,676	-9.7%
Consumer	10,644	9,596	-9.8%
Business	1,180	1,080	-8.5%

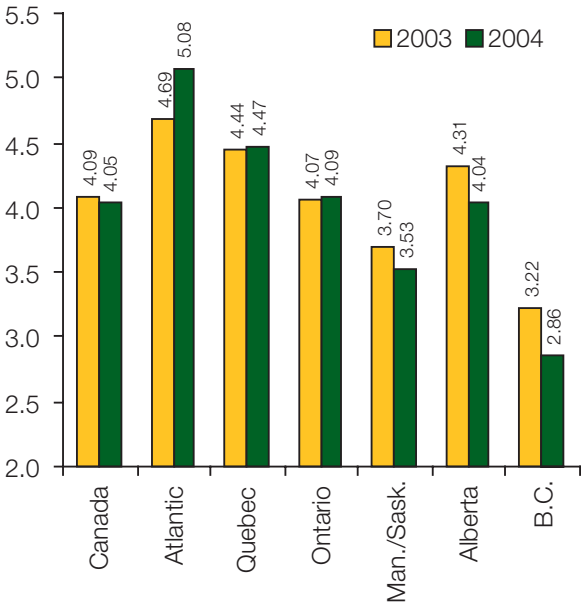
Insolvencies in the 6 major canadian regions in 2004

In 2004, the filing of new insolvency cases was up in three provinces out of six. The steepest increase was in the Atlantic region with 8.0%, followed by Ontario with 1.3% and Quebec with 0.7%. British Columbia, Alberta and the Manitoba/Saskatchewan region recorded declines of 9.7%, 4.0% and 4.4% respectively. As all regions benefited from good economic conditions in 2004, the insolvency differences between them are difficult to explain. Local factors probably played an important part.

Consumer insolvencies were up in the Central and Eastern regions of the country. Atlantic Canada saw the highest increase (8.9%). In the three Western regions, consumer insolvencies were down, with the strongest drop in British Columbia (-9.8%).

The number of consumer insolvencies per thousand residents 18 years of age and over remained essentially the same in Canada in 2004. On the other hand, in the Atlantic region, consumer insolvencies increased by 0.39 case to 5.08 cases per thousand in 2004. In British Columbia, consumer insolvencies decreased by 0.36 case to 2,86 cases per thousand in 2004.

Figure 1: Number of consumer insolvency cases per thousand residents 18 years of age and over, Canada and regions



Business insolvencies declined in all regions. The decreases ranged from 10.8% in Quebec to 1.4% in Alberta. This resulted in a general reduction in the number of cases per thousand businesses. In Canada, the number of cases went down by 0.59 case to 4.2 cases per thousand businesses in 2004. Alberta continued to show the largest number of business insolvencies per thousand businesses with 5.89 in 2004. The lowest number was in British Columbia, with 3.15.

Insolvencies by major economic sector in 2004

In 2004, 7 out of 8 major economic sectors saw a drop in the number of new business insolvency cases. The sharpest declines were in transportation and communications (-19.0%), services (-11.2%), and accommodation and food services (-10.4%). The only sector with an increase was finance, insurance and real estate services (7.9%).

However, the finance sector showed the lowest number of insolvency cases per thousand businesses. There was 1.31 case per thousand businesses in this sector in 2004. Two sectors recorded significant improvements. In the transportation and communications sector, the number of insolvency

Figure 2: Number of business insolvency cases per thousand businesses, Canada and regions

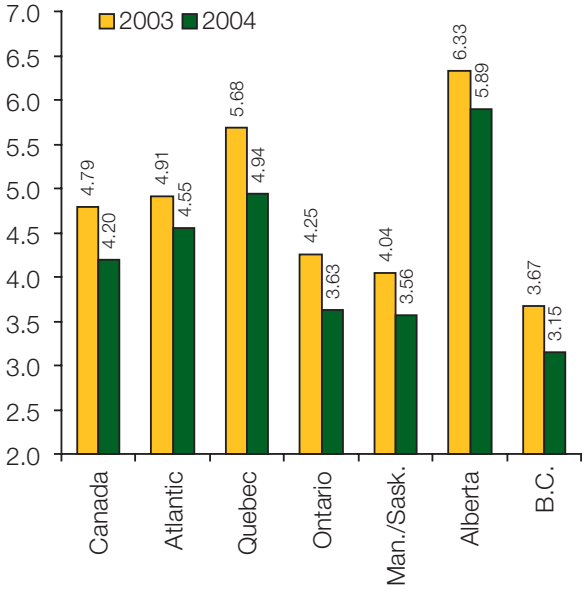


Table 3: Insolvencies by major economic sector, Canada 2003–2004

Sector	2003	2004	Change (%)
Primary	604	588	-2.8%
Manufacturing	1,067	988	-7.4%
Construction	1,614	1,586	-1.8%
Transportation and communications	1,362	1,103	-19.0%
Wholesale and retail trade	1,974	1,922	-2.7%
Finance, insurance and real estate	343	371	7.9%
Services	2,472	2,195	-11.2%
Accommodation and food services	1,232	1,103	-10.4%
Total	10,670	9,856	-7.6%

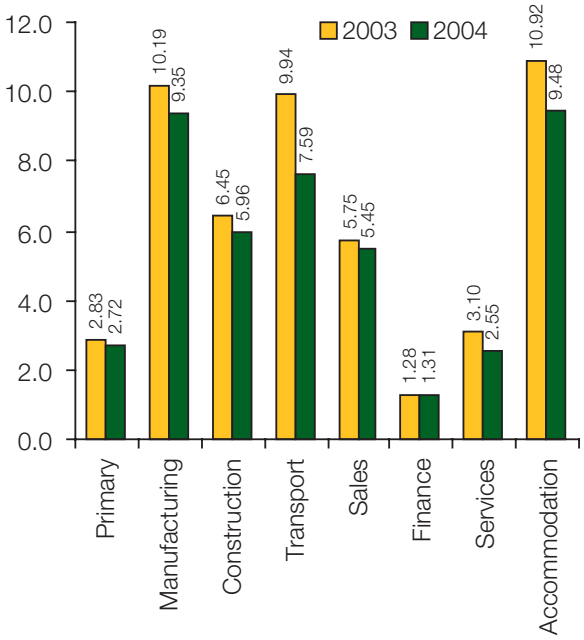
cases went down from 9.94 in 2003 to 7.59 in 2004, a drop of 2.35 cases per thousand. In the accommodation and food services sector, the number of insolvency cases decreased by 1.43 case per thousand businesses to 9.48 cases in 2004.

International insolvencies

In the U.S., statistics for the first three quarters indicated a 2.6% drop in non business insolvencies. If this trend is not reversed in the fourth quarter, 2004 could be the first year since 2000 to record negative growth in non business insolvencies. All indications are that business insolvencies should show negative growth for a third consecutive year. After the first three quarters of 2004, U.S. business insolvencies had declined by 0.8%.

In the U.K., personal insolvencies rose by 31.0%, whereas business insolvencies went down by 14.0% in 2004. The 31.0% increase in personal insolvencies was largely the result of a legislative reform reducing the time period required for obtaining a debtor's discharge from 36 to 12 months.

Figure 3: Number of business insolvency cases per thousand businesses, major economic sectors



Conclusions

In 2004, there was a 0.4% decline in the number of new insolvency cases filed with the OSB. The number of new consumer insolvency cases increased by 0.3%, whereas the number of new business insolvency cases decreased by 7.6%. Overall, this good performance was due to the favourable economic climate, which should continue to prevail into 2005. In addition, certain forecasters now believe that interest rates could continue to abate moderately until late 2005 and start an upward trend in early 2006. Therefore, the changes in the insolvency picture are expected to be modest in 2005. However, strong regional variations are likely to continue.

Richard Archambault
Senior Economist
Office of the Superintendent of Bankruptcy
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Inspectors' Handbook

In line with its commitment to provide timely and resourceful information on bankruptcy and insolvency, the OSB has recently published a revamped guide for individuals who have been appointed inspectors under the *Bankruptcy and Insolvency Act*.

Considering that inspectors have a significant role to play in the administration of insolvent estates, this guide's aim is to provide information about the role and responsibilities of inspectors, as well as to highlight and explain relevant provisions of the Act.

Those interested in obtaining a copy of the "Inspectors' Handbook" must fill out the following form and return it to the Information Distribution Centre of Industry Canada. The handbook has also been published on the OSB's Website at: ***www.osb-bsf.ic.gc.ca***

REQUEST FOR "INSPECTORS' HANDBOOK"

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Insolvency Case Law

Our surveys show that readers are very interested in our caselaw summaries. Below are a few that we felt were worthwhile noting. If you have any decisions that you feel might be of interest to our readers, please submit them to the coordinator, who will ensure that summaries will be prepared and published in both official languages.

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

In the Matter of the Bankruptcy of Daniel Joseph Priaulx

Note: An order allowing appeal was issued upon the trustee and OSB consenting to the terms of the Order. There was an admission by the trustee that there was incomplete disclosure to the Registrar in the trustee's affidavit. The OSB conceded that this incomplete disclosure by the trustee was not intentional. The decision upholds the taxing back of the trustee's fees by $1000.

Court of Queen's Bench of Alberta
Registrar L. Alberstat

Citation: 2004 ABQB 678

Facts: On March 19, 2002, Mr. Daniel Joseph Priaulx ("the bankrupt") made an assignment in bankruptcy. On April 2, 2003, an application was made for an order setting terms for the bankrupt's discharge. The conditional discharge called for the bankrupt to pay $420 by minimum monthly installments of $100. In October of the same year, the trustee applied for and received an order stating that the bankrupt had failed to comply with all conditions set out. The Court ordered that the bankrupt's discharge be adjourned *sine die*. The application had been supported by an affidavit of an employee of the trustee's firm that stated "That […the bankrupt] has failed to make the required payments as stipulated..." As the Registrar put it, what was interesting in this matter was what the affidavit did not say. More specifically, the affidavit did not disclose that:

- Funds were in the estate and had been received after the order of April 2, 2003;
- At the time of the second order, there was only $32.69 outstanding;
- The bankrupt's income as a result of an accident had been reduced to $665.00 per month; and
- The GST rebate cheques were provided regularly to the trustee to be applied against his account.

Issue: What information ought to be provided to the Court when applying for an order? Was the information divulged in the case at bar sufficient?

Decision: The trustee failed to provide all the information and an improper result ensued. Therefore, the Registrar reduced the trustee's remuneration by $1,000. He also ordered $250 costs against the trustee to be paid to the Superintendent for his appearance and submissions.

Discussion: The bankrupt had an income of about $665 per month, plus GST payments each quarter of $81.25. It was obvious that the bankrupt was struggling to pay the trustee with money obtained through GST refunds. He was living on an income of less than half of what the Superintendent's guideline indicates for a single person. Given all the information, it was obvious that the bankrupt had no ability to pay the small balance owing when the trustee applied for the *sine die* order. Had the Registrar known all the facts, there would have been no doubt that an absolute discharge would have been granted. For these reasons, the Registrar found that the actions of the trustee were unconscionable. The Registrar added that a trustee opposing a discharge ought to exercise some discretion and common sense. "Even if the latter does not possess any sense of discretion or a scintilla of common sense he or she has a duty to make full disclosure of all the pertinent facts by affidavit. If inadvertently a matter is missed in an affidavit then a verbal disclosure ought to be made."

In the Matter of the Bankruptcy of Carol Caron

Travel and accommodation costs
Statement of receipts and disbursements
Non-resident office

Superior Court of Quebec
Registrar Normand Michaud
April 14, 2003

Facts: In December 1999, the debtor Carol Caron who resides in Rimouski made an assignment in bankruptcy. He chose a trustee from the firm Malette Syndics & Gestionnaires (Malette Syndics) whose main office is in Quebec City. The trustee also operates a non-resident office in Rimouski.The trustee's statement of receipts and disbursements

includes an amount of $1,473.25 for costs incurred for travel and accommodation between those cities. The Superintendent has raised an objection in respect of the costs claimed.

Issue: Despite Directive 29, is the trustee entitled to claim travel and accommodation expenses to an area in which he operates a non-resident office?

Decision: Registrar Michaud rejected the amount claimed by the trustee for travel and accommodation costs.

Reasons: According to the Registrar, section 8 of Directive 29 does not allow additional costs for the administration of a file in a non-resident office. In his view, travel and accommodation costs are included in the expenses inherent to a non-resident office and cannot be charged to the estate, unless reasonable or necessary circumstances arise. Moreover, the taxation of such fees could be allowed if they are explicitly accepted by the debtor and his creditors. The trustee is required to inform them from the very first meeting of the possibility of additional costs, that could delay the debtor's discharge. This practice would encourage discussion and allow for the substitution of the trustee for a local one in case of disagreement.

In the case at hand, the trustee failed to demonstrate that acceptance of the travel and accommodation costs was explicit. The acceptance cannot be presumed simply because the trustee comes from outside the area. The Registrar suggests that an amendment could be made to Directive 29 regarding travel and accommodation expenses similar to that of bailiffs, who cannot claim more than 15 km of travel expenses if another bailiff resides in the area. This solution would bring equality among trustees and respect the aim of the Directive.

R c. Bernard Ratelle

Court of Québec, Criminal and Penal Division
Before the honourable Louise Provost
June 10, 2004

Facts: Mr. Victor Rioux, a restaurant owner, and his spouse were facing financial difficulties. In order to remedy this problem, they retained the financial services of Ms. Isabelle Fillion, advisor with Bernard Ratelle & Associés. Through Ms. Fillion, Mr. Ratelle ("the accused") collected fees from the couple for services rendered. On November 10, 2005, acting as representative for 140540 Canada Inc., Mr. Ratelle entered into a contract in order to purchase Mr. Rioux`s business. Three days later, these same assets were sold by 140540 Canada Inc. to a company entirely owned by Mr. Rioux`s spouse. The couple subsequently payd fees to the accused for the preparation and execution of the sales agreements. On numerous occasions, Ms. Fillion advised the couple to declare bankruptcy. Mr. Rioux made an assignment in bankruptcy on January 18, 1996 and his spouse transfered to the accused all the shares she held in her company due to a lack of cash assets. The accused then chose a trustee to administer Mr. Rioux`s estate. The R.C.M.P. conducted numerous searches of Mr. Ratelle`s office. Following these searches, Mr. Ratelle was accused of violating s. 202 (1)(f) of the *Bankruptcy and Insolvency Act* (BIA) by encouraging Mr. Rioux to make an assignment in bankruptcy. It is also alleged that he contravened s. 198(1)(a) of the BIA by fraudulently conveying Mr. Rioux`s business before the bankruptcy.

Issues:

1) Does a reasonable doubt exist as to the involvement of the accused in the fraudulent conveyance of Mr. Rioux`s asset?

2) Did the accused in any way solicit Mr. Rioux , either directly or indirectly, to file an assignment in bankruptcy?

Decision: The Court held that the accused defrauded creditors in violation of s. 198(1)(a) of the BIA through transactions that resulted in the removal of some of his client`s assets from the bankruptcy estate. In addition, the Court declared him guilty of encouraging Mr. Rioux to make an assignment in bankruptcy, in breach of s. 202(1)(f) of the BIA.

Discussion: The involvement of the accused in the fraudulent conveyance of Mr. Rioux`s business was largely confirmed by the evidence, which left no room for doubt. The accused did not testify, nor did he present any evidence in support of his defence. For the most part, the Court`s judgment was based on the credibility of Ms. Fillion`s testimony. By setting out the behaviour of the accused, Ms Fillion demonstrated that he formulated a fraudulent scheme by which he recruited clients from a list of individuals registered with the Office of Voluntary Deposits and solicited them to declare bankruptcy. He then directed them to a trustee that conducted business in the neighbouring office. The accused was therefore hunting clients for the trustee. The cost of acting on behalf of his clients was minimal in comparison to the fees that he collected at the expense of creditors.

In the Matter of the Proposal of 555432 B.C. Ltd. doing business as FVFX

British Columbia Supreme Court
Stromberg-Stein J.

Citation: 2004 BCSC 1619

Facts: On August 5, 2003, financial difficulties resulted in the termination of the employment of 555432 B.C. Ltd.'s (the "Company") president and CEO, Mr. O'Brien by way of a settlement agreement. Through discussions with the Company's only shareholder Mr. Gajdecki, Mr. O'Brien understood that the entire operations of the Ontario company were being consolidated with the Company in B.C. As per the settlement agreement, Mr. O'Brien was to assist in the transition on condition that he be paid for such post-employment work by theCompany. Mr. O'Brien performed all the post-employment tasks required under the agreement by mid-August 2003, but when he sought release of the escrow funds due to him for the work performed, Mr. Gajdecki refused to release those funds. On or about August 18, the Company paid the funds of $33,244.89 due to Agnew Gladstone LLP, in trust for Mr. O'Brien, as payment for wages in accordance with the settlement agreement. On September 10, the Company filed a Notice of Intention to make a Proposal. The trustee sought a declaration that the severance payment was fraudulent and void as against the trustee as a preference.

Issue: Could the settlement agreement be characterized as a severance agreement, thus fulfilling the criteria to be considered a fraudulent preference as per s. 95 of the *Bankruptcy and Insolvency Act* (the "BIA")?

Decision: The judge categorized the funds as a severance agreement and stated that the law was clear that a severance payment is a fraudulent preference. Therefore, the orders sought by the trustee were granted.

Discussion: Section 95 of the BIA sets out the principle that all ordinary creditors shall be treated equally. Any payment made by the insolvent person within three months of the initial insolvency event in favour of a creditor is void if it was made with a view to giving that creditor a preference over other creditors. Mr. O'Brien argued that he, as president and CEO of the company, was not a related person, nor did the moneys paid in escrow constitute a preference, since he was not a creditor until he performed the required tasks pursuant to the agreement. He also argued that the Company was not insolvent at the time of the agreement. Furtheermore he argued that he was entitled to the defence against the presumption of preference created by s. 95(2) of the BIA because pursuant to the terms of the agreement, he was simply assisting the Company to continue in business. The Court quickly set aside the first three arguments and focused on the last position. "The payment held in escrow was a severance payment based on a clear reading of the agreement and on the fact that there was no separate employment contract entered into to provide specific services for a fee, so as to rebut the presumption and advance any of the defences put forward by Mr. O'Brien." The Company was insolvent well before the severance agreement was entered into.

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 cases. 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 Website (***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***

While we always strive to accurately summarize the case law presented in this digest, it does happen from time to time that we inadvertently make mistakes in our summaries.

The summary of the Superintendent's Delegate decision in the Matter of Professional Conduct Proceedings regarding James Gordon Touchie and J.G. Touchie & Associates Ltd contained on page 13 of the OSB Newsletter 2004-6 indicated that:

"However, at the hearing, [the Senior Analyst] 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."

Please note that it was not until June 18, 2004, one month following the hearing that the Senior Analyst modified her recommendations. This being said, the summary should have read as follows:

*"However, **one month after the hearing**, [the Senior Analyst] 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."*

This mistake was unintentional and we sincerely apologize for any inconvenience this may have caused to those concerned and to our readers.

In the Matter of D. Geoffrey Orrell, Licensed Trustee

Province of British Columbia
Decision of the Honourable Perry Meyer
Delegate of the Superintendent

Facts: In accordance with subsection 14.01 (1) of the *Bankruptcy and Insolvency Act* (BIA), the Senior Analyst of the Office of the Superintendent of Bankruptcy reported on the performance of Mr. D. Geoffrey Orrell, a licensed trustee who took on the administration of a consumer proposal submitted by Mr. and Mrs. Davies. The report stated that the trustee did not carry out his duties as required under subsection 14.06(1) of the BIA and under Rule 36 of the *Code of Ethics for Trustees*. In this regard, he failed to conduct or cause an investigation on the property and financial situation of the debtors as prescribed in paragraph 66.13(2)(a) of the BIA. It was established that the trustee conferred the responsibility of accurately assessing the debtors' property and financial situation to another licensed trustee who was not properly substituted. Consequently, the parties jointly drafted and filed a proposed text for consideration of a delegate of the Superintendent of Bankruptcy.

Issue: Should the trustee's licence be subjected to any conditions or limitations as a result of his conduct?

Decision: The trustee's licence was limited to a period of two months. He was prohibited from taking on the administration of any new bankruptcies, proposals or receiverships. If the trustee failed to comply with this order, he would be put in default under paragraph 13.2(5)(b) of the BIA.

Discussion: The Superintendent's Delegate, taking into consideration the fact that the trustee acknowledged all of the elements outlined in the Senior Analyst's report, concluded that the trustee failed to meet his statutory responsibilities with regards to the administration of the debtors' proposal. The Delegate also maintained that there is no reason to detract from the draft submitted by the parties and deemed its contents to be reasonable.

In the Matter of the Disciplinary File Under the *Bankruptcy and Insolvency Act* (BIA) Regarding Jacques Roy, Holder of a Trustee Licence.

Note: This decision and any penalty resulting from it are stayed pending the outcome of the judicial review.

Decision of the Honourable Mr. Lawrence A. Poitras
Delegate of the Superintendent of Bankruptcy
December 3, 2004

Facts: The Senior Analyst filed a series of complaints against trustee Jacques Roy regarding his administration of the files Pierre André Jacob and Distribution Sunliner (1985) Inc.

With respect to the bankruptcy of Pierre André Jacob, the Senior Analyst's report mentioned two alleged failures to perform his statutory duties in the bankruptcy's administration following a complaint by the Trans-Canada Credit Corporation on November 24, 1999.

On July 23, 1997, the trustee was discharged from the matter of Distribution Sunliner (1985) Inc. According to the trustee's counsel, Subsection 48(1) of the BIA gave the trustee immunity against any subsequent objection or action regarding his administration of this estate. In a decision rendered on February 14, 2004, the Honourable Justice Lawrence A. Poitras allowed the evidence presented in connection with the Distribution Sunliner (1985) Inc. file, despite the trustee's discharge on July 23, 1997. The decision was based on the general rule that the Superintendent has disciplinary jurisdiction over the conduct of trustees, as set out in *Freedman & Freedman, Harry Bick & al*. (CFPIT-1600-99) of the Federal Court of Canada Trial Division. The complaints originally filed by the principal analyst were reduced to twelve during the hearing.

Findings regarding the alleged failure: Four of the twelve remaining complaints were upheld. The trustee contravened section 13.5 and subsection 5(5) of the BIA, Rules 36 and 52, and section 5 of Directive No. 22, as well as paragraphs 6 and 7 of Directive No. 31.

Discussion: Concerning Pierre André Jacob's file, the Delegate upheld one of the two allegations made by the Senior Analyst. It was found that the trustee acted contrary to section 13.5 of the Act and Rule 36, regarding an application for substitution by the representatives of Trans-Canada Credit on November 18, 1999. The trustee did not perform his duties in a timely manner and did not carry out his functions with due care by not accepting the application for substitution at the time of the meeting and by delaying the preparation and forwarding of the minutes of the creditors' meeting until December 28, 1999.

In the Distribution Sunliner (1985) Inc. file, the Delegate upheld 3 of the 10 allegations made by the Senior Analyst. It was found that the trustee contravened subsection 5(5) of the Act and paragraphs 6 and 7 of Directive No. 31 on taking inventory of the bankrupt's property. According to the trustee, a complete inventory had been conducted in the days preceding the bankruptcy, and the signature by the president of the debtor company on the balance sheet attested to its accuracy. Counsel for the Senior Analyst argued that there was a sale of several boats the day after the inventory was taken, which would have affected the inventory.

Also, the Delegate held that the trustee did not properly document his file contrary to subsection 5(5) of the Act and paragraph 5 of Directive No.22 on the realization of the estate's assets. The trustee's argument that "this would create a mountain of paper" was not accepted by the Delegate.

Finally, the Delegate held that the trustee acted contrary to section 13.5 and subsection 5(5) of the Act and paragraph 5 of Directive No.22 on realization of the property of the estate. The evidence showed that amounts that would ordinarily pass through the hands of the trustee and then be forwarded to the secured creditors were the subject of a delegation to a third party. There was no evidence of this on the statement of receipts and disbursements. Also, the trustee apparently instructed the third party to handle his mail at the trustee's secondary office in Trois-Rivières.

In the Matter of the Disciplinary File Under the *Bankruptcy and Insolvency Act* (BIA) Regarding Jacques Roy, Holder of as Trustee Licence.

Note: This decision and any penalty resulting from it are stayed pending the outcome of the judicial review.

Decision of the Honourable Mr. Poitras Delegate of the Superintendent of Bankruptcy January 31, 2005

Facts: In a decision rendered on December 3, 2004, the delegate upheld 4 complaints against the trustee. The parties were asked to send their respective submissions on sanction before December 15, 2004.

Issue: Which disciplinary measure should be imposed given the complaints that were upheld?

Decision: The trustee's licence was suspended for a period of one week.

Discussion: Objective and subjective factors must be taken into account when imposing disciplinary measures. The objective factors include protection of the public, the seriousness of the offence and the exemplary value. The subjective factors include the existence or absence of prior misconduct, the age, experience and reputation of the professional. Also considered are the chances of a repeat offence, deterrence, remorse and the likelihood of rehabilitation of the professional, as well as the financial position of the latter and the consequences for the client. The disciplinary measure must first and foremost be aimed at protecting the public and not punishing the professional.

The trustee administered some 6,000 files in his career and has never been the subject of any complaints by the Senior Analyst, creditors or the Office of the Superintendent of Bankruptcy. Moreover, the circulation of the Senior Analyst's report has caused great harm to the trustee's reputation. All things considered, the trustee was convicted of an offence to the Act, the Regulations made thereunder and to the Directives issued by the Superintendent. Therefore, the Court ordered a suspension of the licence of the trustee for a period of one week pursuant to subsection 14.01(1) of the BIA.

In the Matter of the Disciplinary File of Raymond Chabot Inc., Holder of a Corporate Trustee Licence, and in the Matter of Yves Guay and Pierre Guay, Holders of Individual Trustee Licences

Decision of the Honourable Benjamin J. Greenberg, Q.C.
Delegate of the Superintendent of Bankruptcy
October 22, 2004

Facts: A Senior Evaluation Officer from the Office of the Superintendent of Bankruptcy (OSB) conducted an audit of trustees Yves and Pierre Guay in addition to a general audit of the office of Raymond Chabot, corporate trustee, in October 2000. The OSB's Senior Analyst, professional conduct, submitted a report on the conduct of the aforementioned individual trustees as well as on the corporate trustee. These powers were delegated to the Senior Analyst pursuant to subsection 14.02(1) of the *Bankruptcy and Insolvency Act* (BIA). The corporate trustee generally admitted the facts set forth in the Senior Analyst' report. He undertook to pay an amount equal to the interest lost by the estate files in addition to fees that were not processed in the usual manner. Mr. Yves Guay is no longer associated with and/or is no longer an employee of Raymond Chabot Inc. since 2002. As for Mr. Pierre Guay, he agreed to leave Raymond Chabot Inc.

Infractions: The report stated that the management of estate funds and banking operations of the aforementioned trustees did not comply with the requirements of the Superintendent of Bankruptcy's Directive No. 5 on Estate Funds and Banking (Directive No. 5). It is worth mentioning that the report listed many other infractions, such as the following:

1) The corporate trustee opened consolidated accounts in trust without seeking and obtaining approval from the Division Assistant Superintendent, thereby contravening subsection 5(5) of the Act and sections 5 and 6 of Directive No. 5;

2) The consolidated trust accounts in the summary administration files contained files that were not summary administration files, thereby contravening subsection 5(5) of the BIA as well as section 5 of Directive No. 5;

3) The corporate trustee made unauthorized withdrawals of funds from various trust accounts, thereby contravening subsection 25(1.3) of the Act;

4) The corporate trustee signed certificates of compliance as well as statements of receipts and disbursements that were incomplete and false, thereby contravening section 13.5 and subsection 152(1) of the Act and section 45 of the *Bankruptcy and Insolvency General Rules* (Rules); and

5) The corporate trustee submitted to the Court and the Superintendent a report on the discharge of the bankrupts they failed to indicate the value of some of the amounts that were realized, thereby contravening subsection 170(1) and section 13.5 of the Act and section 45 of the Rules.

Sanctions: The Delegate of the Superintendent of Bankruptcy ordered that the licence of Raymond Chabot Inc. be restricted for a period of two months in the Districts of St-François and Drummondville. The licence of trustee Yves Guay is currently cancelled. If this licence is reactivated, the Delegate stipulated that it will be suspended for a period of two years. During that period, Yves Guay may not act as a trustee in bankruptcy nor accept any mandates under the BIA. Finally, the Delegate ordered that the licence of trustee Pierre Guay be suspended for a period of three weeks under the same conditions. If the trustee does not comply with all the orders of the Delegate, he will be in default pursuant to paragraph 13.2(5)b) of the BIA.

In the Matters of the Professional Conduct of Trustees PricewaterhouseCoopers Inc., Robert Brochu, Serge Morency, Serge Morency & Associates Inc.

Facts: In January 2001, the Disciplinary Analyst produced a report containing allegations with regards to the conduct of trustees PricewaterhouseCoopers, Robert Brochu, Serge Morency and Serge Morency & Associés Inc.

The proceedings were suspended pending the decision of the Court of Appeal (#200-09-004077-027) determining the constitutionality of the Superintendent of Bankruptcy's jurisdiction over the professional conduct of trustees. The hearing of this case, presided by Jean-Claude Demers, resumed on January 26, 2004, and came to a sudden halt on January 29, 2004.

In fact, according to the stenographed notes and the correspondence exchanged between the parties, the delegate joined the Senior Analyst, his counsel and the auditor of the Office of the Superintendent of

Bankruptcy (OSB) and shared a meal on January 27. As the hearing resumed the next morning, the delegate dislosed to the other parties the events of the previous night. Consequently, the trustees immediately sought that the delegate recuse himself and requested the dismissal of the case in light of the "blatant weakness of the evidence concerning the complaints". The delegate suspended the hearing so that he could decide whether or not the analyst and his counsel had "met the burden of proof that was incumbent upon them", and to decide whether or not he had jurisdiction to preside over the hearing given the previous evening's events.

Upon resumption of the hearing the next day, counsel for the Senior Analyst, indicated to the delegate that he had been instructed to ask him to recuse himself from the case on the grounds that he could no longer maintain the appearance of objectivity. Faced by the request from all parties to the case, the delegate came to the conclusion that his only choice was to recuse himself from the case at once. The case was then returned before the Superintendent.

Decision: The Superintendent ordered the dismissal of all the complaints brought against the trustees and took official notice of the withdrawal of the proceedings that were initiated.

Discussion: In order to rule on the various requests before him, the Superintendent believed that he must first review the progress of the case and the evidence adduced to date. In light of the exceptional circumstances of this case, he needed to determine whether or not the process had been breached to the extent that a termination of the proceedings would be justified, and whether or not the Senior Analyst had sufficiently met the burden of proof incumbent upon him to conclude that it was possible to continue these proceedings in a way that would not constitute a denial of justice to the parties nor affect the public interest.

As a result, the Superintendent concluded:

- The burden of proof incumbent upon the Senior Analyst had not been met and ordered the dismissal of all complaints brought against the trustees as formulated in the disciplinary report;
- The obligation of procedural fairness bound the Superintendent to bar any further proceedings in light of the flawed investigation process and the hearings in this case;
- Took official notice of the withdrawal of the proceedings that were initiated; and
- Ordered the publication of this decision in accordance with the process.

In the Matter of Professional Disciplinary Proceedings under the *Bankruptcy and Insolvency Act* as against Sydney H. Pfeiffer, Holder of an Individual Trustee Licence and Pfeiffer & Pfeiffer Inc., Holder of a Corporate Trustee Licence.

Interlocutory Decision

The Honourable Benjamin J. Greenberg, Q.C.
Delegate of the Superintendent
Montreal, October 29, 2004

Facts: A motion before the Federal Court of Canada is challenging the Superintendent's appointment of the Senior Analyst to carry out investigations of this matter. Meanwhile, the trustees filed a motion for a stay of proceedings pending the Federal Court's decision. Based on the legal principle of *lis pendens*, the trustees argued the "clear possibility of conflicting judgments" between the Federal Court judgment and the proceedings herein. Consequently, the trustees moved to adjourn of the merits hearing until the Federal Court's final decision.

Issues:

1) Does the Delegate have jurisdiction to grant a stay of proceedings?

2) If so, should an adjournment be granted pending a decision from the Federal Court?

Decisions:

1) Before a higher authority determines that the Superintendent's Delegates have jurisdiction to grant a stay of proceedings, the Delegate will exercise his jurisdiction by refusing a stay.

2) The request for adjournment was dismissed as such, but granted in part in that the merits hearing was adjourned to two consecutive weeks during the five-week period from January 24, to February 26, 2005.

Discussion:

1) Counsel for the senior analyst contested the argument advanced by the trustee based upon *lis pendens*, claiming there was no identity of object between the proceeding herein and those before the Federal Court. The Delegate agreed with this position to set aside the argument that the proceeding should be stayed on the basis of *lis pendens*. Furthermore, the *Bankruptcy and Insolvency Act* calls for a "speedy and expeditious" hearing. After study of prior decisions of Delegates Kaufman, Meyer and Poitras[1], the Delegate in the case herein concluded that he did not have jurisdiction to grant a stay of proceedings.

2) The Delegate concluded that the request for adjournment was a disguised request for stay of proceedings. However, a Delegate could always grant less. The request was therefore granted in part.

In the Matter of the 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

Stay of proceedings
Competence to grant a stay of proceedings

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

Facts: The Senior Discipline Analyst initiated proceedings against the trustees after sampling 15 of their estates to conduct a special audit. In a report dated September 6, 2002, the Senior Analyst noted numerous deficiencies with respect to the trustees' internal control and administrative competence. Some of these deficiencies pertained to property costs, estate administration and proofs of claim. The trustees claimed that the Senior Analyst failed to fully disclose the materials obtained in the course of the examinations that were carried out. The trustees therefore filed an application for a stay of proceedings in June 2004. However, the Delegate found no evidence that any material remained undisclosed.

Additional disclosure was submitted to the trustees in November 2004, before a hearing on the merits of the proceedings brought by the Senior Analyst. On receipt of this new evidence, the trustees expressed their doubt that full disclosure had been made and suggested that the integrity of the proceedings warranted a stay. The trustees also contended that the hearing should be adjourned pending determination by the Federal Court of Canada of an application for judicial review filed with respect to the Superintendent's judgment attesting that the trustees had not received full disclosure in a related case. The Senior Analyst asserted that the items recently disclosed were not required. Instead, they were provided voluntarily and may not even be pertinent to the proceedings.

Issue: Do the circumstances of this case provide adequate grounds for a stay of proceedings?

Decision: Requests for disclosure were not fully satisfied. The proceedings initiated by the Senior Analyst against the trustees are therefore stayed.

Discussion: The delegate held that the related proceedings filed before the Federal Court of Canada were separate in law and therefore cannot be considered together with the current motion. The latter nevertheless took the Superintendent's judgment into account and asserted that the trustees' concerns in regards to full disclosure were valid.

The delegate observed that the allegations brought against the trustees were not of the most serious kind. Although the law requires the trustees' counsel to take the necessary measures to ensure full disclosure, requests for disclosure need not be filed with respect to every document. The duty to disclose rests only with the Senior Analyst.

The Senior Analyst continued to disclose information despite previous assurances that all requests for documentation had been satisfied. A failure to disclose may hinder the trustees' right to make a full answer and defence. It may also deprive them of an opportunity to use the undisclosed information for investigation purposes. Considering that their right to exercise their profession was at stake, the delegate concluded that the trustees' interests outweighed the interests of the state in having the alleged misconduct punished. A stay of proceedings was granted accordingly.

[1] Levy, Sherriff, St-Georges and Roy

In the Matter of the Professional Conduct of Jean-Guy St-Georges, Holder of an Individual Trustee Licence and St-Georges Hébert Inc., Holder of a Corporate Trustee Licence

Decision on the sanctions

Decision of the Honourable Perry Meyer Delegate of the Superintendent of Bankruptcy November 22, 2004

Facts: A complaint was filed against the trustees regarding the administration of certain files. An audit was carried out which led to conservatory measures on June 20, 2003. The Senior Analyst filed a report on the trustees' conduct, which discussed several discrepancies in the administration of the estates by the trustees. These discrepancies and omissions included:

i) use of non-compliant "filing fee" bank account;

ii) use of non-compliant bank account "for GST";

iii) disbursements not supported by documentation;

iv) cashing final fees prior to taxation;

v) illegal offset of banking costs from interest income; and

vi) failure to respond to the requests of the Assistant Superintendent;

The professional conduct report also referred to the fact that the trustee had not opened a trust bank account or kept a cash card for seventy-seven ordinary estate files.

The parties submitted the text of the decision on the sanctions, which in the circumstances of this case appeared to be fair, reasonable and not contrary to public order, according to the delegate.

Sanctions:

a) Suspension of the licence of trustee Jean-Guy St-Georges for a period of twenty-one months, a period during which he may file no new estate bankruptcies pursuant to the BIA. As the licence of St-Georges Hébert Inc. has already been cancelled, it may not be reactivated until the suspension of the licence of Mr. St-Georges has expired.

b) If trustee Jean-Guy St-Georges resumes practice as a trustee after the suspension lifts, he shall submit proof of measures that were undertaken in addition to various documents to the Official Receiver during the first twelve months after he resumes his trustee practice.

c) Maintains the conservatory measures applicable to the two general trustee accounts.

OSB Newsletter

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