Insolvency

BULLETIN

Issued by the Office of the Superintendent of Bankruptcy

2nd trimester 1997 Vol. 17, No. 2

If undelivered, return COVER ONLY to:
Canada Communications Group - Publishing
Ottawa, Canada K1A 0S9

POSTE MAIL
Société canadienne des postes / Canada Post Corporation
Port payé Postage paid
Nbre Blk
8801320
OTTAWA

Canada

Insolvency BULLETIN

2nd trimester 1997 Vol. 17, No. 2

Industry Canada Industrie Canada

INSOLVENCY BULLETIN

Issued by the
Office of the Superintendent of Bankruptcy,
Industry Canada.

The objective of the Insolvency Bulletin is to promote communication and strengthen ties between the Office of the Superintendent of Bankruptcy and insolvency professionals. The Insolvency Bulletin is a free publication which is published four times a year. The Bulletin is aimed particularly at trustees, jurists, registrars, accountants, credit managers and to those with a general interest in bankruptcy and insolvency.

The opinions expressed in the Bulletin are solely those of individual authors and may not reflect the policy of the Office of the Superintendent of Bankruptcy. Reproduction in whole or in part of signed articles is prohibited without permission in writing from the editors. Reproduction of unsigned articles is, however, permitted as long as reference is made to the Insolvency Bulletin.

For information:
Bankruptcy Branch
Journal Tower South
365 Laurier Ave. West, 8th Floor
Ottawa, Ontario
K1A 0C8

Subscriptions and addresses:
Francine Emery (613) 941-2693

Statistics:
Monique Leclair (613 941-9054

Editors:
Karina Fauteux (613) 941-5762
Henri Massüe-Monat (613) 941-2697

Fax: (613) 941-2692

© Minister of Supply and Services Canada
ISSN 0821-0012

Table of Contents

In Brief 31

Statutes of Canada 1997, Chapter 12 (Bill C-5)
Summary of Amendments 33

- I Consumer Bankruptcies 33
- II Consumer Proposals 37
- III Reorganizations and Commercial Bankruptcies. 38
- IV Companies' Creditors Arrangement Act 41
- V Securities Firms Bankruptcies 43
- VI Miscellaneous Administrative Amendments 44

Decision of the Federal Court relating to a trustee's licence —
Louis Drolet and Groupe G. Tremblay Syndics Inc.. 47

Decision relating to a trustee's licence — Daniel Girouard
and Arthur Andersen Inc. 63

Notice — 1997 Written Insolvency Examination 67

An International Comparison of Bankruptcy Filing Rates 69

Address of Offices of the Superintendent of Bankruptcy A-1

Notice to Publisher of Change of Address A-2

In Brief

As you are probably aware, Bill C-5 received Royal Assent on April 25, 1997. The new Act is now Chapter 12 of the Statutes of Canada of 1997. In order to increase your familiarity with the provisions of the new Act, we have included a summary of the amendments in this issue of the Bulletin. You may remember that in the 4th trimester Bulletin of 1995, we had reproduced a summary of amendments proposed by Bill C-109, as it then was. Since that time, amendments were made to the Bill during its passage through the House of Commons and the Senate. As a result, this issue contains an update of the text previously published in the 1995 Bulletin. Furthermore, the date of coming into force, as well as the transitional measure applicable to the amendment is indicated below each amendment.

Please note that the summary in this issue refers to the principal amendments in the Act but it is not meant to be an exhaustive summary of amendments brought by the new Act. However, the Office of the Superintendent is currently developing a detailed explanatory guide including all of the amendments that will come into force in the fall. This guide will be distributed to practitioners during information sessions that will be held in various regions of the country during the upcoming month of September.

For those interested in both the amendments and the reasoning behind them, please refer to the 3rd trimester Bulletin of 1996, in which you will find excerpts from the working documents of the Bankruptcy and Insolvency Advisory Committee (BIAC). The majority of the changes in the Act are based on BIAC recommendations.

With respect to the development of the Rules and Forms required to implement the new Act, the amended forms are expected to be finalized for the first phase of the coming into force scheduled for the fall of 1997. However, the new rules must be submitted to the Federal Regulatory Process, and are expected to be issued in time for the second phase of the coming into force scheduled for the spring of 1998.

Statutes of Canada 1997, Chapter 12 (Bill C-5) Summary of Amendments

This document is a summary of the major amendments brought by the new Act, an Act to amend the *Bankruptcy and Insolvency Act* (BIA), the *Companies' Creditors Arrangement Act* (CCAA) and the *Income Tax Act*, which received Royal Assent on April 25, 1997.

Please note that in the following text all references to the commencement of proceedings refer exclusively to proceedings under the *Bankruptcy and Insolvency Act.*

I Consumer Bankruptcies

1. Exempt property

1.1 Exempt property under federal and provincial statutes

The exemption provisions in bankruptcy matters are amended to include any property that is declared exempt under a federal statute as well as property declared exempt under a provincial statute (s. 67(1)(b) BIA).

Coming into force: Fall 1997
Transitional measures: apply to bankruptcies where proceedings are commenced after the coming into force of the section.

1.2 GST credits and other essential needs

Such goods and services tax (GST) credits and prescribed payments relating to the essential needs of debtors as are made in prescribed circumstances are exempt (s. 67(1)(b.1) BIA).

Coming into force: Spring 1998
Transitional measures: apply to bankruptcies where proceedings are commenced after the coming into force of the section.

2. Surplus income

2.1 Superintendent's standards

The amount of surplus income that a bankrupt must pay to the estate shall be determined according to the standards established by the Superintendent. These standards may vary from one region to another (s. 68(1) BIA).

2.2 Duty of the bankrupt

The bankrupt has a duty to pay to the estate the amount of his or her surplus income (s. 68(3) BIA). The bankrupt shall inform the trustee of any material change in his or her personal financial situation (s. 158(n.1) BIA).

2.3 Trustee must ensure bankrupt's compliance with the duty

The trustee is responsible for ensuring that the bankrupt complies with his or her duty to pay surplus income to the estate (s. 68(3) BIA). The trustee shall review the bankrupt's budget and determine how much is to be paid, having regard to the Superintendent's standards and the personal situation of the bankrupt.

2.4 Recommendation of the official receiver

If the amount that the bankrupt must pay to the bankruptcy estate differs substantially from the Superintendent's standards, the official receiver shall recommend to the trustee and the bankrupt an amount to be paid to the estate by the bankrupt (s. 68(5) BIA).

2.5 Information to creditors

The trustee shall inform the creditors, in the notice of bankruptcy, of the amount of the excess income that the bankrupt must contribute to the estate (s. 102(3) BIA). If there is any change in the amount to be paid, the creditors shall be notified (s. 68(4) BIA).

2.6 Mediation

If there is no agreement between the bankrupt and the trustee concerning the amount of surplus income to be paid, the trustee shall send a request for mediation to the official receiver. A creditor may also request mediation with respect to the amount to be paid to the estate (s. 68(6) and (7) BIA).

2.7 Maintenance of judicial remedy — as a last resort

The new mediation process does not remove recourse to the courts. However, the court shall intervene only as a last resort; i.e. where the bankrupt disagrees with the recommendation of the official receiver, where the mediation fails, or where the bankrupt fails to comply with his or her obligation (s. 68(10) BIA).

Coming into force of the above-mentioned sections (except section 158 (n.1) mentioned later on: Spring 1998
Transitional measures: apply to bankruptcies where proceedings are commenced after the coming into force of the sections.

3. Opposition to discharge

3.1 Two new grounds for opposition

The new Act introduces two new grounds for opposition to discharge:

- non-compliance with the requirement to pay the surplus income under section 68 (s. 173(1)(m) BIA);
- the fact that the bankrupt chose bankruptcy, when he or she could have made a viable proposal to creditors, as the means to resolve his or her financial difficulties (s. 173(1)(n) BIA).

Coming into force: Spring 1998
Transitional measures: apply to bankruptcies where proceedings are commenced after the coming into force of the sections.

3.2 Recommendation of conditional discharge by the trustee

When the bankrupt applies for discharge, the trustee may recommend that his or her discharge be subject to conditions. The trustee shall consider whether the bankrupt has complied with his or her obligation to pay some part of the surplus income to the estate; the total amount paid to the estate, having regard to the bankrupt's financial resources; and the fact that the bankrupt chose to proceed to bankruptcy rather than to make a proposal as the means to resolve his or her indebtedness when a viable proposal was possible. If the trustee elects to make such a recommendation, it shall be included in the "report on the bankrupt's application for discharge" that is prepared pursuant to section 170. A recommendation that the bankrupt be discharged subject to conditions is deemed to be an opposition to the discharge of the bankrupt (s. 170.1(1) to (3) BIA).

Coming into force: Spring 1998
Transitional measures: apply to bankruptcies where proceedings are commenced after the coming into force of the sections.

3.3 Copy of the trustee's report to creditors who request it

The trustee's report on the bankrupt's application for discharge, prepared according to section 170, shall be forwarded to each creditor who requested a copy. Creditors will be able to make the request in a proof of claim (s. 168.1(1)(a) and s. 170(2) BIA).

Coming into force: Fall 1997
Transitional measures: apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

3.4 Mediation

Where the bankrupt does not agree with the recommendation of the trustee regarding the bankrupt's application for discharge, he or she may request mediation. Similarly, where a creditor or the trustee files an opposition based on the new paragraphs 173(m) and (n), the trustee shall send an application for mediation to the official receiver (s. 170.1(4) and (5) BIA).

Coming into force: Spring 1998
Transitional measures: apply to bankruptcies where proceedings are commenced after the coming into force of the sections.

3.5 Court order of discharge

Where the mediation regarding the bankrupt's application for discharge fails, where the bankrupt has failed to comply with conditions that were established by the trustee, or as a result of the mediation, the trustee shall apply to the court for an appointment for hearing the discharge application of the bankrupt (s. 170.1(7) BIA).

Coming into force: Spring 1998
Transitional measures: apply to bankruptcies where proceedings are commenced after the coming into force of the sections.

3.6 Costs where discharge opposed

The court may award costs to the opposing creditor out of the estate in an amount not exceeding the amount realized by the estate under the conditional order (s. 197(6.1) BIA).

Coming into force: Fall 1997
Transitional measures: apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

4. Meeting of creditors and information to creditors

In summary administration estates, the meeting of the creditors is no longer mandatory. A meeting shall be called if it is requested by the creditors or the official receiver (s. 155(d.1) BIA).

Coming into force: Fall 1997
Transitional measures: apply to bankruptcies where proceedings are commenced after the coming into force of the section.

The notice of bankruptcy that is sent to the creditors shall indicate the amount of the surplus income that the bankrupt is to pay to the estate under section 68 and other information on the financial situation of the bankrupt (s. 102(3) BIA).

Coming into force: Spring 1998
Transitional measures: apply to bankruptcies where proceedings are commenced after the coming into force of the sections.

The bankrupt is required to inform the trustee of any material change in his or her financial situation so that the latter can amend the amount of the excess income that is to be paid to the estate (s. 158(n.1)).

Coming into force: Fall 1997
Transitional measures: apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

The creditors shall be informed of any material change in the financial situation of the bankrupt and of any amendment to the amount he or she must pay to the estate (s. 102(4)(b) BIA).

Coming into force: Spring 1998
Transitional measures: apply to bankruptcies where proceedings are commenced after the coming into force of the sections.

5. Claim for support

A claim for spousal or child support is a provable claim. The claim is provable if it is based on an order or agreement made before the date of the initial bankruptcy event in respect of the bankrupt and at the time when the spouse or child were living apart from the bankrupt, whether the order or agreement provides for periodic amounts or lump sum amounts (s. 121(4) BIA). The claim is a preferred claim for periodic amounts accrued in the year before the date of the bankruptcy that are payable, and for any lump sum amounts that are payable (s. 136(1)(d.1) BIA).

Furthermore, in respect of such a claim for support, an individual's bankruptcy does not stay the proceedings by the spouse or children in relation to any property of the bankrupt that has not vested in the trustee or in relation to amounts that are not payable to the estate pursuant to section 68 (as surplus income) (s. 69.41).

Coming into force: Fall 1997
Transitional measures: apply to bankruptcies or proposals where proceedings are commenced after the coming into force of the section.

6. Claims for student loans

Student loans made under any federal or provincial statute are undischargeable debts when the bankruptcy occurs while the debtor is still a student or within two years following the termination of studies (s. 178(1)(g) BIA).

However, the court may order that the bankrupt is discharged from such debt if it is satisfied that the bankrupt has acted in good faith and that he or she will continue to experience financial difficulty to such an extent that he or she will be unable to pay the liabilities under the loan (s. 178(1.1) BIA).

Coming into force: Fall 1997
Transitional measures: apply to bankruptcies or pro-

posals where proceedings are commenced after the coming into force of the section.

7. Claims for assaults

A bankrupt is not discharged from payment of damages awarded by a court in civil proceedings in respect of either bodily harm intentionally inflicted, or sexual assault; or wrongful death resulting therefrom (s. 178(1)(a.1) BIA).

Coming into force: Fall 1997
Transitional measures: apply to bankruptcies or proposals where proceedings are commenced after the coming into force of the section.

8. Counselling service

The counselling service is expanded to encompass a person who, as specified in directives of the Superintendent, is financially associated with the bankrupt (s. 157.1(1)(b) BIA).

Coming into force: Fall 1997
Transitional measures: apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

II Consumer Proposals

1. Joint consumer proposal

Two or more consumer proposals may, in such circumstances as are specified in directives of the Superintendent, be joined where they could reasonably be dealt with together because of the financial relationship of the consumer debtors involved (s. 66.12(1.1) BIA).

2. Distribution of dividends

It is no longer necessary to distribute consumer proposal dividends every three months. The manner of distribution must be indicated in the proposal (s. 66.12(6)(c) and 66.26 (1) BIA).

3. Changes in limitation periods

The time allowed for creditors to respond to the proposal is increased from 30 days to 45 days. The time for the court's approval of the proposal is reduced from 30 days to 15 days (s. 66.15 and 66.22 BIA).

4. Proposal by a bankrupt

A bankrupt may file a consumer proposal if the proposal is approved by the inspectors, if there are any; the debtor shall retain the services of a trustee in bankruptcy (ss. 66.11 and 66.4(2) BIA). Where a consumer proposal made by a bankrupt is annulled by the court, the debtor is deemed to have made an assignment on the date of the annulment (s. 66.3(5) BIA).

Coming into force of all amendments to the consumer proposals provisions: Fall 1997
Transitional measures: apply to bankruptcies or proposals where proceedings are commenced after the coming into force of the sections.

1. Liability of trustees, receivers and interim receivers

1.1 General liability

Trustees, receivers and interim receivers who carry on the business of the debtor or continue the employment of the debtor's employees are not personally liable in respect of any claim against the debtor where the claim arose before or upon their appointment (ss. 14.06(1.1) and (1.2) BIA).

1.2 Environmental liability

Trustees, receivers and interim receivers are not personally liable in those respective positions for any environmental condition that arose or environmental damage that occurred before or after their appointment, unless the condition arose or the damage occurred as a result of their gross negligence or wilful misconduct (s. 14.06(1.1) and (2) BIA).

These persons are not, however, exempted from their duty to report or provide the necessary information under the applicable environmental statutes (s. 14.06(3) BIA).

Where a court or agency issues an order to remedy any environmental condition or damage, the trustee has four options. The trustee may: (1) comply with the order; (2) contest it; (3) request a stay of the order to assess the economic viability of complying with it, or; (4) abandon any real property affected by the condition or damage. The trustee has immunity for at least ten days following the order (s. 14.06(4) and (5) BIA).

Crown claims resulting from orders to remedy are secured by a charge on the real property affected and on any real property contiguous thereto that is related to the activity that caused the damage. The charge is enforceable in accordance with the law of the jurisdiction in which the real property is located (s. 14.06(7) BIA).

Coming into force: Fall 1997
Transitional measures: apply to bankruptcies, proposals or receiverships where proceedings are commenced after the coming into force of the sections.

2. Disclaimer of commercial leases

In the context of a commercial reorganization, a debtor who wishes to disclaim a commercial lease (formerly, *repudiate* a commercial lease) has two options:

- the debtor may offer the landlord compensation corresponding to the actual losses resulting from the disclaimer (65.2(4) BIA);
- the debtor may also make an offer to the landlord based on a pre-determined formula for assessing damages. Under this formula, the landlord's claim amounts to 100 percent of the rent provided for in the lease in the first year of the lease after the disclaimer plus 15 per cent of the rent for the remainder of the term of the lease after that year, the total amount not to exceed three years rent.

  The proposal indicates the class in which the landlord's claim should be included: it can either be a separate class of similar claims of landlords or a class of unsecured claims that includes claims of creditors (s. 65.2(5) BIA). The court may, on application made at any time after the proposal is filed, determine the classes of claims of landlords and the class into which any particular landlord's claim falls (s. 65.2 (7)).

Coming into force: Fall 1997
Transitional measures: apply to proceedings commenced after the coming into force of the sections.

3. Liability of directors

Directors sued for repayment of a dividend paid at the time when the corporation was insolvent may assert in their defence that they had reasonable grounds to believe that the corporation was not insolvent. By "reasonable grounds" the court shall consider whether the directors relied on financial statements or reports relating to the corporation's affairs prepared by credible professional persons (s. 101(2), (2.1) and (5) BIA).

Coming into force: Fall 1997
Transitional measures: apply to bankruptcies or proposals where proceedings are commenced after the coming into force of the sections.

In the context of a commercial reorganization, proceedings against the directors, in their capacity as directors, on statutory claims for which they may be liable are stayed (s. 69.31 BIA). A proposal may include an offer to compromise such claims. The offer of compromise may not include claims that are based on a contract (compromise is possible only on claims for which directors can be liable pursuant to any law) or on allegations of misrepresentation or of wrongful conduct by the directors. The court may declare that a claim shall not be compromised if it is satisfied that the compromise would not be just and equitable under the circumstances. In addition, the compromise must be for prior claims only. The affected creditors shall vote by classes (s. 50(13) to (17) BIA).

For the purposes of the above-mentioned sections, where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director (50 (18) and 69.31 (3)).

Coming into force: Fall 1997
Transitional measures: apply to proceedings commenced after the coming into force of the sections.

4. Deemed refusal of a proposal

The court may, at any time before the meeting of creditors, declare that the proposal is deemed to have been refused by the creditors if the court is satisfied that the debtor is not acting in good faith or that the proposal will not likely be accepted by the creditors (s. 50(12) BIA).

Coming into force: Fall 1997
Transitional measures: apply to proceedings commenced after the coming into force of the section.

5. Claims by a workers' compensation body

Claims by a workers' compensation body are dealt with on the same footing as claims by the Crown.

Generally speaking, these claims rank as ordinary claims. The securities created by statute for amounts owing to the body shall be recognized only if they are registered. In such cases they rank according to the date of registration and in respect of the amounts owing at the time of registration (s. 86 and 87).

Coming into force: Fall 1997
Transitional measures: apply to bankruptcies or proposals where proceedings are commenced after the coming into force of the sections.

6. International insolvencies

In accordance with the new trends observed among our major trading partners, the new Part XIII (International Insolvencies) is intended to codify and clarify the domestic rules in order to promote greater cooperation and coordination in international insolvencies.

The court may "recognize" a foreign representative. A "foreign representative" is a person who is assigned, under the laws of the jurisdiction outside Canada, functions that are similar to those performed by a trustee, liquidator, administrator or receiver appointed by the court (s. 267).

A foreign representative or any interested person may ask the court to limit the property to which the authority of the trustee in bankruptcy extends to the property of the debtor situated in Canada (s. 268(2) BIA).

Foreign orders to stay proceedings in regard to property situated in Canada are not automatically recognized; however, a foreign representative may ask the court to stay proceedings in Canada (s. 269).

A foreign representative may commence proceedings in Canada in accordance with Canadian laws, as if he or she were a creditor, trustee, receiver or debtor. Proceedings include the filing of a petition for a receiving order, the filing of a notice of intention or a proposal with respect to an insolvent person and the request for the appointment for an interim receiver (s. 270).

The court is empowered to issue orders to facilitate and coordinate international proposals and arrangements (s. 268(3) BIA).

Under section 271, the court may seek the aid and assistance of a court or other authority in a foreign proceeding. It may also, at the request of the foreign representative:

- grant a stay of proceedings against a debtor in Canada who has filed a notice of intention or a proposal or who has become bankrupt;
- appoint an interim receiver of the property of the debtor situated in Canada;
- authorize the examination under oath of the debtor or some other interested person.

The exchange rate applicable to claims is the rate in effect as of the date of the bankruptcy; in the case of a proposal in respect of an insolvent person, the rate is the one referred to in the proposal, or, if not provided, the one in effect as of the day the notice of intention or proposal was filed (s. 275).

Coming into force of new Part XIII of the Act: Fall 1997
Transitional measures: apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

IV Companies' Creditors Arrangement Act

The new Act amends the *Companies' Creditors Arrangement Act* (CCAA) and borrows certain provisions from the *Bankruptcy and Insolvency Act* with a view to establishing greater uniformity and certainty in the process, while maintaining the necessary flexibility to deal with complex reorganizations involving several million dollars or more.

1. Threshold of eligibility

The Act applies only if the total of creditor claims exceeds five million dollars. This threshold of five million dollars may include the liabilities of affiliated companies (s. 3 CCAA).

2. Initial stay and further orders

The court may, without prior notice, grant an initial stay of any proceeding for a period not exceeding 30 days (s. 11(3) CCAA). It may also, upon prior notice of at least ten days, grant further stays for such period as it may impose if it is satisfied that the applicant has acted in good faith and with due diligence (s. 11(4) and (5) CCAA).

3. Financial disclosure

An initial application for a stay shall be accompanied by a statement indicating the projected cash flow of the company and copies of the most recent financial statements (s. 11(2) CCAA).

4. Appointment of a monitor

A court that grants a stay of proceedings shall appoint a monitor to supervise the business and financial affairs of the debtor company. This monitor shall file with the court, prior to the meeting of the creditors or forthwith after ascertaining any material adverse change in the company's financial circumstances, a report on the business and financial affairs of the company. The company's auditor may be appointed as the monitor (s. 11.7 CCAA).

5. Extension of credit and supply of goods

The court may not stay proceedings against third parties under a letter of credit or guarantee in relation to the debtor company (s. 11.2 CCAA). Nor shall it prohibit a person from requiring immediate payment for goods or services provided after the order to stay is made or requiring the further advance of money or credit (s. 11.3 CCAA).

6. Liability of the monitor

The liability of the monitor is similar to that of the trustee in bankruptcy or the receiver. (See above, Section III)

7. Claims by the Crown

The court may order the stay of proceedings by the federal or provincial Crown on claims for deductions at source made by the debtor company but not remitted to the government. The stay shall end once the company defaults on its obligations for current deductions at source, i.e. those that must be remitted after the order to stay is made (s. 11.4 CCAA).

Furthermore, the court shall not sanction any arrangement that does not provide for the payment in full to the federal or provincial Crown, within six months after court sanction of the arrangement, of the amounts that are subject to a claim for deductions at source; nor shall it sanction an arrangement if the current deductions at source have not been remitted to the government (s. 18.2 CCAA).

The statutory trusts are not recognized, with the exception of those trusts the amount of which corresponds to the federal or provincial deductions at source, unemployment insurance premiums and contributions to a federal or provincial pension plan (s. 18.3 CCAA).

Generally speaking, the statutory claims of the federal or provincial Crown rank as ordinary claims (s. 18.4 CCAA).

A statutory security provided for amounts owing to the federal or provincial Crown is valid only if it is registered before the date of the initial application. In such case it shall rank according to the date of registration and for amounts owing at the time of that registration (s. 18.5 CCAA).

In addition, the CCAA is now binding on the Crown (s. 21).

8. Liability of directors

An order to stay proceedings may provide for a stay of proceedings against the directors in their capacity as directors for statutory claims for which they may be liable (s. 11.5 CCAA). The proposed arrangement may include an offer to compromise such claims. The offer of compromise shall not include claims based on a contract or on allegations of misrepresentations or of wrongful conduct by directors (s. 5.1 CCAA).

For the purposes of the above-mentioned sections, where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director (5.1 (4) and 11.5 (3) CCAA).

9. Vote of creditors

The majority required to approve an arrangement is decreased from three-fourths in value of the creditors to two-thirds (s. 6 CCAA).

10. International context

Section 18.6 of the CCAA is intended to codify and clarify the domestic rules so as to promote greater international cooperation and coordination.

The court may "recognize" a foreign representative. A "foreign representative" is a person who is assigned, under the laws of the jurisdiction outside Canada, functions that are similar to those performed by a trustee, liquidator or administrator appointed by the court.

The court is empowered to issue orders to facilitate and coordinate international arrangements.

The court may seek the aid and assistance of a court or other authority in a foreign proceeding.

The exchange rate applicable to claims is the rate referred to in the arrangement, or, if not provided, the one in effect as of the day of the initial request.

11. Continuance of proceedings from one Act to another

Continuance of proceedings from one Act to another: BIA to CCAA (s. 11.6 CCAA)

- A reorganization proceeding commenced under Part III of the BIA may not be continued under the CCAA.
- However, the continuance is possible if no proposal has been filed under the BIA.

Continuance of proceedings from one Act to another: CCAA to BIA (s. 66(2) BIA)

- Proceedings taken under the CCAA may not continue under the BIA.
- Reorganization proceedings under Part III of the BIA may not be commenced if the CCAA arrangement has not been agreed to by the creditors or sanctioned by the Court.

Coming into force of all amendments to the CCAA: Fall 1997
Transitional measures: apply to proceedings commenced under the CCAA after the coming into force of the sections.

V Securities Firms Bankruptcies

The new Part XII of the BIA provides a framework for the more effective administration of insolvencies of securities firms bankruptcies.

A petition for a receiving order may be filed against a securities firm by either a securities commission, a securities exchange, a customer compensation body (e.g., the Canadian Investor Protection Fund (CIPF)) or a person appointed under a federal or provincial enactment relating to securities. To this effect, the scope of the "acts of bankruptcy" is enlarged to include the failure to meet capital adequacy requirements (s. 256).

This part creates three categories of property:

1. customer name securities: these are securities registered in the name of a customer that are not in negotiable form (s. 253 BIA);
2. the customer pool fund: it is composed of securities other than customer name securities, cash in customers' accounts and income obtained from securities in the customer pool fund (s. 261(2)(a) BIA); and
3. the general fund: it includes all of the remaining vested property (s. 261(2)(b) BIA).

The estate property is distributed as follows:

1. the customer name securities shall be delivered to the customer unless the customer is indebted to the securities firm (s. 263 BIA);
2. the assets of the customer pool fund shall be distributed to the customers in proportion to their net equity (s. 262(1) BIA); any shortfall may be compensated by a customer compensation body;
3. the assets of the general fund shall first be distributed to the non-customer creditors, in accordance with the order of distribution set out in s. 136 BIA and, rateably (s. 262(3) BIA):
   - to customers, for the remainder of their claims after distribution of the assets of the customer pool fund;
   - to any customer compensation body;
   - to the ordinary creditors.

Upon the application by the trustee or a customer compensation body, the court may order that a customer be treated as a "deferred customer" (s. 258 BIA). In such case the deferred customer shall not be entitled to share *in the assets of the customer pool fund; a deferred* customer is a customer whose misconduct caused or materially contributed to the insolvency of a securities firm. The deferred customer will participate, with the lowest ranking, in the assets of the general fund (s. 262(3)(d) BIA).

With respect to the trustee's administration, his powers are enlarged. The trustee may deal with securities in the same manner as a securities firm: sell, purchase, call margins if it is essential to the carrying on of the firm's business. In addition, the trustee may act without the permission of the inspectors before they are appointed. We should also mention that where accounts of customers are insured by CIPF, the trustee may consult CIPF on the administration on the bankruptcy; and CIPF may designate an inspector to act on its behalf.

Concerning the statements that the trustee must prepare, in addition to the regular statement of receipts and disbursements, the trustee must also prepare a statement of distribution of customer pool fund and customer named securities (s. 266). The trustee must also prepare any other report that the court may direct (s. 266 (b)).

Coming into force of new Part XII of the Act (except for section 256 (3) (c) and (d) which require new rules): Fall 1997
Transitional measures: apply to bankruptcies where proceedings are commenced after the coming into force of the sections.

VI Miscellaneous Administrative Amendments

Some amendments of an administrative nature are made throughout the *Bankruptcy and Insolvency Act.* These include the following.

1. Standardization of limitation periods

To facilitate the day-to-day administration of files, time limits are standardized. Limitation periods of more than five and up to 30 days are calculated in multiples of five: see, for example, section 50(11), which increases the period to 15 from 13 days. Unless otherwise provided (for example, 45 days), limitation periods of more than 30 days are calculated in months: see, for example, section 35(3), which changes the period from 90 days to three months.

For the applicable coming into force date and transitional measure, reference to the specific section is necessary. Generally, these sections come into force in the Fall of 1997 and are applicable to files where proceedings were commenced before the coming into force of the sections. However, the time periods mentioned in Part III of the BIA (ss. 50 to 66.4) apply only where proceedings are commenced after the coming into force of the sections.

2. Definitions — s. 2

The definitions of "corporation" and "insolvent person" are extended to include a person having property in Canada.

Coming into force: Fall 1997
Transitional measures: apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

3. Date of the initial bankruptcy event and time or date of bankruptcy — ss. 2 and 2.1

"Date of the initial bankruptcy event" is defined as the earliest of the date of filing or of making an assignment by or in respect of the person, a notice of intention or a proposal, or a petition for a receiving order. Furthermore, section 2.1 states that the bankruptcy or putting into bankruptcy of a person is deemed to occur at the time or date of the granting of a receiving order, the filing of an assignment or the event that causes an assignment by the person to be deemed.

A number of correlative amendments are made to specify the time at which the rights and obligations set out in the Act commence — in which case it is necessary to refer either to the definition of "date of the initial bankruptcy event" or to the rule of construction in section 2.1. See, for example, section 95(1).

Coming into force: Fall 1997
Transitional measures: apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

4. Forms for Superintendent's directives — ss. 2 and 5(4)(e)

The Superintendent is authorized to prescribe by directives the form of the documents and the information to be given therein. The definition of "prescribed" is amended accordingly.

Coming into force: Fall 1997
Transitional measures: the new forms will apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

5. Notifications to the Superintendent — s. 2.2

Notifications and documents that are given to the Superintendent are given at the division office as specified by directives.

Coming into force: Fall 1997
Transitional measures: apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

6. Trustee licences — ss. 5(4)(d) to 15.1

The Superintendent is authorized to issue directives governing the criteria in relation to the issuance of licences (s. 5(4)(d) BIA). The superintendent may issue a licence after investigating the conduct of the applicant

and verifying his or her qualifications; a licence may be denied to a candidate who is insolvent or who has been convicted of an indictable offence (s. 13(2) and (3) BIA).

Other provisions affecting the Superintendent's actions in relation to the trustee's licence include:

- On an *ex parte* application by the Superintendent, the court may order a financial institution to freeze a deposit account of a trustee (s. 6(4) BIA).
- A licence ceases to be valid if the trustee becomes bankrupt. The Superintendent may, however, on written representations made by the trustee, reinstate the licence (s. 13.2(3) and (4) BIA).
- A licence may be cancelled or suspended if the trustee is convicted of an indictable offence or if he or she has failed to comply with the conditions or limitations to which the licence is subject, if the trustee has ceased to act as a trustee or at the request of the trustee (s.13.2 (5)). In such case, ten days before the decision to suspend or cancel the licence takes effect, the Superintendent shall send the trustee a notice setting out the reasons therefore. The formal disciplinary process does not apply to such cases (s. 13.2(6) to (7) BIA). This new disciplinary power may be delegated by the Superintendent (s. 14.01(2) BIA).
- A trustee shall not engage the services of a person whose trustee licence has been cancelled (s. 13.6 BIA).
- Under section 14.01(1), the range of potential breaches of duty by the trustee, and potential penalties therefor, is expanded: it now includes, for example, the trustee's duty to take an exam or to make restitution of money to the estate. In addition, sections 14.01 and 14.02, apply, in so far as they are applicable, in respect of former trustees.
- Unless the Superintendent decides otherwise in the interest of third parties or the public interest, the disciplinary hearing is public. A disciplinary decision is always public (s. 14.02(3) and (4) BIA).
- Under section 14.03(1), the scope of conservatory measures is clarified: for example, the Superintendent may direct a person to continue the administration of the estate and the costs of this person shall be paid in priority (s. 136(1)(b)(i) BIA); the superintendent may also direct the official receiver not to appoint the trustee in respect of any new estates.
- The circumstances in which the Superintendent may take conservatory measures are extended to the insolvency of the trustee and the trustee's conviction on an indictable offence (s. 14.03(2) BIA).
- Section 15.1 states that a trustee is deemed to be a "trustee" within the meaning of section 2 of the *Criminal Code.*

Coming into force: Fall 1997
Transitional measures: apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

7. Trustee acting for a secured creditor — s. 13.4

A trustee, while acting as the trustee of an estate, shall not act for or assist a secured creditor, unless that trustee has obtained an independent legal opinion as to the validity of the security and has notified the superintendent and the creditors of that fact.

Coming into force: Fall 1997
Transitional measures: apply to files already open at the coming into force of the sections.

8. Transfer of funds other than by cheques — s. 25(2)

The Superintendent is authorized to issue directives governing the manner in which payments may be made by a trustee.

Coming into force: Fall 1997
Transitional measures: apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

9. Assignment of wages and assignment of debts — s. 68.1

An assignment of existing or future amounts receivable as wages, commission or professional fees is of no effect in respect of the amounts earned or generated after the bankruptcy.

Coming into force: Fall 1997
Transitional measures: apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

10. Margin deposits — s. 95(2.1) and (3)

A "margin deposit" made by a clearing member with a clearing house is explicitly excluded from the presumption of fraudulent intent in the context of a request to cancel a preferential payment. "Margin deposit" is defined as a payment to ensure the performance of the obligations of a clearing member in connection with security transactions.

Coming into force: Fall 1997
Transitional measures: apply to bankruptcies where proceedings are commenced after the coming into force of the sections.

11. Proof of claim for unpaid wages — s. 126(2)

Proofs of claims for unpaid wages may be made by a representative of a federal or provincial ministry or by a union representing the employees.

Coming into force: Fall 1997
Transitional measures: apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

12. Petition for a receiving order against fishermen and farmers — s. 48

The protection against being petitioned into bankruptcy for individuals engaged solely in fishing and farming is expanded to include an individual whose principal occupation and means of livelihood is fishing or farming (and not only the individual who exclusively engages in fishing or farming).

Coming into force: Fall 1997
Transitional measures: apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

13. Contingent or unliquidated claims — ss. 121(2), 135(1.1), (3) and (4)

The trustee shall determine whether a contingent or unliquidated proof of claim is a provable claim and, if it is a provable claim, shall value it. The trustee shall notify the creditor thereof, who has 30 days in which to appeal the trustee's decision to the court.

Coming into force: Fall 1997
Transitional measures: apply to bankruptcies or proposals where proceedings are commenced after the coming into force of the sections.

14. Examination by the official receiver — s. 161

The statutory examination by the official receiver may be held at any time prior to the bankrupt's discharge. If it is held after the first meeting of the creditors, the notes shall be made available only to those creditors who request them.

Coming into force: Fall 1997
Transitional measures: apply to files where proceedings were commenced before the coming into force of the section (ongoing files).

Decision of the Federal Court relating to a trustee's licence — Louis Drolet and Groupe G. Tremblay Syndics Inc.*

T-1918-95

BETWEEN:

GROUPE G. TREMBLAY SYNDICS INC.
and
LOUIS DROLET, TRUSTEE,

Applicants,

- AND -

SUPERINTENDENT OF BANKRUPTCY, GEORGES R. REDLING,
and
DEPUTY SUPERINTENDENT, Policy, Programs and Standards, MARC MAYRAND,

Respondents,

- AND -

ATTORNEY GENERAL OF CANADA,
and
FRANÇOIS A. GOUIN, TRUSTEE,

Mis-en-cause,

AND

T-1952-95

BETWEEN:

GILLES M. TREMBLAY, TRUSTEE,

Applicant,

- AND -

SUPERINTENDENT OF BANKRUPTCY
and
FRANÇOIS A. GOUIN, TRUSTEE,
and
DEPUTY SUPERINTENDENT, Policy, Programs and Standards,
and
PIERRE LECAVALIER, in his capacity as Deputy Administrator of the Office of the Superintendent of Bankruptcy,
and
ATTORNEY GENERAL OF CANADA,

Respondents.

* Federal Court of Canada, T-1918-95 and T-1952-95, March 12, 1997 (Justice Tremblay-Lamer) (T.D.).

Reasons for Decision

Tremblay-Lamer J.

Introduction

This case raises the issue of whether section 14.03 of the *Bankruptcy and Insolvency Act* [1] (B.I.A.) is constitutional. That section authorizes the Superintendent, in certain expressly stated circumstances, to take the necessary steps to preserve the records of estates.

In the fall of 1995, in the exercise of that power, the Deputy Superintendent took possession of records administered by the applicants and entrusted them to a guardian until the completion of the investigation and disciplinary hearing into the applicants' conduct and administration.

These applications for judicial review relate to that taking of possession.

The Facts

Louis Drolet is one of the applicants in application for judicial review No. T-1918-95. He began working as a trustee with Ginsberg, Gingras & Associés, a corporate trustee, on February 2, 1990. From 1991 to 1993, numerous complaints were made against him, primarily to the Office of the Superintendent of Bankruptcy in Québec. He was alleged to have committed improper acts in administering estate records, which is what led to the end of his association with Ginsberg, Gingras & Associés.

At that time, Ginette Trahan was the Official Receiver and Assistant Superintendent for the district of Québec. After receiving the complaints about Mr. Drolet's activities, she informed Marc Mayrand, the Deputy Superintendent (Policy, Programs and Standards). In view of the seriousness of the improper acts alleged against Mr. Drolet, the Deputy Superintendent announced that a disciplinary committee would be formed.

While the committee was considering his case, Mr. Drolet contacted the Deputy Superintendent to tell him of a plan to create a new corporate trustee. He submitted the proposal in order to settle the dispute associated with his disciplinary case. Mr. Drolet and Mr. Tremblay planned to work together for Groupe G. Tremblay Syndics Inc. (Groupe G. Tremblay). Mr. Drolet agreed to transfer all the records he had handled while working for Ginsberg, Gingras & Associés to the newly formed corporate trustee. Mr. Tremblay was to do the same with his own records. Mr. Drolet further agreed that his licence as a trustee in bankruptcy would be suspended for a period of one year, from September 1, 1994 to September 1, 1995.

In September 1994, the proposal was finally accepted. An agreement was entered into with respect thereto by Mr. Drolet, Mr. Tremblay, the Deputy Superintendent and Ginsberg, Gingras & Associés. Although Mr. Tremblay had been audited in 1992, the Deputy Superintendent said he was satisfied that Mr. Tremblay was competent. To be fully executory, however, the agreement had to be approved by the Superintendent of Bankruptcy, Georges Redling (the Superintendent). To this end, the Deputy Superintendent filed a report with the Office of the Superintendent recommending that the agreement be ratified. On receiving the report and the recommendation, the Superintendent, under sections 14.01 and 14.02 of the B.I.A., delegated his powers, duties and functions in dealing with the matter to François Daviault, who was to hear the parties and render a decision on the trustee licence of the applicant Mr. Drolet.

Although, to become executory, the agreement had to be ratified subsequently by the Superintendent, or in this case his delegate, it was nevertheless applied as soon as it was concluded. Thus, records began to be transferred to Groupe G. Tremblay in the fall of 1994. From that time on, the records administered by Groupe G. Tremblay were as follows: (1) records on which Mr. Drolet had worked while with Ginsberg, Gingras & Associés; (2) new records of Groupe G. Tremblay; (3) Québec records handled pursuant to Mr. Tremblay's

1 R.S.C. 1985, c. B-3, as amended, *inter alia*, by S.C. 1992, c. 27.

personal licence; and (4) Montréal records handled pursuant to Mr. Tremblay's personal licence.

In October 1994, the Assistant Superintendent for the district of Québec, Ms. Trahan, decided to audit the Québec records handled pursuant to Mr. Tremblay's personal licence. Laurent Lachance, an auditor, was assigned to do the work. In spite of the deficiencies reported by the auditor, the Assistant Superintendent and the Deputy Superintendent decided not to say anything to Mr. Daviault, the delegate, before he rendered his decision.

By mid-March 1995, the new Assistant Superintendent for the district of Québec, Denis Gilbert, had already informed the Deputy Superintendent that numerous complaints had been filed against the corporate trustee Groupe G. Tremblay. The complaints referred not only to administrative deficiencies, such as slowness in issuing certificates of discharge, but also to much more serious misconduct.

On March 27, 1995, Mr. Daviault rendered his decision, at the end of which he ratified the September 1994 agreement.

On April 6, 1995, the Deputy Superintendent called a special meeting, at which, relying on paragraph 5(3)(*e*) of the B.I.A., he announced the formation of a committee to investigate Mr. Tremblay's administration of estates. The committee was also given the more general mandate to investigate Groupe G. Tremblay's administration and activities. It was in that context that the Office of the Superintendent first contacted François A. Gouin, a trustee. Subsequently, in May 1995, at a conference of the Canadian Insolvency Association, the Deputy Superintendent approached Mr. Gouin personally to discuss the same mandate.

As well, in the weeks following the decision of the delegate, Mr. Daviault, the Royal Canadian Mounted Police (R.C.M.P.) began a number of investigations into the administration and activities of Mr. Drolet, Mr. Tremblay and Groupe G. Tremblay. Some of those investigations were initiated after the issuance of investigation mandates by the Office of the Superintendent.[2] The rest were begun at the initiative of the R.C.M.P. itself, which was acting in response to complaints it had received from debtors and creditors involved in the records managed by the applicants.

Throughout August 1995, the auditor, Mr. Lachance, audited Groupe G. Tremblay's records. The investigation corroborated the information that had already been gathered, which showed that serious offences had been committed.

On August 28, 1995, the auditor submitted his report on Groupe G. Tremblay's administration to his superiors. The report recounted all the disturbing facts that he had noted in the audit, namely: misappropriation of funds, estates that had not been realized or had been realized at a very low price, misrepresentations to the courts and the Official Receiver and the preparation of false statutory documents.

On August 31, 1995, R.C.M.P. officers submitted a number of informations to Judge Choquette of the Court of Quebec, Penal Division, in order to obtain search warrants. Judge Choquette issued the warrants the same day. He authorized the officers to seize eighteen (18) of Groupe G. Tremblay's records.[3] The search took place the next morning.

The same day, the applicants received a letter prepared by the Deputy Superintendent informing them of the decision he had made, based on a progress report (by the auditor, Mr. Lachance), to issue a direction to protect all the estates administered by Groupe G. Tremblay until the completion of the investigation under way. Notices that conservatory measures had been directed were sent the same day to, *inter alia*, trustees in bankruptcy in the Québec region, financial institutions with which Groupe G. Tremblay did business, Bell Canada and Canada Post. The recipients of the notices were told that the estate records formerly administered by Groupe G. Tremblay would now be administered by François A. Gouin, trustee.

The direction for conservatory measures was issued by Deputy Superintendent Mayrand under paragraphs 14.03(1)(*b*) and 14.03(2)(*b*) of the B.I.A., which provide

2 It is subsection 10(1) of the B.I.A. that authorizes the Superintendent to issue investigation mandates.

3 See the respondents' application record, Vol. I., at pages 268 *et seq.*

that where an investigation is being made pursuant to paragraph 5(3)(*e*) of the B.I.A., the Superintendent may direct any person to take the necessary steps to preserve the records of estates.

The Deputy Superintendent has admitted that he thought the B.I.A. did not require him to obtain judicial authorization before taking possession of the records. Given the seriousness of the alleged misconduct and the search conducted that morning by the R.C.M.P. officers, he considered it reasonable to take possession of all of Groupe G. Tremblay's records.

Relevant Statutory Provisions

The relevant statutory provisions for the purposes of the case at bar are all found in the B.I.A. They are as follows:

5. (3) The Superintendent shall, without limiting the authority conferred by subsection (2),

(*a*) receive applications for licences to act as trustees under this Act and issue licences to persons whose applications have been approved;

(*b*) [Repealed, 1992, c. 27, s. 5]

(*c*) where not otherwise provided for, require the deposit of one or more continuing guaranty bonds as security for the due accounting of all property received by trustees and for the due and faithful performance by them of their duties in the administration of estates to which they are appointed, in such amount as the Superintendent may determine, which amount may be increased or decreased as he may deem expedient, and the security shall be in a form satisfactory to the Superintendent and may be enforced by the Superintendent for the benefit of the creditors;

(*d*) [Repealed, 1992, c. 27, s. 5]

(*e*) from time to time make or cause to be made such inspection or investigation of estates as he may deem expedient and for the purpose of the inspection or investigation the Superintendent or any person appointed by him for the purpose shall have access to and the right to examine all books, records, documents and papers pertaining or relating to any estate;

(*f*) receive and keep a record of all complaints from any creditor or other person interested in any estate and make such specific investigations with regard to such complaints as the Superintendent may determine; and

(*g*) examine trustees' accounts of receipts and disbursements and final statements.

14.01 (1) The Superintendent, after making or causing to be made an investigation into the conduct of a trustee, may, where it is in the public interest to do so,

(*a*) cancel the licence of a trustee;

(*b*) suspend the licence of a trustee; or

(*c*) place such conditions or limitations on the licence of a trustee as the Superintendent considers appropriate.

(2) The Superintendent may delegate by written instrument, on such terms and conditions as are therein specified, any or all of the Superintendent's powers, duties and functions under paragraphs (1)(*a*) to (*c*) or section 14.02 or 14.03.

(3) Where the Superintendent delegates in accordance with subsection (2), the Superintendent or the delegate shall

(*a*) where there is a delegation in relation to trustees generally, give written notice of the delegation to all trustees; and

(*b*) whether or not paragraph (*a*) applies, give written notice of the delegation of a power to any trustee who may be affected by the exercise of that power, either before the power is exercised or at the time the power is exercised.

14.02 (1) Where the Superintendent intends to exercise any of the powers set out in paragraphs 14.01(1)(*a*) to (*c*), the Superintendent shall send the trustee written notice of the powers that the Superintendent intends to exercise and the reasons therefor and afford the trustee a reasonable opportunity for a hearing.

(2) At a hearing referred to in subsection (1), the Superintendent

(*a*) has the power to administer oaths;

(*b*) is not bound by any legal or technical rules of evidence in conducting the hearing;

(*c*) shall deal with the matters set out in the notice of the hearing as informally and expeditiously as the circumstances and a consideration of fairness permit; and

(*d*) shall cause a summary of any oral evidence to be made in writing.

(3) The notice referred to in subsection (1) and, where applicable, the summary of oral evidence referred to in paragraph (2)(*d*), together with such documentary evidence as the Superintendent receives in evidence, form the record of the hearing.

(4) The decision of the Superintendent after a hearing referred to in subsection (1), together with the reasons therefor, shall be given in writing to the trustee not later than ninety days after the conclusion of the hearing and may, where the Superintendent considers it in the public interest to do so, be made public after the decision has been given to the trustee.

(5) A decision of the Superintendent given pursuant to subsection (4) is deemed to be a decision of a federal board, commission or other tribunal that may be reviewed and set aside pursuant to the *Federal Court Act*.

14.03 (1) The Superintendent may, for the protection of an estate in the circumstances referred to in subsection (2),

(*a*) direct any person to deal with the property of the estate described in the direction in accordance with the terms of the direction;

(*b*) direct any person to take such steps as the Superintendent may deem necessary to preserve the records of the estate; and

(*c*) direct a bank or other depository not to pay out funds on deposit to the credit of the estate except in accordance with the direction.

(2) The circumstances in which the Superintendent is authorized to exercise the powers set out in subsection (1) are where

(*a*) an estate is left without a trustee by the death, removal or incapacity of the trustee;

(*b*) the Superintendent makes or causes to be made any investigation pursuant to paragraph 5(3)(*e*);

(*c*) the Superintendent exercises any of the powers set out in section 14.01; or

(*d*) the fees referred to in subsection 13.2(2) have not been paid in respect of the trustee's licence.

(3) A direction given pursuant to subsection (1)

(*a*) shall state the statutory authority pursuant to which the direction is given;

(*b*) is binding on the person to whom it is given; and

(*c*) is, in favour of the person to whom it is given, conclusive proof of the facts set out therein.

(4) A person who complies with a direction given pursuant to subsection (1) is not liable for any act done by the person only to comply with the direction.

Issues

Administrative law issues:

1. Did the Deputy Superintendent exceed his jurisdiction by going beyond the inherent limitations of the discretion conferred on him by section 14.03 of the B.I.A.?
2. Did he exercise that discretion for improper purposes, in bad faith or in an arbitrary, unfair or unreasonable manner?
3. Was he required to comply with the rules of natural justice?

Charter issues:

1. Did the taking of possession on September 1, 1995 infringe section 7 of the *Canadian Charter of Rights and Freedoms* by depriving the applicants Drolet and Tremblay of their liberty in a manner not in accordance with the principles of fundamental justice?
2. Is section 14.03 of the B.I.A. contrary to section 7 of the *Canadian Charter of Rights and Freedoms* because it is too vague?
3. Was the taking of possession on September 1, 1995 a search or seizure within the meaning of section 8 of the *Canadian Charter of Rights and Freedoms*?
4. Was the taking of possession on September 1, 1995 an unreasonable seizure and hence constitutionally prohibited by section 8 of the *Canadian Charter of Rights and Freedoms*?
5. Is section 14.03 of the B.I.A. contrary to the guarantee set out in section 8 of the *Canadian Charter of Rights and Freedoms*? If so, is this infringement saved by section 1?

Analysis

A. Preliminary Issue

The respondents began by arguing that the "direction for conservatory measures" issued by the Deputy

Superintendent on September 1, 1995 was not a decision within the meaning given to that term in section 18 of the *Federal Court Act*.[4] In the respondents' submission, it was not a measure that had a final effect on the applicants' rights and was binding on the parties.

The rule being relied on in this regard was formulated by the Federal Court of Appeal in *Szczecka* v. *Canada (Minister of Employment and Immigration)*.[5] In that case, the Court, *per* Létourneau J.A., held that unless there are special circumstances, there should not be any immediate judicial review of an interlocutory decision. The decisions in respect of which judicial review is available are those that make a final ruling on the merits of a case.

In my view, the Deputy Superintendent's decision was not an interlocutory decision within the meaning that the courts have given that term. It was not a decision made in the course of an action by an administrative tribunal. It was a decision that had a final effect on the applicants' rights, because the seized records were administered by a representative of the Superintendent and could not, in all likelihood, be returned to them until the end of the disciplinary process. Moreover, in most instances, the administration of the seized records will probably be complete by the time the disciplinary process ends. For these reasons, it seems to me that the *Szczecka*[6] rule is not applicable to this case.

B. Administrative Law Issues

1. *Excess of jurisdiction*

The applicants submitted that the decision to initiate an investigation into a trustee's administration (paragraph 5(3)(*e*) B.I.A.) and the decision to issue a direction for conservatory measures (paragraphs 14.03(1)(*b*) and 14.03(2)(*b*) B.I.A.) are decisions that fall within the Superintendent's discretion. The courts have consistently held that a discretion is never absolute. In the case at bar, the Deputy Superintendent's decision to issue a direction for conservatory measures was contrary to the three legal limitations on any discretion.

According to the applicants, the Deputy Superintendent exercised his discretion for improper purposes, because his decision was intended not to preserve estate records but rather to permanently and irrevocably prevent the applicant Mr. Drolet from working as a trustee. If the Superintendent's objective was really to preserve estate records, why did he take possession of all the records administered by Groupe G. Tremblay, without exception?

The applicants further submitted that a direction for conservatory measures can be issued only to preserve future estate records. The "preservation power" set out in section 14.03 of the B.I.A. can, by definition, be exercised only to prevent an imminent, future threat to an estate. In so far as an act has already been done, it is no longer a question of "preserving" estate records, but rather of "recovering" estates because of past actions or misconduct.

Moreover, the applicants argued that his decision was made in bad faith. Not only did the Deputy Superintendent, without reason, deem it appropriate to take greater exceptional measures than had even been taken before, but he applied those measures in an excessive manner.

Finally, the applicants submitted that the Superintendent's decision was unfair, arbitrary and discriminatory. While he claimed to have made it on the basis of the "progress" report prepared by the auditor, Mr. Lachance, the evidence showed that his actions had in fact been planned for a long time.

As for the respondents, they argued that since the Deputy Superintendent simply applied the principles found in paragraph 5(3)(*e*) and section 14.03 of the B.I.A., he in no way exceeded his jurisdiction. The Deputy Superintendent exercised his discretion in an appropriate manner, that is, within the limits set out in the B.I.A.

I agree with the applicants that the statutory discretion exercised by the Superintendent is not absolute. The courts have held on numerous occasions that every

---

4 R.S.C. 1985, c. F-7, as amended.

5 (A-1270-92), September 15, 1993 (F.C.A.).

6 *Ibid.*

discretion is subject to certain general legal limitations.[7] For example, it is established that a discretion cannot be used for improper purposes that are contrary to the applicable legislation. Furthermore, a discretion cannot be exercised in bad faith or in an arbitrary, unfair or unreasonable manner.

As noted by Lamer J. (as he then was) in *Slaight Communications*:[8]

> Parliament cannot have intended to authorize such an unreasonable use of the discretion conferred by it. A discretion is never absolute, regardless of the terms in which it is conferred. This is a long-established principle. H.W.R. Wade, in his text titled *Administrative Law* (4th ed. 1977), says the following at pp. 336-37:
>
> > For more than three centuries it has been accepted that discretionary power conferred upon public authorities is not absolute, even within its apparent boundaries, but is subject to general legal limitations. These limitations are expressed in a variety of different ways, as by saying that discretion must be exercised **reasonably** and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious. [Emphasis added.]

What is the situation in the case at bar? Did the Deputy Superintendent disregard the general legal imitations to which he was subject in exercising his discretion? I do not think so.

Section 14.03 authorizes the Superintendent to take conservatory measures for the protection of bankruptcy estates. Given the seriousness of the irregularities alleged against the applicants, the taking of possession was intended to ensure that debtors and creditors did not suffer any harm pending the completion of the investigation under way.

In these circumstances, I cannot conclude that the conservatory measures ordered by the Deputy Superintendent had any purpose other than preserving estate records.

As for the argument that he should not have taken possession of all the records, when the situation had become urgent, I have difficulty seeing how he could have sorted through them and decided which records he could have left to be administered by the applicants. It must be recalled that what was at issue **was their ability to fulfil their responsibilities as trustees with integrity**. Because of their fiduciary role, trustees must be as transparent as possible in administering the records entrusted to them. They manage the property of others for the benefit of all creditors, and this is true for **each record** of a bankruptcy. Once the relationship of trust had broken down, the Deputy Superintendent had no choice but to take possession of all the records. Given the seriousness of the alleged misconduct, it seemed impossible to him to select certain records that the applicants could have continued to handle without jeopardizing the administration of property belonging to others. I cannot conclude that such a decision was unreasonable.

As for the conservatory measures involving Bell Canada and Canada Post, since they were cancelled a few days after they were taken, this Court no longer has to consider their validity and thus determine whether taking them was consistent with the power conferred by the B.I.A.

Moreover, I do not accept the argument that the power "to preserve" estates set out in section 14.03 was used in this case to "recover" estate records. The alleged actions endangered estates under the administration and control of the trustees, and it was precisely to prevent the occurrence of further misconduct that the conservatory measures were taken.

The applicants also submitted that, for all practical purposes, the direction for conservatory measures of September 1, 1995 rescinded the decision of the delegate, Mr. Daviault. According to the applicants, by ordering that possession be taken of all of Groupe G. Tremblay's records, the Deputy Superintendent made it impossible to implement Mr. Daviault's decision. By taking possession of the records, the Deputy Superintendent prevented the applicant Mr. Drolet from resuming his activities as a trustee in bankruptcy as planned. It should be recalled that the suspension of Mr. Drolet's licence was to end on September 1, 1995. The decision

7 In this regard, see *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038.

8 *Ibid.*, at page 1076.

of the delegate, Mr. Daviault, was binding on Deputy Superintendent Mayrand. The applicants argued that because the Deputy Superintendent disregarded that decision, his exercise of the power to issue a direction for conservatory measures was unlawful.

In my view, this argument carries no weight. The decision of the delegate, Mr. Daviault, and that made by the Deputy Superintendent on September 1, 1995 related to two different matters. While Mr. Daviault's decision concerned Mr. Drolet's conduct when he worked for Ginsberg, Gingras & Associés, the taking of possession on September 1, 1995 was made necessary by the misconduct of Mr. Tremblay and the corporate trustee that he headed, namely Groupe G. Tremblay. The events on which these two decisions were based occurred at two different times.

2. The principles of natural justice

The applicants criticized the Deputy Superintendent for not giving them any notice before ordering the conservatory measures. They were never able to learn what misconduct the auditor was alleging they had committed, nor were they aware of the possible consequences thereof. They had no meaningful opportunity to respond to the auditor's allegations.

The respondents argued that the principles of natural justice are flexible and that, in the case at bar, those principles did not require that the applicants be given advance notice of the possible consequences. The applicants will have a hearing as part of the disciplinary proceedings and can raise their defences at that time.

I want to begin by noting that the Office of the Superintendent gave these trustees a number of opportunities to explain the shortcomings in their administration.[9] They neglected to respond, and they have only themselves to blame if they feel that they were not heard.

The courts have long recognized that the rules of natural justice and the duty of fairness are variable standards. As Sopinka J. has said, their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided.[10]

In the case at bar, the applicable statutory provisions authorize the taking of conservatory measures to protect the public interest involved. It was imperative in such circumstances for the Superintendent to act quickly.

In this regard, I consider it appropriate to refer to the following passage from the Supreme Court of Canada's decision in *Homex Realty and Development Co.* v. *Wyoming (Village)*:[11]

> There are instances where the omission of the prerequisite notice is not supplied by the courts, as, for example, where the statute in question, by its very nature and by the legislative framework there adopted by the Legislature, must be read as precluding the requirement of prior notice. The Ontario Court of Appeal, for example, in *Bishop v. Ontario Securities Commission* [[1964] 1 O.R. 17], so construed s. 19 of *The Securities Act*, R.S.O. 1960, c. 363. Roach J.A., in speaking for the Court, stated:
>
> > **The whole purpose of the Act might be defeated if the chairman could make an order or ruling under that section only on notice to the person or company affected and after a hearing. Many days might elapse between the giving of the notice to the persons or company sought to be affected and the conclusion of the hearing during which time those persons or that company if dishonest and disreputable could continue to prey upon the public and plunder and fleece many people.** For that reason it was essential to the purpose of the Act that the chairman should be empowered to act promptly and without notice to the person or company sought to be affected. The chairman's first duty is to the public and in empowering him to discharge that duty the Legislature has by appropriate legislation at the same time protected the person or company affected by the order by giving to him on (*sic*) it at their election the right to have the order reviewed by the Commission. (at p. 23) (Emphasis added)

9 Audit progress report, May 1995, letter of May 11, 1995; letter of the Assistant Superintendent dated June 19, 1995; letter of June 22, 1995.

10 *S.E.P.Q.A.* v. *Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at page 896.

11 [1980] 2 S.C.R. 1011.

Similarly, in *Bunn*,[12] the Court held that the public interest involved was pressing and required that the Law Society act promptly. The Court ruled that the object of the provisions in issue would be frustrated if it were impossible to take action until after notice had been given and a full hearing held. Hanssen J. stated the following:[13]

> [14] The legislation seeks to strike a balance between the rights of an individual member and the public interest. However, it recognizes, on the question of whether to suspend or not, the interest of the individual lawyer must be subordinate to the public interest. The object of s. 50(1)(a) is to protect the public interest. In many cases, that object would be frustrated if the action contemplated in that section could only take place after notice and a hearing.

In the instant case, the applicants will have an opportunity for a hearing as part of the disciplinary proceedings, and they can raise all their defences during that hearing. In the meantime, it was the Superintendent's duty to act quickly to protect estates.

Finally, as noted above, the evidence shows that the applicants were given numerous opportunities to provide explanations of the misconduct alleged against them. They neglected to do so. They have nothing to complain of now but their own carelessness.

3. Erroneous finding of fact made in a perverse or capricious manner

Subsection 18.1(4) of the *Federal Court Act* [14] authorizes the Court to review findings of fact that are not supported by the evidence or that an assessment of the evidence as a whole shows to be unreasonable.

The evidence shows that Mr. Mayrand had evidence of serious misconduct in **their** administration. That evidence was from a number of sources, and more specifically:

> [TRANSLATION]
>
> (i) the first report of the auditor, Laurent Lachance, dated May 13, 1995, concerning the records administered by the applicant Gilles M. Tremblay;
>
> (ii) the report of the Official Receiver, Sylvie Laperrière, dated June 14, 1995;
>
> (iii) the second report of the auditor, Laurent Lachance, dated August 28, 1995;
>
> (iv) the reports on the R.C.M.P. investigations;
>
> (v) the judgments of the Superior Court — Bankruptcy Division, which were sent to him by the judges and other interested persons;
>
> (vi) the informations prepared by the R.C.M.P., which led to the issuance of search warrants on August 31, 1995;
>
> (vii) the many complaints that were constantly being filed at the Superintendent's offices in Québec, Montréal and Ottawa;
>
> - transcript, examination of Marc Mayrand, January 31, 1996, pp. 145 *et seq.*

The reports submitted were subjected to a strict internal verification process to determine their accuracy. The alleged acts raised serious doubts about the trustees' integrity. Contrary to what the applicants argued, the reports submitted were not interpreted in a discretionary or arbitrary manner.

In light of this evidence and the seriousness of the misconduct noted in the reports, Mr. Mayrand's decision to take effective conservatory measures to protect the estates administered by the applicants was reasonable.

In conclusion, I have found no reason to intervene as far as the administrative law issues are concerned. Although I imagine that the Deputy Superintendent could have taken less drastic conservatory measures, it is a clearly established rule that a superior court should not interfere with the exercise of a discretion by an administrative agency merely because the court might not have reached the same decision. This rule of curial deference has been stated many times by the Supreme Court, *inter alia* in *Maple Lodge Farms Ltd.*,[15] in which McIntyre J. summarized the principle as follows:

> Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has

12 *Bunn* v. *Law Society of Manitoba*, 63 Man. R. (2d) 210, at page 213.

13 *Ibid.*, at page 213.

14 *Supra*, note 4.

> not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

That is the case here. It is therefore not appropriate to vary the Deputy Superintendent's decision.

C. *Charter* Issues

1. *Section 7 of the* Charter

(a) **The right to liberty and the principles of fundamental justice**

Section 7 of the *Canadian Charter* reads as follows:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Since *Re B.C. Motor Vehicle Act*,[16] it has been accepted that section 7 does not guarantee the right to life, liberty and security *per se*. Section 7 guarantees that subjects of law to whom the section is applicable will not be deprived of their life, liberty or security except in accordance with the principles of fundamental justice. Thus, in determining the scope of section 7, it is necessary to define both the right to life, liberty and security and the principles of fundamental justice.

For the purposes of these proceedings, attention should be focused specifically on the right to liberty.

The applicants argued that the right to liberty includes the right to practice a profession and that the cancellation of a professional licence must be seen as infringing the right to liberty. Canadian courts seem to be divided on this subject at the present time. A number of decisions have found that the right to liberty includes the right to practice a profession.[17]

In my opinion, this issue does not arise in the case at bar, because the conservatory measures ordered by the Superintendent did not affect the existence or validity of the applicants' trustee licence. The issue can still be raised on judicial review of any disciplinary proceeding that cancels their licence without giving them an opportunity to assert their rights.

(b) The doctrine of vagueness

It was in *R.* v. *Morgentaler*[18] that the Supreme Court of Canada first associated the defect of vagueness with the principles of fundamental justice.[19] In that case, Dickson C.J. held that the impugned legislative provision violated the principles of fundamental justice because of its "failure to provide an adequate standard for therapeutic abortion committees".[20] Subsequently, in the *Prostitution Reference*,[21] Lamer J. (as he then was), with whom a majority of judges concurred, expressed his views in terms similar to those used by Dickson C.J. in *Morgentaler*.[22]

It is clear that the doctrine of vagueness does not require Parliament and the provincial legislatures to enact legislation that provides absolute certainty. The courts are responsible for interpreting legislation. **A legislative provision establishing a sanction that may deprive a person of life, liberty or security must not be unacceptably vague.** The test to be applied was established by the Supreme Court of Canada in *R.* v. *Nova Scotia Pharmaceutical Society*.[23] A legislative provision becomes unacceptably vague

15 *Maple Lodge Farms Limited* v. *Government of Canada et al.*, [1982] 2 S.C.R. 2, at pages 7-8.

16 [1985] 2 S.C.R. 486.

17 *Wilson* v. *B.C. Medical Services Commission* (1988), 53 D.L.R. (4th) 171, at page 195; *Howard* v. *Architectural Institute of British Columbia* (1989), 47 C.R.R. 328, at pages 334-37; *Richardson* v. *Association of Professional Engineers*, [1990] W.W.R. 709, at pages 716-17; and *Harvey* v. *Law Society of Newfoundland* (1992), 88 D.L.R. (4th) 487, at pages 499-501 and 503.

18 [1988] 1 S.C.R. 30.

19 Patrice Garant, *Droit administratif*, 3rd ed., Les Éditions Yvon Blais Inc., Cowansville, 1991, Vol. III, at pages 416-17.

20 *R.* v. *Morgentaler*, *supra*, note 18, at pages 68-69. A majority of judges concurred with him on this point.

21 [1990] 1 S.C.R. 1123.

22 *Supra*, note 18.

23 [1992] 2 S.C.R. 606.

when it "does not provide an adequate basis for legal debate".[24]

The applicants argued that paragraph 5(3)(*e*) and section 14.03 of the B.I.A. are so vague as to infringe section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). An investigation under paragraph 5(3)(*e*) is all that is required for the seizure power set out in section 14.03 to be exercised. Under section 14.03, the Superintendent may direct any person to take such steps as the Superintendent may deem necessary to preserve the records of estates. In the applicants' submission, these are vague terms that confer an unlimited discretion on the Superintendent. The wording of paragraph 5(3)(*e*) and section 14.03 is so vague that it becomes impossible for a court to interpret it as limiting the Superintendent's discretion in any way. Nor do these provisions give individuals any reasonable notice of the circumstances in which the legislation applies or the types of consequences that result from violating it.

The respondents argued only that, in light of the context of section 14.03 of the B.I.A., the issue of its vagueness simply does not arise because what is involved is perfectly clear. The Superintendent is made responsible for supervising trustees' administration. The wording of paragraph 5(3)(*e*) and section 14.03 is not so vague as to justify a finding by me that they cannot provide guidance for legal debate.

It is important to recall that the doctrine of vagueness is applicable under section 7 only if the sanction provided for in the provision in question may deprive someone of life, liberty or security of the person.

In the case at bar, however, as noted above, the measures provided for in section 14.03 do not affect the right to practise a profession—here the profession of trustee—a right which, according to some cases, may make section 7 of the *Charter* applicable. In any event, I am of the view that paragraph 5(3)(*e*) and section 14.03 provide "sufficient guidance for legal debate".[25]

The applicable test is a very strict one. As noted by Gonthier J. in *Ontario* v. *Canadian Pacific Ltd.*,[26] at page 1071:

> In particular, a deferential approach should be taken in relation to legislative enactments with legitimate social policy objectives, in order to avoid impeding the state's ability to pursue and promote those objectives.

In the instant case, although it is true that the Superintendent has the discretion to decide what conservatory measures are needed in each situation, the circumstances in which such measures may be taken and the goal to be achieved, namely preserving the records of estates, are specified. The doctrine of vagueness is inapplicable in the circumstances.

2. Section 8 of the Charter

The applicants argued essentially that the conservatory measures taken in this case were in the nature of a seizure. Since that seizure was carried out without the prior authorization of a neutral and impartial arbiter, it was unreasonable within the meaning of section 8 of the *Charter*. They also argued that paragraph 5(3)(*e*) and section 14.03 of the B.I.A. are constitutionally invalid.

It was in *Hunter* v. *Southam Inc.*[27] that the Supreme Court of Canada first ruled on the scope of section 8 of the *Charter*, which reads as follows:

> **8**. Everyone has the right to be secure against unreasonable search or seizure.

In dealing with the basis for this constitutional guarantee, Dickson J. (as he then was) wrote the following:[28]

> This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's

24 *Ibid.*, at page 639.

25 *Ibid.*, at page 643.

26 [1995] 2 S.C.R. 1031.

27 [1984] 2 S.C.R. 145.

28 *Ibid.*, at pages 159-60.

privacy in order to advance its goals, notably those of law enforcement.

In defining the terms "search" and "seizure" in section 8, reference must be made to the Supreme Court of Canada's decision in *R.* v. *Dyment*.[29] In that case, the Court held that the essence of a seizure under section 8 is the taking of a thing from a person by a public authority without that person's consent.

In the instant case, the respondents argued that there was no seizure because the applicants do not own the estate records entrusted to them. In the alternative, they argued that the applicants consented to the seizure.

I do not share this view. Since *Plant*,[30] it has been accepted that ownership of the seized items is not a relevant consideration. Because section 8 is essentially concerned with the expectation of privacy, its focus is above all on individuals, not property. The taking of possession on September 1, 1995 was undoubtedly a "seizure" within the meaning given to that term in section 8 of the *Charter*.

Before examining the nature and scope of the guarantee provided by section 8 of the *Charter*, I should consider whether the guarantee can be waived by a person to whom it applies.

In criminal cases, the Supreme Court of Canada applied the following test for waiver before the advent of the *Charter*:

> [It must be] clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.[31]

In *Borden*,[32] the Supreme Court made a definitive ruling on the question of what conditions must be met for a waiver of the section 8 guarantee to be valid. It confirmed the approach put forward by the Saskatchewan Court of Appeal in *R.* v. *Neilsen*,[33] namely that the waiver of the section 8 right must, at a minimum, be subject to the conditions applicable to the waiver of a statutory procedural right like that in issue in *Korponay*.[34]

For a true waiver, the person purporting to consent must be possessed of the requisite informational foundation. In *Borden*,[35] Iacobucci J., writing for the majority, stated the following:

> . . . the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful. This is equally true whether the individual is choosing to forego consultation with counsel or choosing to relinquish to the police something which they otherwise have no right to take.

In the case at bar, rather than risk having physical force used against him or proceedings brought against him for hindering government representatives in the performance of their duties, the applicant Mr. Tremblay preferred to act prudently and complied with their demand, on the assumption that the "direction for conservatory measures" pursuant to which they were acting was lawful. The applicant Mr. Tremblay felt that he had no choice; he simply submitted to the requirements of the representatives from the Office of the Superintendent, who, it should be noted, showed up at his place of business accompanied by bailiffs.

Moreover, I consider it important to point out that the representatives of the Office of the Superintendent were preceded that day by R.C.M.P. officers, who had search warrants issued by a justice of the peace, namely Judge

---

29 [1988] 2 S.C.R. 417.

30 *R.* v. *Plant*, [1993] 3 S.C.R. 281.

31 *Korponay* v. *Canada (A.G.)*, [1982] 1 S.C.R. 41, at page 49.

32 [1994] 3 S.C.R. 145.

33 (1988), 43 C.C.C. (3d) 548 (Sask. C.A.).

34 *Supra*, note 31.

35 *Supra*, note 32.

Choquette of the Court of Quebec, Criminal and Penal Division. As Mr. Tremblay saw it, the search conduced by the representatives of the Office of the Superintendent came within the scope of the police operation of the same morning. In these circumstances, I cannot conclude that he consented freely and voluntarily to the seizure and thus waived the guarantee conferred on the applicants by section 8 of the *Charter.*

Applicability of the Hunter *criteria in a regulatory context*

To determine whether a statute that authorizes a search or seizure is unreasonable, it is first necessary to ascertain whether the criteria formulated by Dickson J. (as he then was) in *Hunter* are applicable. Those criteria were summarized as follows by Wilson J. in *Thomson Newspapers Ltd.* v. *Canada*:[36]

> (a) a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;
>
> (b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established upon oath, to believe that an offence has been committed;
>
> (c) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered; and
>
> (d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation.

However, in *Thomson Newspapers Ltd.*[37] and *McKinlay Transport*,[38] the Supreme Court stated that the development of less stringent criteria for administrative or regulatory searches and seizures may be consistent with the spirit of section 8.

The standard of review must be reasonable and take account of the regulatory nature of the legislation and the scheme enacted.[39] For example, prior authorization is not required for a search or seizure that is aimed not at detecting criminal activities but rather at ensuring compliance with regulatory provisions adopted to protect the public interest.[40] It is thus necessary to balance a group of factors.

What is the purpose of the legislation? What is the degree of intrusion? What expectation of privacy should exist in light of the purpose of the legislation? What is the nature of the seized documents? These are a few of the questions that must be asked.[41]

Sections 14.01, 14.02 and 14.03 of the B.I.A. are part of a set of provisions whose essential purpose is the supervision of trustees' administration and conduct. In authorizing such supervision by the Superintendent, Parliament's primary aim is to protect third parties, whether they be debtors or creditors. The nature of the role played by trustees makes the existence of such rules necessary. Trustees act as fiduciaries and as such, as we have seen, they are responsible for administering property owned by others. For this reason, the duties and obligations of trustees in bankruptcy are highly regulated. Such trustees are subject to constant audits, by means of which the Superintendent assures himself of their integrity.

Moreover, the documents administered by trustees are, according to law, **public documents**. It has been found that the expectation of privacy associated with such documents, that is, documents produced in the course of operating a regulated business, is lower than the expectation of privacy associated with documents that are strictly personal and private.

As noted by La Forest J. in *Fitzpatrick*:[42]

> In my view a similar standard should be applied to the use in a regulatory prosecution of records that are

36 [1990] 1 S.C.R. 425, at page 449.

37 *Ibid.*

38 *R.* v. *McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627.

39 *Ibid.*

40 *Re Belgoma Transportation Ltd. and Director of Employment Standards* (1985), 51 O.R. (2d) 509.

41 *R.* v. *Ezzeddine*, (April 10, 1996) (Alta. Q.B.).

statutorily compelled as a condition of participation in the regulatory area. **Little expectation of privacy can attach to these documents, since they are produced precisely to be read and relied upon by state officials.** (Emphasis added)

In light of these various factors, I do not think that the balance to be struck between society's interests and the applicants' expectation of privacy, which in the circumstances is low, requires a strict application of the *Hunter* criteria.

Our courts have recently developed less stringent criteria for cases in which the *Hunter* criteria are inapplicable. In this regard, I consider the Ontario Court of Appeal's decision in *Johnson* v. *Ontario (Minister of Revenue)*[43] to be relevant. In that case, the Court had to determine whether subsections 15(3) and (4) of the *Tobacco Tax Act*[44] were constitutional. Those subsections authorized the seizure of motor vehicles used in the tobacco trade and the contents thereof.

Since the measures authorized by subsections 15(3) and (4) of the *Tobacco Tax Act* were administrative or regulatory in nature, the parties acknowledged that the strict criteria formulated in *Hunter* were inapplicable. It was in that context that Arbour J.A. wrote the following:[45]

> However, the fact that legislation is merely regulatory rather than criminal in nature does not in itself determine what standard of reasonableness will be required. This depends largely on the second step in the analysis which consists of identifying the privacy interest which is at stake under the search and seizure provision and the severity of the intrusion on that privacy interest.

It is therefore necessary to strike a balance between the reasonable expectation of privacy and the seriousness of the intrusion resulting from the search or seizure. She concluded as follows:[46]

> Against this limited privacy claim, the intrusion permitted by s. 15 is serious. . . . The section contains no requirement of reasonable and probable grounds or even of reasonable suspicion. It allows a person authorized by the Minister of Revenue to stop and detain for any purpose related to the administration or enforcement of the *Tobacco Tax Act*, any commercial vehicle, to search the contents thereof, to seize documents that may afford evidence of a contravention of the Act and to seize cargo if it consists of more than 10,000 cigarettes.

She noted, however, that persons engaged in a regulated activity, such as the tobacco trade, must expect that the authorities will make certain inspections and checks. In other words, persons involved in a regulated activity must expect a certain amount of intrusion by administrative authorities. However, the measures authorized by subsections 15(3) and (4) went much further than what such persons were obliged to expect. Such measures would not be consistent with the section 8 guarantee unless the reasonable grounds test were met. She stated the following:[47]

> A requirement of reasonable and probable grounds to believe that a commercial vehicle contains evidence of a contravention of the *Tobacco Tax Act* will, in my opinion, reduce the scope of the search sufficiently to recognize the privacy interest at stake. While not unduly impairing the enforcement of the Act, such a requirement would also satisfy the s. 8 *Charter* standard required for regulatory type searches.

The *Johnson*[48] test must, however, be applied only in cases in which the significance and severity of the intrusion so require. The reasonable grounds requirement will not be applicable when the case involves monitoring-type measures such as those discussed by Arbour J.A., namely checks and inspections that a person engaged in a regulated activity must reasonably expect. Likewise, the test will not be applied when doing

42 *R.* v. *Fitzpatrick*, [1995] 4 S.C.R. 154, at pages 181-82.

43 (1990), 75 O.R. (2d) 558.

44 R.S.O. 1980, c. 502, s. 15.

45 *Supra*, note 43, at page 567.

46 *Supra*, note 43, at pages 568-69.

47 *Supra*, note 43, at page 574.

48 *Supra*, note 43.

so would be unjustified given the low degree of "*intrusion*".

In my view, since this case involves a search **of private premises that was not conducted as part of a regulatory inspection**, the degree of intrusion is greater than it would be, for example, in a case involving a request for the production of documents. For this reason, I feel that when conservatory measures involve a search or seizure within the meaning given to those terms in section 8 of the *Charter*, the measures cannot be taken unless there are reasonable grounds to believe that they will make it possible to "preserve" the records of estates.

Thus, in so far as it authorizes conservatory measures in the nature of a "seizure" where there are no reasonable grounds to believe that the measures will make it possible to "preserve" the records of an estate, paragraph 14.03(1)(*b*) of the B.I.A. infringes the guarantee set out in section 8 of the *Charter*. That infringement is not saved by section 1, no evidence having been adduced in this regard by the Attorney General of Canada.

In so far as it infringes section 8 of the *Charter*, paragraph 14.03(1)(*b*) of the B.I.A. is of no force or effect. I must therefore consider what remedy would be appropriate. In *Schachter* v. *Canada*,[49] Lamer C.J. set out the range of remedies and the principles applicable to selecting the appropriate one:

> A court has flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. . . . In choosing how to apply s. 52 . . . a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.[50]

For the following reasons, I am satisfied that the appropriate remedy in the circumstances is to "read down" paragraph 14.03(1)(*b*) of the B.I.A. so that conservatory measures in the nature of a "seizure" are not authorized unless the Superintendent or his delegate has reasonable grounds to believe that they will make it possible to "preserve" the records of estates. This was the type of remedy chosen by the Supreme Court of Canada in a similar context in *R.* v. *Grant*.[51]

The advantage of such a remedy is that it means that a mechanism that is absolutely essential for the protection of third parties can be maintained. In my view, the reading down involved here satisfies Parliament's legitimate concerns for effective law enforcement without offending the reasonable seizure requirement under section 8 of the *Charter*.

The existence of reasonable grounds can be verified by this Court through judicial review after the fact. In *Thomson Newspapers Ltd.*,[52] La Forest J. noted the importance of such judicial review where the requirement of prior judicial authorization is found to be inapplicable:

> The opportunity to challenge, by way of judicial review, the relevancy of any particular use of s. 17 to matters in respect of which the Director or Commission can conduct inquiries, provides adequate guarantee against potential abuse of the power s. 17 confers. No evidence of any such abuse is apparent in the case before this Court.

I now turn to the question of whether, in the case at bar, the Deputy Superintendent had reasonable grounds to believe that the conservatory measures would make it possible to "preserve" the records of estates. In my view, an affirmative answer must be given to this question. As I noted above, the evidence in the record refers to very serious misconduct, which called for effective and prompt action to protect the estates of third parties.

49 [1992] 2 S.C.R. 679.

50 *Ibid.*, at pages 695-96.

51 [1993] 3 S.C.R. 223.

52 *Supra*, note 36, at page 535.

As for the applicants' argument with respect to section 12 of the *Charter*, I need only say that the conservatory measures taken in the case at bar do not amount to "*cruel and unusual treatment*". *Section 12 is therefore* inapplicable.

I also reject the arguments based on the *Canadian Bill of Rights* on the basis that they are without merit.

Conclusion

For these reasons, the applications for judicial review are allowed in part. Paragraph 14.03(1)(*b*) of the B.I.A. is of no force or effect in so far as it authorizes the taking of conservatory measures in the nature of a "seizure" where there are no reasonable grounds to believe that the measures will make it possible to "preserve" the records of estates.

The applicants' conclusions seeking to reserve their right to claim damages are dismissed.

OTTAWA, ONTARIO
The 12th day of March 1997

Danièle Tremblay-Lamer
JUDGE

Certified true translation
A. Poirier

Decision relating to a trustee's licence — Daniel Girouard and Arthur Andersen Inc.

IN THE MATTER OF

Marc Mayrand

Deputy Superintendent
(Policies, Programs and Standards) for the Office
of the Superintendent of Bankruptcies

AND

Daniel Girouard and Arthur Andersen Inc.

Trustees

Judgement

I render the following decision as the Superintendent of Bankruptcy's delegate pursuant to subsection (2) of section 14.01 of the Bankruptcy and Insolvency Act (the Act). The delegation is dated May 15, 1996.

In an April 2, 1996 report to the Superintendent, the Deputy Superintendent (Policies, Programs and Standards) concludes that in the course of the administration of the bankruptcy of Antonello Javicoli, trustee Daniel Girouard, who works for the firm Arthur Andersen Inc., failed in his fiduciary duties, attempted to conceal some of the bankrupt's assets, and withdrew fees without the written permission of the inspectors. The Deputy Superintendent recommends that Girouard's licence be suspended for a period of 10 months, and that Arthur Andersen Inc.'s licence in the Province of Québec be limited for a period of one month. The hearing provided for in section 14.02 of the Act was held in my presence in Montreal on March 18, 1997.

I heard from two witnesses: Girouard himself, and André Bélanger, one of the inspectors. There was also important documentary evidence. Having considered the evidence, as well as the arguments on all sides, I am of the opinion that the recommendations of the Deputy Superintendent should be rejected. The reasons for this decision are set out below.

* * *

On May 27, 1991, Antonello Javicoli and his wife meet Daniel Girouard in his office. Girouard just received his trustee licence on April 15. Javicoli is overwhelmed with debt. The Javicolis ask if their four registered retirement savings plans (RRSPs), which constitute approximately Javicoli's only property not exempt from seizure, were seizable. Girouard gives them a verbal opinion. That very day, he takes them to the office of solicitor Alain Robichaud for a legal opinion. Once the Javicolis are introduced, Girouard leaves Robichaud's office without participating in the discussion between solicitor and clients.

Some weeks later, on June 13, Girouard accompanies the Javicolis a second time to Robichaud's office. In a letter dated October 26, 1995, Robichaud says that he indicated to Girouard, "that he could, if he wished, join us for this meeting", but Girouard testifies that he attended at Robichaud's request because the latter

"wanted to be sure his fees would be paid .... He told me: 'I want to be paid immediately'. He said: 'Speak to Mr. or Mrs. Javicoli'...." At this same meeting on June *13, 1991, Robichaud gives an opinion on the RRSPs,* which he addresses to the Javicolis as well as Girouard. Girouard says to Robichaud: "My name shouldn't be there, I am not your client". Robichaud answers: "That's not important". In his October 26, 1995 letter, Robichaud says that "it was due to an error on our part that our opinion was also addressed to the trustee" and adds that "Mr. Girouard preferred to wait outside the conference room when we discussed the substance of the opinion with Mr. Javicoli and his wife." Nevertheless, despite his opinion that "I shouldn't have it", Girouard at the very least "skims" the opinion. As to the substance of the opinion, it says that one of the RRSPs would be seizable and two others would be exempt from seizure. As to the fourth, Robichaud writes "that it is essential that Mr. Javicoli go as quickly as possible to a branch of the Royal Trust Company in order to sign the appropriate forms pursuant to the Act (on Trust and Savings Companies) in order to render exempt the funds deposited with Royal Trust." The opinion is 13 pages long and rather detailed; Robichaud requests further information on some matters.

On June 17, Javicoli makes an assignment for the general benefit of his creditors. The information sheet signed by Girouard as trustee replies "no" to the question "existence of a possible conflict of interest". The statutory statement of affairs prepared by Girouard and signed by Javicoli indicates that three of the RRSPs are exempt from seizure. As to their being exempt from seizure, Girouard testifies that he based this "on my knowledge at the time, in 1991—and more precisely on May 27—on the knowledge I had of RRSPs, on the status of RRSPs and of insurance companies and banks. Or, if you wish, on instinct. Nevertheless, I would have verified it, definitively, as we do in all cases." He realizes, however, that "it certainly should have been marked 'to be determined'. When such a situation arises today, that is what is written."

The first meeting of Javicoli's creditors took place on July 9. A trustee's report signed by a colleague of Girouard was presented. This preliminary report describes the RRSPs in the same manner as the statutory statement of affairs and says that "it doesn't appear to be a case of " reviewable transactions or preferential payments.

On July 26, in response to a letter from Girouard requesting information, Royal Trust advises him that Javicoli had signed a "supplementary agreement on *May 28, 1991* agreeing that the RRSP is exempt from seizure". (As already determined, May 28, 1991 was the day after the first meeting between the Javicolis and Robichaud).

On September 4, Girouard submits Royal Trust's letter to the inspectors, with several "letters received from various banks and insurance companies confirming whether or not the debtor's investments were exempt from seizure". Inspector Bélanger testifies that there "was no question about any document in particular in that pile." Girouard indicates that it was discussed. Be that as it may, at this first inspectors' meeting, a decision is made to speak with a lawyer to obtain "a legal opinion as to whether or not certain elements of the debtor's assets were exempt from seizure". Lawyer Jean Lozeau accepts this mandate some weeks later.

In his discussions with Lozeau, Girouard mentions "that I had in my hands an opinion which I shouldn't have had, ie., Alain Robichaud's opinion". Lozeau asks for the opinion immediately and Girouard gives it to him. The inspectors learn of the existence of the Robichaud opinion when Bélanger meets Lozeau on October 23.

At a special meeting of creditors on April 14, 1992, *Girouard, ie., Arthur Andersen Inc., is replaced as Javicoli's bankruptcy trustee.*

* * *

As to the disbursement of fees (in the amount of $5,000) which the Deputy Superintendent of Bankruptcy claims was made by Girouard without the written permission of the inspectors, and therefore in violation of section 25(1.3) of the Act, the evidence is clear that the inspectors adopted a resolution authorizing this disbursement. If it is less clear that they all signed the resolution, the benefit of the doubt is nevertheless necessarily given to Girouard. Indeed, the attorney for the Deputy Superintendent suggested in his argument that he would not stress this aspect of the report.

As to the claim of failure to fulfill fiduciary duties, I cannot conclude that if there was such failure, that it constitutes "conduct" such that "it is in the public interest" to suspend, cancel or place conditions or restrictions on Girouard's or Arthur Andersen Inc.'s licence as provided for under section 14.01 of the Act. Girouard

was perhaps a little naive in twice accompanying the Javicolis to Robichaud's office. He was perhaps slow in responding to the questions raised by the inspectors. He himself admits that he should have indicated that the seizability of the RRSPs was "to be determined". A misunderstanding of the nature of solicitor-client privilege seems to have compelled him to act as if he had not seen Robichaud's opinion. All of this demonstrates, in my view, ignorance or inexperience and explains why the creditors replaced the trustee. Given all of the circumstances, however, I do not see conduct to be sanctioned by application of section 14.01(1). In particular, I have not been convinced that the relationship between Javicoli and Girouard was such that the latter would, as trustee, place himself in a position of conflict of interest or even of potential conflict of interest. Nor has it been established that there is the possibility that the conduct in question will be repeated in the future. In fact, the contrary is true. Finally, there do not appear to have been significant consequences for the creditors.

The claim of an attempt to conceal assets has not been established in any way. Here again, Girouard's conduct demonstrates, in my view, ignorance or inexperience, but not bad faith. In his October 26, 1995 letter, Robichaud stresses that "in no way did Mr. Girouard refer this client (Javicoli) to us in order to find a way to render the RRSPs exempt from seizure" and, in a June 13, 1995 letter, Lozeau acknowledges Girouard's full cooperation.

***

Having arrived at the conclusion that in any case, given all of the circumstances, section 14.01(1) of the Act should not apply either to Girouard or to Arthur Andersen Inc., I do not have to render a decision on the preliminary motion to deny the corporate trustee responsibility under section 10.02 of the Policy on trustee licences, Part 3—section which was invoked in the Deputy Superintendent's report.

Montréal, this 14th day of May, 1997.

(S) Gerald McCarthy
Gerald McCarthy
Delegate.

Notice — 1997 Written Insolvency Examination

The Canadian Insolvency Practitioners' Association (Association canadienne des professionnels de l'insolvabilité) and the Superintendent of Bankruptcy announce that the 1997 Written Insolvency Examination will be held on November 18 and 19, 1997. The tutorial session to support the examination is scheduled for the week of November 2 to November 7, 1997.

Candidates will be examined on their knowledge of applicable acts and jurisprudence enacted before January 1, 1997. Therefore, students will not be examined on federal and provincial statutes enacted or amended, or jurisprudence published after January 1, 1997. **Accordingly, the examination will not include the new *Bankruptcy and Insolvency Act* (Bill C-5).**

Application forms for the examination are now available.

For additional information, please contact the Canadian Insolvency Practitioners' Association (416) 204-3242 or the Superintendent of Bankruptcy's office (613) 941-2698.

An International Comparison of Bankruptcy Filing Rates

I. Canada, United States and United Kingdom

Bankruptcy rates in Canada have a general tendency to be correlated with those in the United States and the United Kingdom. The bankruptcy rates of these countries are however different and warrant individual attention.

Consumer bankruptcy rates have been increasing rapidly in North America. Canada's consumer bankruptcy rate has increased from 1.1 per 1,000 population in 1989 to 2.7 per 1,000 population in 1996. Similarly, the United State's consumer bankruptcy rate has increased from 2.3 per 1,000 population in 1989 to 3.7 per 1,000 population in 1996. Canada and the United States have thus both seen large increases in consumer filing rates since 1989.

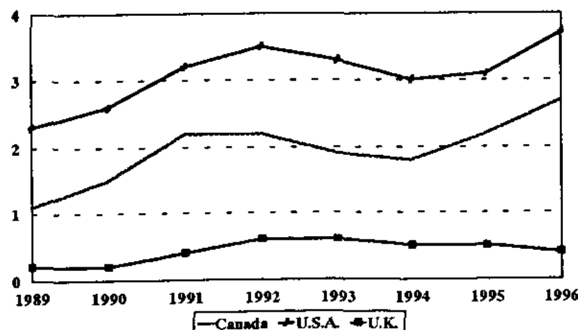
The consumer bankruptcy rate has tended to be more stable in the United Kingdom. Their consumer bankruptcy rate was 0.2 per 1,000 in 1989 and by 1996 it was only 0.4 per 1,000. Consumer bankruptcy rates in the United Kingdom have therefore been much lower than in Canada and the United States during the period 1989 to 1996.

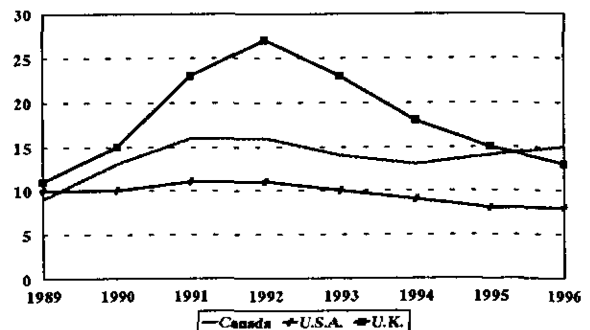
The United Kingdom has a tendency to have higher business insolvency rates than Canada and the United States. In 1992, the United Kingdom had a business bankruptcy rate of 27 per 1000 establishments while the United States and Canada had business bankrutpcy rates of 11 and 16 respectively. Canada and the United States have had similar business insolvency rates for the years 1989 to 1996.

Recessions have a greater impact on business insolvency rates than on consumer insolvency rates. The recession of the early 1990 had a greater impact on business insolvency rates in the United Kingdom than either Canada or the United States.

II. International Association of Insolvency Regulators: Member Countries

The member countries of the International Association of Insolvency Regulators (I.A.I.R.) are Australia, Canada, Finland, Hong Kong, Jersey, Malaysia, New Zealand, Singapore, the United Kingdom, and the United States. Information on insolvency filing rates has





been compiled for these countries by the Office of the Superintendent of Bankruptcy.

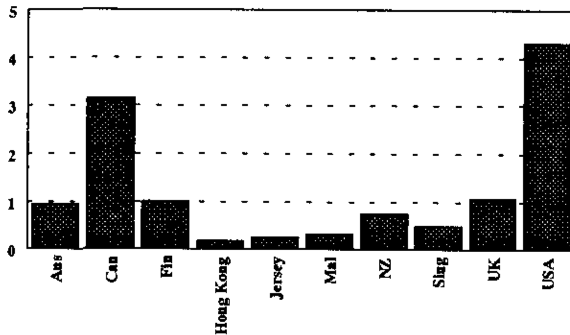
As can be seen on the graph below, bankruptcy filing rates can vary quite substantially across the I.A.I.R. member countries. In 1995, Hong Kong, Jersey, Malaysia, New Zealand, and Singapore have had less than 1 insolvency filing per 1,000 population. Australia, Finland and the United Kingdom have had approximately 1 insolvency filing per 1,000 population. Canada and the United States have had insolvency rates of approximately 3 and 4 per 1,000 population respectively.

Total insolvency filings have experienced a substantial increase between 1991 and 1995 in most of the I.A.I.R. member countries. Only Finland and New Zealand experienced declines in total insolvency filings during this time. Of the remaining countries, only Singapore had less than a 20% increase in total insolvency filings. Most of the member countries had experienced increases in total insolvency filings of between 20% and 40% between 1991 and 1995.

If you have any other questions pertaining to international insolvency statistics, please contact Trent Craddock at (613) 941-2858.

Bankruptcy/Insolvency Rate

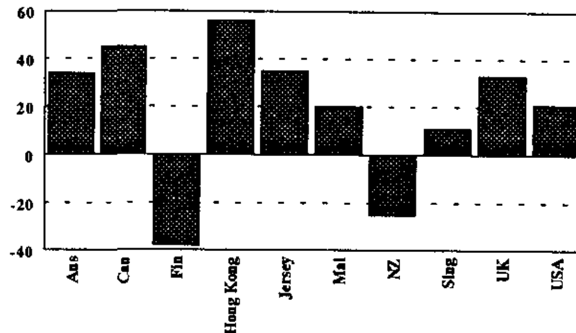
1995



Total Files/1,000 population

Bankruptcy/Insolvency Growth

1991-1995



Change in volume of total files over last 5 years