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

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

2003

OSB Newsletter

A Word from the Superintendent of Bankruptcy

It has already been a little more than a year since we launched the *OSB Newsletter* and you now have before you the fourth issue. In meetings with various stakeholders, I have received very positive comments on this publication. However, I have not had the opportunity to hear from all of you. You will find enclosed, a short reader survey that we are asking you to kindly take a few minutes of your time to fill out and return to us. While I understand that this may be a mundane task, your comments are extremely valuable to us. They are the only way we can have a good idea of our readership's needs and allow us to work on ways to better meet these. In response to various comments, you will find in this issue a new section summarizing unreported case law brought to our attention. We feel that the *OSB Newsletter* is our best way of letting you know what is happening at the OSB as well as other important issues in the insolvency community and we want to know how effective we are at doing this.

As you know, the Initiative for Orderly and Timely Administration (IOTA) was launched during the month of August. The results so far have been most impressive as you will see from a more detailed report later in this issue. Several comments have been made as to the timing of IOTA and the nature of the correspondence sent to those 99 trustees who received it. These comments point to the need for ongoing effective communication on such matters as raised by IOTA. The feedback received has not fallen on deaf ears and I want to take this opportunity to reaffirm the OSB's preferred approach of dealing with compliance issues first cooperatively with the individuals involved and rely on enforcement mechanism only as a last resort.

Almost a year ago we launched the e-filing system. We are excited with the results. More than 162 trustees are using the system (that is to say about 32 percent of trustees who have filed summary estates this year). Twenty-three percent of all summary estates have been filed electronically between the launch on December 9, 2002 and October 31, 2003. It is worth noting that e-filing is growing steadily across the country; in October 32 percent of all files were e-filed.

The e-filing system was particularly useful during the major power outage in Ontario last August; trustees were able to resume using the system after a one-day interruption. In total, 40 percent of files were e-filed during the week of August 18 in Ontario.

Many are asking whether and to what extent they can take advantage of various technology in processing various statutory documents without overexposing themselves to challenges from third parties. The OSB has started to review the BIA, rules, forms and directives with a view of identifying impediments to on line transactions. Until we complete our review and determine resulting changes, you will find in this issue a short statement regarding the due dilligence required of trustees while they contemplate using on-line transactions.

The Senate Standing Committee on Banking, Trade and Commerce has issued its report. You should have received your copy by now and if you haven't, please contact the Newsletter Coordinator. The Senate Standing Committee has put in a considerable amount of work at producing this report and I would encourage you to read it as it will most likely be one of the corner stones for major legislative changes to the Bankruptcy and Insolvency Act (BIA) and the Companies' Creditors Arrangement Act (CCAA). While no exact timeline has been set for the new legislation, Department Officials are working "feverishly" at fleshing out how could the more than 45 Senate Committee's recommendations be turned into legislative amendments. They want to be in a position to provide advice to the new Government early in the new year. You will also find in this issue of the Newsletter an article outlining some of the highlights.

Finally, a recent decision by the Quebec Court of Appeal, confirmed the constitutionality of sections

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14.01 and 14.02 of the BIA. A short summary of this decision can be found in the insolvency case law section of this Newsletter. It is not known at this time if the trustee will seek leave of the Supreme Court.

This is just a hand full of issues that have come up in the past few months. You can of course, look to the next edition for updates on some of these as well any new developments in the insolvency community.

Insolvencies continue to offer challenges and provide rewards to those who are committed. Beyond the legal technicality, the accounting issues, the assets and liabilities it presents and outstanding opportunity to help consumers and business people along when they are facing one of the more difficult and stressful situation that life has to offer.

In closing, I would like to congratulate the 25 candidates that received a full licence this year and the 13 others who got restricted licences in 2003.

I would like to take this opportunity to wish you and your loved ones all the best in 2004.

Report on the Initiative for the Orderly and Timely Administration of Insolvency Estates (IOTA)

In the last issue of the Bulletin, we informed you that the OSB was about to launch the first phase of an "Initiative for the Orderly and Timely Administration of Insolvency Estates". This first phase began on August 5th, with 99 individual trustees across the country receiving a letter from the OSB. The letter requested that the trustees return a signed bank confirmation form, submit a satisfactory reconciliation of their trust bank accounts and/or file a plan for closing their files where files open more than three years exceeded 15% of their summary administration inventory and 60% of their ordinary administration inventory.

We are happy to report that by the deadline set in the letter, 97% of the trustees had complied with our requests. Although we are still analyzing the numerous closing plans that were submitted, we can confirm that many of the aged files have been closed already. The table that follows shows the number of files closed since July 9, 2003, the date on which we produced the inventory for each trustee targeted by this initiative.

It is apparent from these numbers that significant efforts have been made towards the closing of files. We recognize that a lot of work remains to be done to ensure that files continue to be closed over the next 12 months so that trustees bring their inventories below 10% for summary administrations and 40% for ordinary administrations, however, to date, we are encouraged by the results of the initiative.

We would like to thank the many trustees who cooperated with the OSB following the receipt of our August 5th letters. We would also like to note the work accomplished by OSB representatives who facilitated trustee cooperation as well as the support received from the Canadian Association of Insolvency and Restructuring Practitioners (CAIRP) and the managing partners of the firms involved. We strongly believe that our entire insolvency system will benefit as a whole if together we can strive to make this initiative a success.

Files targeted by IOTA closed between July 9, 2003, and December 12, 2003

	Files open as at 2003/07/09	Files closed between 2003/07/09 and 2003/12/12	Percentage of files closed between 2003/07/09 and 2003/12/12	Estimated Amount Made Available For Creditors
Summary files	10,805	4,433	41.0%	$2.44M
Ordinary Files	2,144	390	18.2%	$2.28M
Total number of files	12,949	4,823	37.2%	$4.72M

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Impact of the 1992 and 1997 BIA amendments on the dividends paid to unsecured creditors

This article presents the results of an analysis[1] that assessed the impact of the amendments made to the BIA in 1992 and 1997 on the dividends paid to unsecured creditors. According to the study's findings, the 1992 and 1997 amendments appear to have made it possible for an additional $425 million to be paid to unsecured creditors over the 1993-2002 period.

The analysis was derived from the following question: How much would have been paid as dividends to unsecured creditors if no amendments had been made to the BIA in 1992 and 1997? Among the amendments made to the BIA in 1992 and 1997, were some designed to encourage consumer and business proposals as an alternative to bankruptcy. Other amendments were aimed at enhancing the viability of business proposals and facilitating their acceptance by creditors.

The conclusions were reached by developing a simulation model based on two hypotheses. The simulation was applied to the 1993-2002 period. The first hypothesis was based on the number of files that would have been submitted as bankruptcies rather than as Division I or II proposals if no amendments had been made to the BIA in 1992 and 1997. Thus, for the purposes of the simulation, all Division II consumer proposals submitted between 1993 and 2002, were treated as bankruptcy files. In addition, since Division I proposals existed before 1993, some of the Division I proposals submitted between 1993 and 2002 were treated as proposals and others as bankruptcies.

The second hypothesis was based on the average value of dividends that would be associated with the additional bankruptcy files stemming from the first hypothesis. It is to be expected that this average value would be less than the value observed in proposals, but greater than the value observed in the bankruptcy files because the files that were submitted as proposals should have had a greater potential than bankruptcy files for realization of assets. In this approach, we used the average value of all dividends paid to unsecured creditors in these files. For more information on the two hypotheses, readers are invited to consult the complete version of the analysis.

As the amounts paid to unsecured creditors can vary enormously depending on the type of debtor concerned, the simulation was developed for the following three types of debtor:

- consumers
- individual business
- corporations

Main amendments to the BIA in 1992 and 1997 that may have had an effect on the dividends paid to unsecured creditors

- Introduction of the Division II consumer proposal
- Possibility of submitting a notice of intention to make a proposal
- Stay of proceedings of secured creditor procedures in the context of proposal proceedings
- Acceptance of the proposal by a numerical majority of creditors, representing 2/3 of the value of the proven claims
- Complete payment of the Crown's claims, which are considered to be deemed trusts, within 6 months of the proposal being approved
- Prohibiting creditors from cancelling an existing lease or installment sales contract
- Prohibiting the interruption of public utilities
- Possibility for debtors to cancel commercial leases
- Increase in the fees paid to the bankruptcy trustees for consumer proposal files
- Directive on surplus income made compulsory

[1] Impact of the amendments to the BIA concerning Divisions I and II proposals in terms of dividends paid to unsecured creditors available on the OSB Web site: ***http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwGeneratedInterE/br01400e.html***

Tableau 1 : Result of the simulation of dividends paid to unsecured creditors, Canada 1993-2002 ($ million)				
	Consumers	**Corporations**	**Individual business**	**Total**
Dividends actually paid	$922	$971	$254	$2,147
Simulated dividends paid	$761	$760	$201	$1,722
Actual minus simulated dividends	$161	$211	$ 53	$ 425
Lost in percentage	17.5%	21.7%	20.7 %	19.8%

The results shown in Table 1 indicate that the dividends actually paid to unsecured creditors between 1993 and 2002 totalled slightly more than $2.1 billion, whereas the amount of dividends paid in the no-amendment simulation were just over $1.7 billion. Thus, if the BIA had not been amended, unsecured creditors would have received $425 million less during the 1993-2002 period. Corporations, consumers and individual business would have paid $211 million, $161 million and $53 million less respectively to unsecured creditors.

In conclusion, the results strongly suggest that the amendments made to the BIA with a view to encouraging Division I and II proposals as an alternative to bankruptcy enabled an additional $425 million in dividends to be paid to unsecured creditors during the 1993-2002 period.

How effective are counselling sessions? What the qualitative and quantitative studies show

As a result of the BIA amendments in 1992, bankrupts and debtors filing a consumer proposal[1] are required to take part in counselling sessions. These sessions are designed to make debtors aware of the importance of sound management of their personal finances. The goal is to teach them to avoid behaviours that could lead them back to insolvency.

Do these sessions meet their objectives? How do debtors and the counsellors feel about these sessions? To get answers to these questions, the OSB commissioned two studies. The first was a qualitative study conducted by Consulting and Audit Canada. It found that debtors were very satisfied with the sessions and the type of counselling they received. The second study was a quantitative one by Saul Schwartz.[2] Its findings suggest that counselling sessions have had no appreciable effect on debtor credit habits.

To better understand the differences between the conclusions of these two studies, this article explains the approach taken by each study, as well as some other findings.

Consulting and Audit Canada's qualitative study

This study was based on an August 2001 telephone survey of 451 debtors who had been discharged from bankruptcy between January 1st and May 30th 2001. The debtors were therefore interviewed less than 8 months after their discharge. This limited the study to debtors' short-term perceptions of the counselling sessions. This study also surveyed 624 counsellors. The questions, which were designed to measure the level of debtor and counsellor satisfaction, dealt mainly with the content of the first and second counselling session and with the overall effect of the counselling, but also collected demographic data.

The results indicate that the counselling program should continue to be mandatory. Furthermore, the debtors surveyed seem very satisfied with the session format and the type of counselling they received. Lastly, over the short term, most of the debtors and counsellors felt that counselling truly helps debtors acquire the knowledge and skills needed to avoid becoming insolvent again.

This study also compared some findings with a national study conducted in 1994: *A National Assessment of Bankruptcy Counselling Services (June 1994)*. Comparison of the two studies' overall results suggests that debtors and trustees both seem more favourable toward the mandatory counselling program than in the past.

[1] Only in the case of Division II proposals.

[2] Saul Schwartz is a professor at Carleton University's School of Public Policy and Administration.

Schwartz' quantitative study

This study was based on a comparison of seven credit variables for two groups of bankrupts monitored at two different times. The control group did not receive counselling, whereas the experimental group was entitled to such sessions. The information on the debtors' credit variables came from Equifax Canada.

Schwartz's analysis was divided into two parts. The first part compared the situation of an experimental and a control group in 1992 with their situation in 2002, that is, 10 years after their bankruptcy. The second part repeated the procedure by comparing the situation of a group of debtors that had declared bankruptcy in 1996 with their situation in 2002, that is, six years after their bankruptcy. This second part was necessary to take into account any changes that might have occurred as a result of the counselling process. On the other hand, the six-year period limits the analysis of the second part since, during this period, a flag limiting access to credit was still in the credit files of debtors who had declared bankruptcy. This flag is removed from the credit file six years after the bankrupt's discharge, that is, at least slightly less than seven years after the date of the bankruptcy.

The conclusions drawn from the two parts of Schwartz' study show that counselling sessions in both their initial and current formats have only a very limited effect on the credit habits of insolvent debtors. However, Equifax Canada files also contain information on situations of recurring insolvency. Although this information is subject to several limitations, it seems that recurring insolvencies are more common in the group that did not take part in counselling sessions than in the group that did.

Credit variables used for the analysis

- Number of bad debts in the 24 months prior to the date of the survey
- Worst credit rating appearing in the file at the time of the survey
- Ratio of the total balance in credit accounts to the total credit available
- Ratio of the total balance on national credit card accounts to the total credit available on the same cards
- Ratio of the total balance on department store credit cards to the total credit available on the same cards
- Number of credit checks in the last 12 months
- Number of active credit accounts

Conclusions

The two studies commissioned by the OSB do answer some questions about the achievement of counselling session objectives and how debtors and counsellors perceive these sessions.

According to the Consulting and Audit Canada study, debtors seem to be satisfied with the type and current format of counselling sessions. It also appears that trustees and debtors are both more favourable toward the mandatory counselling program than they were in 1994. Lastly, it seems that debtors, in the short term, feel that counselling helps them acquire the knowledge and skills needed to prevent them from becoming insolvent again. On the other hand, Schwartz' quantitative study found that, over the long term, counselling sessions had only a very limited impact on insolvent debtors' credit habits.

In conclusion, it would be worth thinking about continuing the second part of Schwartz' study in 2006. At that time, the flag limiting access to credit will have been removed from the credit files of the 1996 group. This group's situation could then be compared 10 years after bankruptcy, as was the case of the 1992 group in the first part of the study.

Update on E-filing

Some trustees are calling e-filing the most important advancement the industry has seen since the advent of computers

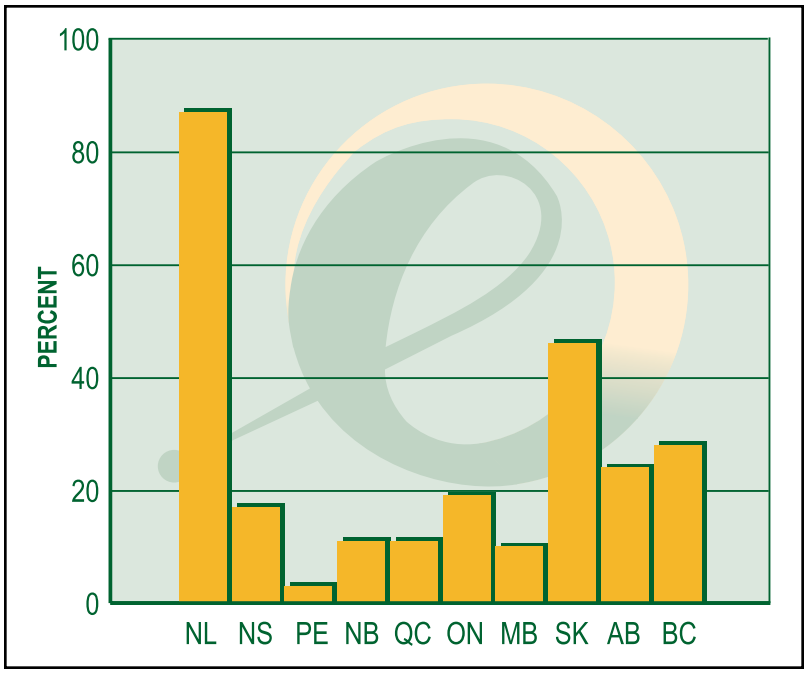
It was the early 1990s and Canadians had just come through three years of double-digit interest rates and inflation that bounced between 4 and 6 percent. And it showed. In 1990, consumer and business bankruptcies were up 44 percent. In 1991, they jumped another 39 percent. Insolvency trustees were working overtime processing documents for filing and lugging them down to the post office so they could be sent to what has since become the Office of the Superintendent of Bankruptcy.

But there was hope for Canadians as lowering bank rates in the mid-90s began to ease the burden. Trustees had an easier time of it, too — and not just

because there were fewer bankruptcies (which leveled off in 1992 and actually dropped 12 percent in 1993). There was also a relatively new technology on the scene that was easing the burden for trustees.

It was called the facsimile machine. An amazing piece of technology that despite its cost of almost $5,000, allowed you to simply feed a piece of paper into a slot and presto, deliver copies of your documents across town or around the world.

It seems silly now, of course, but at the time, it truly was a revolution in the world of document delivery. Within two years, the federal government's bankruptcy office was receiving 80 percent of its paper by fax. That soon settled in at around 98 percent.



Percentage of filing done electronically, by province, between the launch date (December 9, 2002) and August 31, 2003.

While we are somewhat hesitant to use the word "revolutionary" when speaking of e-filing, this breakthrough in document delivery certainly does present enormous potential. And while filing over the Internet may not be a revolution, it certainly is an inevitable evolution for an industry that relies heavily on documentation.

We are only just beginning to tap the potential of this technology. And trustees, perhaps because they are used to being able to step back and look at the big picture, are running with it in even greater numbers than we had anticipated.

Originally we expected to see a 10 to 20 percent pickup rate in the first year. As it turns out, that was a conservative estimate. After one year, 25 percent of all summary administrations are being filed electronically. As word gets out to trustees about the convenience of e-filing, we expect a massive rush to get on board, much like the rush we saw in the 90s with the advent of the fax machine.

It seems a good number of trustees agree. Since the launch of e-filing last December, more than 162 trustees have used the system — that's almost one out of three trustees filing summary bankruptcies.

"Since the implementation of the e-filing initiative, we have filed almost 100 percent of our estates by the Internet," says Paul Salewski, an Ottawa-based trustee. "We have realized a considerable savings in administrative time required to send the filing information to the Official Receiver."

But it's not just time trustees are saving according to British Columbia trustee, John Beverley. It's also cold, hard cash.

"This process has reduced our administration time in opening estates, reduced mailing and courier costs, and increased the speed in processing the notice to the creditors due to the instant Certificate of Appointment."

Newfoundland and Labrador trustee Richard Janes is also quite excited about e-filing.

"In my view, next to computerization, e-filing is the single biggest and best improvement in the consumer bankruptcy administration process since I received my license in 1979," he says.

While we can't be certain that's true, what we do know is that is has opened the door to new ways of doing business. And that is good for everyone.

Oral Boards 2003

The results of the Oral Boards of 2003 have been sent to all candidates June 13, 2003. This year, the number of candidates which appeared to the Oral Board was 64 — an increase of 60%, compared to the year 2002. However, the success rate of this year was lower compared to previous years. As a matter of fact, 59.38% of candidates received a licence compared to an average of 66% in previous years.

You will find in the appendix a chart showing the results of the Oral Exam of 2003. You will also find the list of new trustees and the candidates qualified to receive a licence, as well as a list of members of the Oral Exam for 2003.

List of new trustees and candidates who are qualified to receive a licence

British Colombia

BOPARAI, Pam
CONN, Cheryl Anne
HAZRA, Paul
KEEBLE, Jeff
McKIE, Mélinda Christine
NIELSEN, Mona Grace
TAN, Kelvin

Alberta

DARBY, Paul James
RIDEOUT, Karen
ROBERTS, Clinton
VERES, Brian Joseph
VININSKY, Mitchell

Ontario

AGUIRRE, Samuel
ALAM, Zaki Mirza
BASS, Glynis
BERRIDGE, Matthew
BISHARA, Hani
CLARKSON, Brad
CONSOLI, Angelo
FONG, Victor
HSU, Felix
LEVINSON, Yitzchok
MARTYN, Rebecca Lynn
PORTER, Christopher John
STEWART, Michael Gregory
TUCK, Andrews
WEAVER, Tracey
WIEBE, Jake
WONG, Brenda

Quebec

BOUCHARD, Rachel
BOURGEOIS, Josée
D'ASTOUS, Jocelyne
LABBÉ, Nathaly
RIVARD, Gilles
VINCENT, Éric

Atlantic provinces

KINSMAN, Georges
MARSHALL, Scott Gordon
MUNRO, Matthew James

Cities Villes	Candidates Candidats	Licence							
		Full (%) Complète		Limited Restreinte				No (%) Non	
				Cons. (%)		Corp./ Personne morale (%)			
Montréal	2			1	(50)			1	(50)
Québec	10	4	(40)	1	(10)			5	(50)
Ottawa	1							1	(100)
Toronto	24	12	(50)			3	(12)	9	(38)
London	1	1	(100)						
Hamilton	1					1	(100)		
Winnipeg	2							2	(100)
Calgary	6	4	(67)			1	(16.5)	1	(16.5)
Halifax	3	3	(100)						
Vancouver	14	1	(7)	2	(14)	4	(29)	7	(50)
Total	**64**	**25**	**(39.06)**	**4**	**(6.25)**	**9**	**(14.06)**	**26**	**(40.63)**
	64	**(100)**		**38**	**(59.38)**			**26**	**(40.63)**

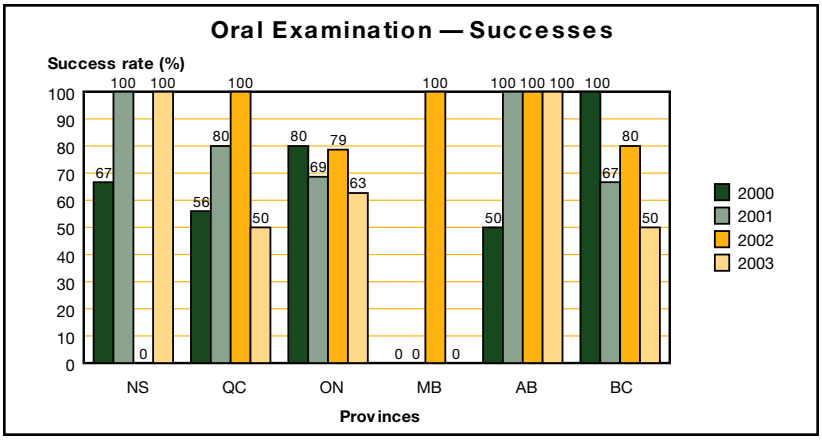
We would like to thank the following people for sitting on the boards:

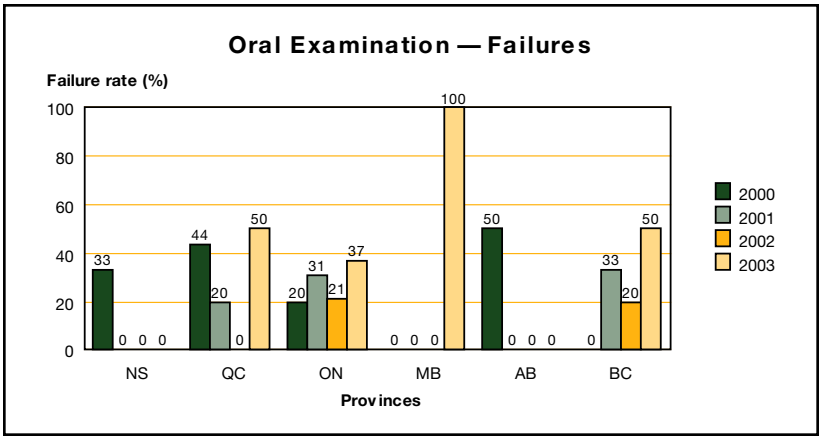
Mr. Pierre M. Bouchard
Fasken Martineau

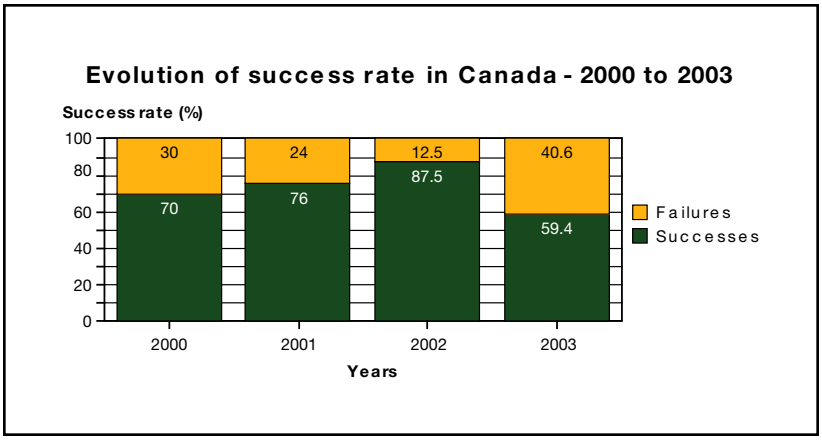
Mr. Timothy Alder Carson
Jackson Carson Inc.

Mr. Andrews Dalgleish
Friedman & Friedman Inc.

Mr. John Everett
Office of the Superintendent of Bankruptcy







Mr. Denis Gilbert
Office of the Superintendent of Bankruptcy

Mr. Alex A. Ilchenko
Fraser Milner Casgrain LLP

Mr. Marc Kelly
KPMG Inc.

Mr. Richard John Killen
Richard Killen & Associates Inc.

Mr. Walter MacKinnon
J. Walter Mackinnon Ltd.

Ms. Kate Maj
Office of the Superintendent of Bankruptcy

Mr. Bill Millar
Office of the Superintendent of Bankruptcy

Ms. Jane Milton
Bull, Houser & Tupper

Mr. Gilles Paquin
Goldstein, Flanz & Fishman

Mr. Michel Paré
Lemieux Nolet Inc.

Mr. Paul Radford
Coady Filliter Barristers & Solicitors

Mr. Chris Reed
LeDrew, Laishley Reed

Ms. Susan Robinson-Burns
Miles Davison McCarthy McNiven LLP

Mr. Charles Walker
Office of the Superintendent of Bankruptcy

Mr. Robert Randolph West
R. West & Associates Inc.

Once again, we would like to extend our special thanks to Mr. Yves Pigeon for his many years of sitting on the Boards and contributing greatly to the process.

Report of the Standing Senate Committee on Banking, Trade and Commerce

On November 4, the Standing Senate Committee on Banking, Trade and Commerce released its report reviewing the *Bankruptcy and Insolvency Act* as well as the *Companies' Creditors Arrangement Act*. This report was the result of numerous hearings conducted between the months of May and June where testimony was given by representatives from a variety of stakeholder organizations, practitioners, individuals and academics.

The Committee was chaired by the Honourable Richard H. Kroft and was assisted in a legal advisory capacity by Mr. Yoine Goldstein.

The Committee made a total of 53 recommendations on issues of consumer and commercial insolvency as well as administrative and procedural issues.

All recipients of the OSB Newsletter should have received a copy of the report. Nevertheless, here is a brief overview of some of the recommendations made by the committee. Pertaining to consumer issues, the Senate committee addressed:

- **The exemption for RRSP's and RESP's** — Recommended exempting all RRSP's from seizure provided they are locked in, that contributions made in the one year period prior to bankruptcy be paid to the trustee for distribution to the creditors and that the exempt amount be no greater than that set by regulation. Recommended exempting RESP's from seizure provided they are are locked in, and that contributions made in the one year period prior to bankruptcy be paid to the trustee for distribution to the creditors.
- **Reaffirmation Agreements —** Recommended prohibiting reaffirmation by conduct or by express agreement.
- **Summary Administration** — Recommended a review of the BIA to eliminate all unnecessary procedural requirements. Also encourage the use of electronic communication in order to simplify and expedite the insolvency process.
- **Student Loans** — Recommended discharge after 5 years as well as no time frame for submitting an application for complete or partial discharge of debt on the basis of undue hardship.
- **Contributions of Surplus Income to the Bankrupt's Estate** — Recommended that bankrupts with surplus income to contribute to their estates for a period of 21 months. Added that trustee's should have the discretion to shorten this period in cases of undue hardship. Suggested that surplus income continue to be calculated in accordance with the directive. Also recommended that the discharge of the debtor should not be delayed merely because of the obligation to continue to contribute for a total of 21 months, and that in appropriate circumstances a trustee should be able to seek a summary judgement to require such payments.
- **Voluntary Agreements to Make Post-Discharge Payments** — Recommended permitting trustee's to enter into voluntary payment agreements with bankrupts who do not have surplus income. Added that fees payable to the trustee in accordance with such an agreement should not exceed the minimum legal amount established for summary administration bankruptcies.
- **Credit Reporting** — Recommended that the OSB take a leadership role in convening a meeting among credit granting agencies, credit grantors, provincial and territorial representatives and other relevant parties with a view of negotiating a mutually acceptable credit scoring regimes.

In regards to commercial insolvency, the following are some of the issues that the committee addressed:

- **Compensation Protection: Wages** — Recommended that unpaid claims for wages and vacation pay arising as a result of an employer's bankruptcy be payable to an amount not to exceed the lesser of $2,000 or one pay period per employee claim. Added that the funding of these claims should be assured by creating a super priority over secured claims to inventory and accounts receivable. Also recommended that the secured creditor or creditors should be able to assume the rights of the employees against the directors.
- **Debtor-in-possession Financing** — Recommended that these types of loans be permitted under the BIA and CCAA.

- **Rights of Unpaid Suppliers** — Recommended that sections of the BIA providing the right of unpaid suppliers to recover goods be repealed, with the exception of the provisions that protect the rights of farmers, fishers and aquaculturalists.
- **Executory Contracts** — Recommended that the BIA and CCAA be amended to permit disclaimer of executory contracts in existence on the date of commencement of proceedings under the Acts, provided that the debtor establish that restructuring will not be possible without the disclaimer and that the co-contracting party will be permitted to file a claim for damages. Added that where a collective agreement is being disclaimed, the debtor should also have burden to establish that post-filing negotiations have been carried on, in good faith, for relief of too onerous aspects of the collective agreement and should establish in Court that the disclaimer is necessary in order to allow for a viable restructuring. Also recommended that the BIA and CCAA permit the assignment of executory contracts provided that the proposed assignee is as credit worthy as the debtor was at the time the contract was entered into and that the proposed assignee agrees to compensate the other party for pecuniary loss.
- **Interim Receivers** — Recommended that the BIA be amended to clarify the role of the interim receiver, and the duration and meaning of the term "interim". Also recommended that the definition of "receiver" should be amended to include interim receivers when they operate in a manner similar to Court-appointed receivers.
- **Governance** — Recommended that the BIA and CCAA be amended to permit the Court to replace some or all of the debtor's directors during proposals or reorganizations. Added that prior to appointment, a trustee / monitor should disclose its relationship to the debtor and that the auditor of the debtor should not be permitted to act as monitor. Also recommended that the monitor should not be permitted, in the event of a failed restructuring, to become the trustee or a receiver for a secured creditor.
- **Subordination of Equity Claims** — Recommended that the BIA provide that the claim of a seller or purchaser of equity securities, seeking damages or rescission, be subordinated to the claims of the ordinary creditors.

As to administrative and procedural issues, the committee addressed:

- **Volume of Filings, Access to the Process and Funding of the Office of the Superintendent of Bankruptcy** — Recommended that the BIA be reviewed in order to identify opportunities that will contribute to greater efficiency within the insolvency system, including efforts regarding the adoption of new technologies. Also recommended that the BIA to permit the Superintendent of Bankruptcy the authority to finance research and education programs from unclaimed dividends and undistributed assets using amounts unclaimed after a two year period.
- **Consolidation of Insolvency Statutes** — Recommended that the BIA and CCAA continue to exist as separate statutes.
- **Conflicts of Interest** — Recommended that the BIA and CCAA be reviewed to identify and eliminate any opportunities for the roles and responsibilities of insolvency practitioners to place them in real or perceived conflicts of interest. Moreover, it recommeded that guidelines be developed to expand upon Rules 34 to 53 of the BIA.
- **Definition of Income** — Recommended that the definition of "total income" in the BIA be clarified and that guidelines be provided in a directive of the OSB, especially with regards of lump sum settlements received after bankruptcy. Also recommended that a bankrupt's tax refunds received during a period to be determined by statute be made available for distribution to creditors.

Debtor Client Satisfaction Survey

Conducted in January 2003

The OSB is conducting a series of client satisfaction surveys, and in January 2003, it commissioned *EKOS Research Associates Inc. (EKOS)* to carry out a Debtor Client Satisfaction Survey. The survey reached some 1,118 randomly chosen individuals who were in their 8th month of bankruptcy, (who had filed for bankruptcy between April 1 and June 1, 2002). Interviews were conducted by telephone from January 20 to 25, 2003.

A sample of this size provides pan-Canadian results with a margin of error of ± 2.2 percentage points, at a confidence level of 95 percent.

The purpose of the survey was to gather their views on what was important to them, and their satisfaction with trustees and the OSB (where applicable).

Key Highlights

Profile of Respondents

Just under half of respondents reported that some triggering events (primarily job loss or the breakup of a marriage) led them to file for bankruptcy. Close to equal numbers simply cited unmanageable debt load as the primary factor. Nine in ten respondents to this survey were involved in the insolvency system as individuals with personal debts as opposed to business debts.

Dealings with Trustees

Across the dimensions of trustee services tested, there were no areas of significant concern: while all service attributes ranked as high priorities, they also garnered high satisfaction rates. Overall, 94% reported that they got what they needed from their trustee. With 73% of respondents reporting that the fees paid were about right, given the benefits they received. A bare majority reported dealing primarily with the trustee themselves, with one in three replying that the bulk of their dealings were with the trustee's staff.

Dealings with OSB

Prior to their involvement with the insolvency system, fewer than one in five respondents had heard of the OSB. Awareness of government publications related to debt and debt management was modest, with one in three reporting being aware of such publications and a majority of those who were aware replying that they read them.

Complementary Survey

In May 2003, the OSB undertook a *Complementary Debtor Survey* of some 200 debtors, randomly selected across Canada, who were in their 13th month after having filed for bankruptcy. The purpose of this second survey was to ensure that the results of the January 2003 survey were not biassed by a desire on the part of the respondents to provide favourable evaluations in an effort to positively impact their insolvency proceedings. The results confirmed that regardless of whether debtors were going through the insolvency process, or had completed the insolvency process, they were very satisfied with the services afforded to them by Trustees. There were no major discrepancies between the findings of the January 2003 and the May 2003 survey results.

What Did we Learn...

Overall, debtors are *very satisfied* both with services rendered by trustees and those offered by the OSB.

The survey revealed high levels of satisfaction with trustee services, with about nine in ten debtors reporting high satisfaction with nearly all elements of the trustee assessment. The lowest level of satisfaction concerned the debt counselling and management skills offered by their trustee (79%), although this element was also of least importance to debtors.

From the comments made, it would appear that debtors want more detailed quality information. For example, while a mere six percent (6%) of debtors indicated that they did not get what they needed from their trustee, sixty-four (64%) of these debtors named an information difficulty as the main reason.

Moreover, when debtors were asked if they had additional comments regarding their relationship with the trustee and how the relationship could be improved, six percent (6%) indicated that such relationship could be improved if they had more detailed information.

Next Steps...

The results of the debtor survey have been analysed and have been discussed with the Management Advisory Board. However, the OSB is awaiting the result of its next survey *The Creditor Client Satisfaction Survey*, in order to conduct a more thorough analysis and ascertain if redress mechanisms are warranted regarding OSB's service improvement initiative.

Once the analysis of both surveys is complete and the results have been discussed with senior management, action plans will be developed and the results will be published on the Internet.

The OSB is committed to better tailor its services to its clients' needs — in doing so, it will continue to periodically evaluate its performance in order to gather valuable information which will assist us in improving our insolvency system while ensuring that our clients receive world-class service.

Business Opportunity

Office of the Superintendent of Bankruptcy Guardian Work Assignments

The OSB is initiating a process to identify and establish a list of pre-qualified trustees, who may be invited to bid for specific work assignments in the event it becomes necessary to appoint a guardian to finalize the administration of the estates of another trustee.

The work assignments will become available when the Superintendent deems it necessary to protect estates, when the estates are left without a trustee due to the trustee becoming incapacitated, insolvent, or on the trustee being convicted of an indictable offence, or in the event the trustee fails to comply with limitations or restrictions placed on his/her licence. In addition, a guardian may also be appointed if an investigation reveals serious deficiencies in the administration of estates or serious breaches of professional conduct such that the estates need to be protected.

It is anticipated that this business opportunity will be posted and available on Merx (***www.merx.com***), Canada's official, public-sector electronic tendering service, in December, 2003. Once posted, interested trustees will have a specified time period in which to submit their response. Full text and a complete overview of the process will be available at that time.

Debtor Compliance: a pilot project has been put in place

Last May, the Office of the Superintendent of Bankruptcy (OSB) set up a pilot project involving an investigation group whose mandate is to investigate the conduct of debtors making use of the *Bankruptcy and Insolvency Act*. This project is anticipated to last for an initial period of three years. The offices of the Investigation Group are located on the south shore of Montréal at 4896 Taschereau Boulevard, 2nd floor, Suite 203. The majority of investigations into debtor conduct will therefore involve filings from the Montréal Division Office.

The Investigation Group currently includes three seasoned investigators with a great deal of experience in the area of economic crime. The need for this project has become abundantly clear given the paucity of police resources devoted to economic crime, and particularly bankruptcy and insolvency. The Superintendent of Bankruptcy therefore decided to use this pilot project to examine the feasibility of the OSB assuming responsibility for investigations of debtors in an insolvency context. This project should enable the OSB to do a cost/benefit analysis of this type of operation. The OSB intends to use the pilot project to evaluate whether the resources invested lead to significant results in terms of charges laid and sanctions imposed by the courts. The project will also enable the OSB to determine the level of interest in this type of initiative on the part of trustees in bankruptcy and creditors. The analysis of all of this information will then enable the OSB to decide whether such investigation groups should be established in the other bankruptcy divisions across the country, or whether the initiative should be abandoned. Should the interest on the part of insolvency stakeholders justify an expansion and the establishment of investigation groups throughout the country, the OSB will consider a variety of financing options to which the stakeholders could be asked to contribute.

With that in mind, it is important that trustees in bankruptcy and creditors take the time to bring to the attention of this investigation group any complaints they may have with regard to the conduct of debtors taking advantage of the bankruptcy and insolvency system. These complaints may be forwarded to the Investigation Group at the following e-mail address: ***trustees.dc@ic.gc.ca*** Each and every complaint will be reviewed and files selected will be the subject of an investigation. Clearly, given the limited resources, it will be impossible to investigate every single file. A set of criteria will be considered in determining which matters will be pursued. For additional information with regard to this pilot project, please contact the Director of the Investigation Group, Mr. Réal Poirier, at (450) 671-8821 or by e-mail at ***poirier.real@ic.gc.ca***

Insolvency Case Law

As a result of a survey conducted with the first issue of the OSB Newsletter, respondents told us they would like to see more summaries of case law dealing with insolvency matters. Here are a few which we felt were worth while noting. If you have any decisions that you feel should be summarized for the newsletter, please submit them to the coordinator.

Clark (Trustee of) v. Manulife Financial Corp.

New Brunswick Court of Appeal
The Honourable Judges Drapeau, Turnbull, and Robertson

Citation: *Clark (Trustee of) v. Manulife Financial Corp*. (2003), 256 N.B.R. (2d) 27, 42 C.B.R. (4th) 107, 2003 NBCA 9.

Facts: This is an appeal by Manulife Financial from a decision that allowed Mr. Clark's shares in Manulife to be available to his creditors. Mr. Clark owned life insurance policies with Manulife, and in January 1998, Manulife became a public company and demutualized its shares. Because of the demutualization, Mr. Clark owned 259 shares of Manulife. Mr. Clark filed for bankruptcy in August 1998. The shares were not remitted to the policyholders until September 1999, with issuance of the letters patent of conversion. The trial judge found that the shares were property as defined under the *Bankruptcy and Insolvency Act* (BIA), and available to Clark's creditors.

Issue: Is an interest in demutualization benefits, prior to the issuance of the letters of patent of conversion, considered "property" as defined under para. 67(1)(c) of the BIA?

Decision: The demutualization benefits were found to be available to the trustee for the general benefit of Mr. Clark's creditors in bankruptcy. The appeal was dismissed with costs.

Discussion: According to s. 2 of the BIA, "'property' includes money, goods, things in action, land and every description of property [...] interest and profit, present or future, vested or contingent [...]." Manulife Financial argued that the demutualization benefits were not available to Mr. Clark, and relied on Registrar Laycock's decision in *Re Broesky* ((2000), 264 A.R. 199, 17 C.B.R. (4th) 24, 2000 ABQB 164). In that case, which is similar to the present case, the letters patent of conversion had not been issued when the bankrupts were discharged. Registrar Laycock concluded that the demutualization benefits did not constitute property under ss. 67(1), even though the "eligibility date" chosen by the company preceded the discharges from bankruptcy.

PriceWaterhouseCoopers argued that the cases relied upon by Manulife Financial failed to give effect to the broad definition of "property" found in s. 2 of the BIA, which includes contingent interests. Furthermore, the Supreme Court of Canada has given a broad interpretation to the word "property" in *Marzetti v. Marzetti* ([1994] 2 S.C.R. 765.). In that case, it was held that a taxpayer's right to an income tax refund constituted "property" even though that "right" was not legally enforceable.

In the present case, Mr. Justice Drapeau is writing for an unanimous Court of Appeal. He stated that the allocation of the contested benefits could not be legally compelled prior to the finalization of Manulife's demutualization. However, it did not foreclose the conclusion that the holder of the policy had, at all times, a contingent interest in those benefits. In Mr. Justice Drapeau's view, Mr. Clark had, prior to his discharge, an "interest" (within the meaning of the definition of "property" under s. 2 of the BIA) in the demutualization benefits prior to his discharge from bankruptcy. That interest consisted of a contingent right to those benefits arising from or incident to the policy, and as such were divisible among Mr. Clark's creditors under para. 67(1)(c) of the BIA.

Éric Métivier (Appelant) v. Marc Mayrand

Appeal Court of Quebec
The Honourable Judges Michel Robert, René Dusseault and Louis Rochette

Citation: *Éric Métivier c. Marc Mayrand* [2003] J.Q. no 15389 (QL)

Facts: The appellant appealed a judgment rendered by the honourable Judge Ivan Godin of the Superior court of Quebec, who dismissed a motion for declaratory judgement seeking to declare section 14.01 and 14.02 of the BIA invalid and inoperative due to their incompatibility with section 2 e) of the *Canadian Bill of Rights*. The parties agreed that due to the limited jurisdiction of the Court, the question should be restricted to the constitutional validity of the

particular provisions of the BIA, without any reference to the practice put in place by the Superintendent.

Issues: Do sections 14.01 and 14.02 violate the *Canadian Bill of Rights*?

Decision: Sections 14.01 and 14.02 of the BIA are compatible with Section 2(e) of the *Canadian Bill of Rights*.

Discussion: The court, in its unanimous decision, explained that an overlap of functions within an administrative tribunal is acceptable if these functions are exercised by different people. Relying solely on the examination of the legal dispositions, the court concluded that because the superintendent could delegate his powers (following section 14.01(2) BIA) different people could, in fact, exercise different functions. This militates against the appellant's argument regarding the accumulation of functions leading to a non-impartial hearing. The ability to delegate renders the law neutral and it is a well-recognized principle that a neutral law could not be considered to violate the constitutional or quasi-constitutional rights.

The appellants also argued that subsection 5(1) which indicates that the Superintendent is appointed, that his salary is fixed by the Governor in Council and that he holds office during pleasure, leads to a lack of independence. The court relying on its original assessment indicates that because the law provides the possibility of delegation, it is the independence of the delegates which must be examined by a court with proper jurisdiction on a case by case basis.

For all these reasons, the Superintendent could therefore put in place a disciplinary tribunal without infringing the right to an impartial hearing protected by Section 2(e) of the *Canadian Bill of Rights*.

Carol Caron and Mallette syndics et gestionnaires inc.

Superior Court of Quebec
M^e^ Normand Michaud, Registrar

Citation: *Dans l'affaire de la faillite de Carol Caron*, [2003] J.Q. No. 5515 (Sup. Ct.).

Facts: On December 14, 1999, Mr. Caron made an assignment into bankruptcy and retained the services of the non-resident office of the trustees Malette syndics et gestionnaires located in Rimouski, Quebec. The trustee travelled from the resident office in Quebec City to the non-resident office to administer the bankruptcy. He claimed the amount of $1,473.25 as travelling and accommodation expenses in the statement of receipts and disbursements. The Superintendent filed an opposition with respect to this claim.

Issue: Can a trustee claim travelling and accommodation expenses incurred in the administration of a bankruptcy in a non-resident office?

Decision: Expenses related to travelling between a resident and a non-resident office for the administration of a bankruptcy cannot be claimed in the statement of receipts and disbursements unless three conditions are met. The court relied upon ss. 8(g) of Directive 29 in reaching its decision, which allows for the operation of a non-resident office if the administration of appointments from the non-resident office does not cause additional costs for an estate.

The registrar refused to proceed with the taxation of the trustee's travelling costs of $1,473.25.

Discussion: Registrar Michaud considered the relevant case law in his analysis of Directive 29, including *Re Oliver* ((1999), 13 C.B.R. (4^th^) 122, B.C.J. No. 1948 (S.C.) (QL).). In that case, Mr. Justice Parrett decided that the trustee's travelling expenses from a resident to a non-resident office could only be reimbursed in reasonable or necessary circumstances, and when certain conditions are met. First, a trustee will have to inform the bankrupt of the potential difficulty and inform him or her on how this situation might affect his or her discharge. Secondly, the trustee must inform the creditors of any additional cost items when they are asked to confirm the trustee's appointment. Finally, the trustee, as an officer of the Court, will have to place this issue before the Court at the discharge hearing.

In this case, Registrar Michaud explained that he agreed with these conditions, but added that the non-resident trustee needs to inform the debtor as early as the first consultation of the repercussions of the appointment, such as the additional expenses and their possible impact on the discharge. He also specified that the creditors need to be advised as early as possible of the additional expenses in order to address the issue at the meeting of creditors. In the case at hand, the trustee did not prove that the debtor or the creditors had agreed with full knowledge of the facts to pay for the travelling expenses incurred.

In the Matter of Anthony John Page, Trustee in Bankruptcy

Ontario Superior Court of Justice
The Honourable Judge Himel

Citation: *Re Page* (2002), 38 C.B.R. (4th) 241, O.J. No. 4345 (Sup. Ct.) (QL).

Facts: Anthony Page is the sole licensed trustee in bankruptcy with his firm and is engaged as a trustee and court appointed receiver in a number of files. He was summoned for jury duty and takes the position that he is ineligible to serve as a juror on the basis of the provisions of the *Juries Act* of Ontario.

Issues:

1 Is the trustee ineligible to serve as juror?

2 Does the expression "officer of the court" apply to trustees and court appointed receivers?

Decision: By reason of s. 3(1)6 of the *Juries Act*, trustees and court appointed receivers are ineligible to serve as jurors since they are considered to be "officers of the court".

Discussion: In his reasons, Mr. Justice Himel examined the definition of "officer of the court" found in various sources, including cases where a court appointed receiver was considered an "officer of the court". He also interpreted para. 3(1)6 of the *Juries Act* by applying various approaches to the interpretation of statutes. He found that it is consistent with the purpose of the *Juries Act* that persons who have the potential to exert influence over other jurors or to pre-judge matters due to their legal knowledge be ineligible to serve as jurors. Mr. Justice Himel determined that trustees and receivers may have special knowledge which may affect their roles as jurors and may result in a partial jury. Also, he noted that trustees and court appointed receivers perform critical functions in the administration of justice, and, if selected as jurors, they could not perform the services needed. Trustees cannot delegate certain functions to others, and could therefore find themselves in the position of having conflicting and competing responsibilities.

Although not required to be decided in this case, Mr. Justice Himel stated that this exemption applies exclusively to licensed trustees in bankruptcy and receivers who are actively engaged, and does not apply to their employees, partners, associates or agents.

Monique Laliberté c. Sam Lévy & Associés inc.

Superior Court of Quebec
Me François Leblanc, Registrar

Citation: *Monique Laliberté c. Sam Lévy & Associés inc*. (15 April 2003), Saint-Hyacinthe 750-11-001516-035, (Sup. Ct.).

Facts: The bankrupt repurchased her automobile from the trustee at a price of $500, while its estimated value at the time of the bankruptcy was between $2,450 and $4,050. The trustee claimed $1,356.56 in fees. The Superintendent of Bankruptcy challenged the trustee's fees.

Issues:

1 a) Do the courts have the power to intervene and modify the remuneration of a trustee established by the Rules under the Bankruptcy and Insolvency Act (section 128)?

b) If so, what criteria should the courts follow in this respect?

Decision: Relying on recent case law (see *Canada (Surintendant des faillites) c. Zamora*, [1997] A.Q. No. 411 (Sup. Ct.) (QL)), registrar Leblanc indicated that, in his opinion, the courts hold a certain level of discretion in reducing the trustee's fees when the fees are prescribed in the Rules under the BIA. The criterion applicable in this case is to reduce the trustee's fees proportionately to the amount that was denied to the creditors.

Discussion: After examining the recent evolution in the case law throughout Canada, Registrar Leblanc determined that courts have more flexibility when it comes to reducing trustees' fees. This discretionary power held by the courts is usually used to remedy the trustee's failure to recover surplus incomes (See *Re Nagy* (1999), 232 A.R. 399, 13 C.B.R. (4th) 1 (C.A.)).

Registrar Leblanc considered two different approaches when reducing trustees' fees. The first approach considered was a symbolic penalty. In this case, it was determined that this would not be the best approach. However, the Registrar explained that it could still be used when there is insufficient evidence to establish a fixed deductable amount. The Registrar applied the second approach which is to reduce the trustee's fees proportionately to the amount that was denied to the creditors.

Éric Schraenen et Raymond Chabot c. La Procureure générale du Canada

Superior Court of Québec
Me François Leblanc, Registrar

Citation: *Éric Schraenen et Raymond Chabot Inc. c. the Attorney General of Canada* (17 March 2003), Saint-Hyacinthe 750-11-001163-002, (Sup. Ct.).

Facts: The debtor, a four time bankrupt, applied for discharge from bankruptcy. All of his debts were owed to both federal and provincial revenue agencies for unpaid taxes. The court noted that the debtor had not paid any taxes since 1997. The creditors opposed the discharge and presented an agreement to the court in which the debtor acknowledged a debt of $27,410. Under the terms of the agreement, the debtor agreed to pay an amount of $15,000 to his creditors, including $5,000 for legal fees. The agreement also stipulated that the debtor's discharge was to be suspended until he paid the $15,000.

Issues:

1 Can the bankrupt be discharged and if so, what criteria must be applied when considering the discharge of the bankrupt where the debts emanate from fiscal or tax related issues?

2 Can the crown's solicitor and client fees be charged to the bankrupt?

Decision:

1 The court applied the following two criteria in reaching its decision:

   (a) the social and economic rehabilitation of the bankrupt and

   (b) the social obligation of every individual to pay his or her fair share of taxes. In the result, the court decided to grant, but suspend, the discharge of the bankrupt until the complete payment of $15,000 was made to the trustee.

2 The circumstances of this case do not allow for the payment of solicitor and client fees.

Discussion: Registrar Leblanc explained that the courts are not bound by any agreement made between the parties, but these agreements should still be considered. He also mentioned that a discharge is a privilege to be earned and not a right. The court noted that the debtor had little chance to obtain credit, and therefore his chances for a relapse into bankruptcy were minimal. In addition the debtor has agreed to pay $15,000 and the agreement between the parties was found to be reasonable.

In regards to the taxation of professional fees incurred by the opposing parties, Registrar Leblanc rejected the argument brought forward by the Attorney General's counsel that the agreement between the parties provides for the payment of such fees on a solicitor and client basis. After an examination of section 197 of the BIA and several cases, the Registrar concluded that he has broad discretion in regards to the taxation of fees. Furthermore, he noted that following common law principles, legal fees should not be taxed on a solicitor-client basis unless a party acted in a reprehensible, scandalous or outrageous manner. Such circumstances did not exist in this case.

Marchand Syndics inc. and Superintendent of Bankruptcy

Superior Court of Québec
Honourable Judge Jean-Pierre Senécal

Citation: *Blais c. Marchand Syndic inc.,* [2003] J.Q. No. 460 (Sup. Ct.) (QL).

Facts: The trustee appealed a decision of the Registrar in bankruptcy who refused to grant him the totality of his requested fees. The trustee claimed $5800 in fees for 73 hours of work for a bankruptcy which had a total of $5000 in realizable assets. The fees were approved by an inspector in the bankruptcy, but were contested by the Superintendent of Bankruptcy.

Issue: Did the Registrar err by reducing the amount of the trustee's requested fee?

Decision: Relying on case law (including *Samson Limousine Service Ltd. (syndic de) (Re)*, [1992] A.Q. No. 911 (Sup. Ct.) (QL)), Judge Senécal upheld the Registrar's decision and rejected the trustee's appeal.

Discussion: In his reasons, Judge Senécal explained that, in this case, two factors must be taken into account in determining the trustees fees: 1) The total hours devoted to the file, 2) the reasonable nature of the fees in relation to the realizable assets in the bankrupt estate. Judge Senécal commented it is not enough for the trustee to simply consider the work accomplished and arbitrarily establish its remuneration

based on the hours devoted to the file. The total realizable assets in the bankrupt estate, the difficulty in administering and realizing the assets, together with the amount of hours devoted to the file must be considered globally. Furthermore, Judge Senécal stated that the Registrar simply needs to make a global assessment of the fees and is not required to examine every hour in detail and explain where and why deductions are being made. The fact that the inspector in this bankruptcy approved the fees is a factor amongst many that the court could consider but, is not bound by.

In the Matter of Bankruptcy of Craig Melvin Guest

Saskatchewan Court of Queen's Bench
Maurice J. Herauf, Registrar

Citation: *Re Guest* (2002), 228 Sask. R. 295, 38 C.B.R. (4th) 209, 2002 SKQB 438.

Facts: The bankrupt, Craig Guest, is a quadriplegic who owned a van that was specially equipped to accommodate his medical condition. He was unemployed and volunteered most of his time counselling individuals recently afflicted with quadriplegia or paraplegia, providing rides and delivering groceries to people with disabilities.

Issue: Is a motor vehicle exempt from seizure if used for volunteer work?

Decision: The motor vehicle operated by Mr. Guest was found not to be exempt from seizure. The court relied upon para. 2(1)(5) of *The Exemptions Act* of Saskatchewan in reaching its decision, which specifically exempts from seizure a "motor vehicle where it is necessary for the proper and efficient conduct of the execution debtor's business, trade, calling or profession."

Discussion: Registrar Maurice J. Herauf considered the case *Re Kurty* ((1998), 173 Sask. R. 260, 6 C.B.R. (4th) 245 (Q.B.)) in determining whether Mr. Guest was engaged in a "business, trade, calling or profession" within the meaning of para. 2(1)(5) of *The Exemptions Act* of Saskatchewan. He examined whether a broad and large interpretation could be given to the word "calling" by reviewing a decision of the Saskatchewan Court of Appeal, *W.W. Gleave Construction Ltd. v. Hampton* ((1986), 53 Sask. R. 163, 31 D.L.R. (4th) 478 (C.A.)). In that case, the word "calling" was interpreted broadly to include the use of a vehicle by a member of the legislative assembly for work in a rural constituency. This conclusion was reached by adopting the Black's Law Dictionary definition of "calling", which defines it as "one's business, occupation, profession, trade or vocation." Registrar Herauf distinguished this case from the one before him by focusing on the non-monetary aspect of the volunteer work performed by Mr. Guest. He therefore found that the vehicle was not exempt from seizure.

It is worth noting that Registrar Herauf stated that the provision of *The Exemptions Act* in question is out of date, and it should foresee this type of situation to ensure that the legislation does not "deprive this bankrupt of the very item that ensures his independence."

In the Matter of the Bankruptcy of Marc Hamel

Superior Court of Quebec
André Belleau, Registrar

Citation: *Marc Hamel et Leblond & Associés Inc. c. Government of Canada* (8 December 2002), Québec 200-11-010845-02 (Sup. Ct.).

Facts: At the time of his assignment in bankruptcy, Mr. Hamel declared that Human Resources Department of Canada ("HRDC") was a creditor for an unknown amount, due to an overpayment of his employment insurance benefits. HRDC was aware of the claim, but did not determine the specific amount owed until after the assignment in bankruptcy. On the basis of para. 52(3)(b) of the *Employment Insurance Act*, R.S.C. 1996, c. 23, HRDC proceeded with an independent seizure of Mr. Hamel's property. It was inferred from this subsection that its liability arose after the date of bankruptcy, and therefore was not a provable claim, exempting them from the application of the *Bankruptcy and Insolvency Act* (BIA).

Issue: Is HRDC's debt a "provable claim" under subsection 121(1) of the BIA?

Decision: HRDC's debt constituted a provable claim in accordance with section 121(1) which reads:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation

incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

HRDC was therefore ordered to produce its claim in the prescribed form. The seizure of the bankrupt's employment insurance benefits was also suspended.

Discussion: In his decision, Registrar André Belleau considered *Québec (Revenue Deputy Minister) c. Leblond, Buzzetti et Associés Ltée,* J.E. 2000-872 (C.A.) and *Re Bouvier*, [1999] R.J.Q. 595 (Sup. Ct.) where it was decided that a non-liquidated claim still constituted a debt, even if its exigibility was at a later date. In the case at hand, Registrar Belleau reasoned that the debt existed at the date of bankruptcy since the obligation existed prior to this date. It was decided that the HRDC had to comply with subsection 121(1) of the BIA and produce a provable claim. He also added that it is not up to the creditor to determine what constitutes a provable claim, but rather the trustee as provided for in subsection 135(1.1) of the BIA.

In the Matter of the Bankruptcy of Patricia Anne Wall

Court of Queen's Bench of New Brunswick
Michael J. Bray, Registrar

Citation: *In the matter of the Bankruptcy of Patricia Anne Wall*, 2003 NBQB 346.

Facts: Patricia Anne Wall, the applicant, sought an order pursuant to subsection 178(1.1) of the *Bankruptcy and Insolvency Act* (BIA), that para. 178(1)(g) did not apply to her Canada Student Loan. Ms. Wall was a student at the University of New Brunswick between 1987 and 1990, where she enrolled in nine courses but completed none. Her debt, with applied interest, was estimated at approximately $18,000 to $20,000. The applicant testified that she had not had full-time employment prior to June 2000 and had been receiving income assistance. However, as of September, 2001, at the time of her discharge, she had secured full-time employment and was earning monthly income of $2,120.91.

Issue: Does para. 178(1)(g) apply to Ms. Wall's debt related to Canada Student Loans resulting in such debts not being dischargeable in bankruptcy?

Decision: The applicant was granted the relief requested and was released from the debt of her student loan.

Discussion: Section 178(1.1) of the BIA provides that there are two criteria, which if present, give discretion to the Court in granting the relief requested:

178(1.1) (a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the loan; and

(b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the liabilities under the loan.

Registrar Bray found the evidence that Patricia Wall did not act in good faith to be inconclusive, and concluded that she would continue to experience financial hardship if compelled to repay her student loan. Registrar Bray concluded that he had the power to either grant or refuse a declaration that subsection 178(1) applied to the loan in question, and expressed concern that the BIA does not allow for the possibility of a decision that better reflects a balance between the rights of both parties.

Professional Conduct Matters

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

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

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

Decision rendered by the Honourable Fred Kaufman, delegate of the Superintendent of Bankruptcy

Facts: The Respondents (Sam Lévy & Associés Inc.) filed an application to postpone a professional conduct hearing which was scheduled for September 29, 2003, until October 30, 2003. The reason given for the application was because the Quebec Court of Appeal has a decision pending in a case (*Métivier c. Mayrand*, [2002] R.J.Q. No. 1710, 34 C.B.R. (4th) 249 (Sup. Ct.) (QL)), in which trustees are challenging the constitutionality of certain sections of the *Bankruptcy and Insolvency Act*. If these sections are declared unconstitutional, it would invalidate Mr. Justice Kaufman's appointment as the Superintendent's delegate to hear this case.

Issue: Should a hearing be postponed, when a court of appeal has under advisement a similar case involving the constitutionality of the relevant legislation?

Decision: The hearing in the Lévy matter was rescheduled for Tuesday, November 11, 2003.

Discussion: The application was opposed by the Senior Analyst who argued that it was in the public's best interest to have the matter decided without further delays. The appellants relied on *Canada (Procureur général) c. Roy* ([2003] J.Q. No. 5529 (C.A.) (QL)), where the court dismissed the appeal in a case involving similar facts to the present situation. Mr. Justice Kaufman felt that if the appeal is allowed in the Métivier case, the legal fees incurred by the present respondent would be a large waste of resources. Mr. Justice Kaufman also highlighted the fact that in *Canada (Superintendent of Bankruptcy) c. Raymond Chabot inc.* ([2001] J.Q. No. 3208 (C.A.) (QL)), a stay was granted by the Superior Court and was confirmed by the Court of Appeal.

Decision Regarding the Professional Conduct of Frank Risman, Trustee, and Frank Risman Associates Limited, Corporate Trustee

On June 24, 2003, the Superintendent's delegate, the honourable Fred Kaufman, rendered a decision regarding the disciplinary conduct of trustees Frank Risman and Frank Risman Associates Limited.

Following an investigation conducted by the principal analyst, Evan De Boice, a report was concluded on September 17, 2001. The investigation revealed many instances where the Bankruptcy and Insolvency Act (BIA), its rules and directives were not respected in the administration of certain files.

- Deficiencies in Third Party Deposit Bank;
- Deficiencies in operation of the Consolidated Bank Account (C.B.A);
- Operation of a "dividend Clearing Account" for which there is no provision in the Act or Directives;
- Lack of Current Estate Ledgers for ordinary administrations/receiverships;
- Deficiencies in Taking Possession and Control and Inventory Taking;
- Irregularities in the propriety of costs and draws of final fees in summary administrations;
- Deficiencies in the distribution to creditors on a timely basis;
- Deficiencies in filing a notice pursuant to S. 245(1) of the Act and in filing reports pursuant to S. 245(2) and (3) of the Act;
- Lack of timely closure of administrations.

An agreement was then concluded between the parties and the Honourable Fred Kaufman accepted this agreement to render his decision. Respecting the agreement, the Superintendent's delegate restricted the trustees for a period of 4 months from taking on any new bankruptcies, proposals, or receiverships and to act as an interim receiver. However, the trustees may continue to work on the files which were opened prior to this order. The trustees must also submit a plan indicating the procedures they will undertake to close all existing files within 12 months from the signature of this order.

Decision Regarding the Professional Conduct of Marvin Zysman, Trustee, and Risman & Zysman Inc. Corporate Trustee

On June 24, 2003, the Superintendent's delegate, the Honourable Fred Kaufman rendered his decision regarding the professional conduct of trustee Marvin Zysman and of the corporate trustee Risman & Zysman Inc.

Following an investigation conducted by the principal analyst, Evan De Boice, a report was concluded on September 17, 2001. The investigation revealed many instances where the Bankruptcy and Insolvency Act (BIA), its rules and directives were not respected in the administration of certain files.

- Failure to deposit all estate funds in the trust accounts, and delays of 30 days or more in making some deposits to the consolidated Bank Account (C.B.A).
- Using Consolidated Bank Account for five proposals and at the same time for consumer proposals.
- Failure to distribute interest on a monthly basis and to follow up on the debtor's N.S.F. cheques.
- Using the bank accounts for the distribution of dividends which is not foreseen in the Act nor in the Rules, and irregularities in the accounting entries.
- Deficiencies in the taking control and possession of assets in one estate.
- Deficiencies in inventory taking in two estates.
- Deficiencies in realization of assets and review of the Statement of Affairs in six estates.
- Deficiencies in the calculation of costs.
- Deficiencies in receiverships and acting in a dual capacity in two estates.

An agreement was then concluded between the parties and the honourable Fred Kaufman accepted this agreement to render his decision. Respecting the agreement, the Superintendent's delegate restricted the trustees for a period of 3 months from taking on any new bankruptcies, proposals, or receiverships and to act as an interim receiver. However, the trustees may continue to work on files which were opened prior to this order.

In the Matter of the Professional Conduct of Todd Y. Sheriff, Trustee, and Segal & Partners Inc., Corporate Trustee

On June 23, 2003, the Superintendent of Bankruptcy, Marc Mayrand, rendered his decision concerning the professional conduct of Todd Y. Sheriff and of corporate trustee, Segal & Partners Inc.

On September 6, 2002, Ann Speers, the Senior Analyst of Disciplinary Affairs, submitted a report regarding the above-mentioned trustees. A hearing was held before the Superintendent between May 27 and June 3 2002. On September 3, 2002, he rendered his first decision respecting the responsibilities of the trustees with regards to some offences. Following the second hearing which was held on November 12, 2002, the Superintendent made a decision, on February 12, 2003, on the duty of disclosing evidence.

The Superintendent of Bankruptcy relied on the following offences to render his decision:

- In the matter of Bruce Michael Grayson:
  - the trustee did not demonstrate the due care, competence and diligence expected of trustees in assessing the affairs of the debtor nor in determining that a proposal was viable under the circumstances known to them;
  - the lack of due care, competence and diligence on behalf of the trustees in reviewing and verifying the debtor's financial affairs caused the latter to engage in costly proceedings which were doomed to fail.
- In the matter of John Gordon Sargant:
  - the trustees did not display the competence and diligence expected of a trustee in overseeing the preparation of a consumer proposal documentation and more specifically, in adequately verifying the affairs of the debtor;
  - the trustees advised and assisted the debtor to proceed with a proposal to "repay in full " the creditors while the trustees knew the debtor had secured a loan before filing the proposal and never did disclose the existence of such a loan to the creditors.

- In the matter of Grayson and Sargant:
  - the trustees and their staff failed to properly conduct an assessment of the debtor ;
  - the failure to conduct such proper assessment resulted in both debtors initiating proceedings which, had they been properly assessed, would never have been filed.
- The trustees failed to comply with Directive 4 — Delegation of Tasks, in allowing a non-licensed trustee staff member to sign the report to creditors on a consumer proposal. That failure was mitigated however, by the representations of the staff member that she was authorized to sign the said report.
- The trustees solicited proxies for a meeting of creditors. Such solicitation by the trustees is mitigated by the fact that it failed to secure the required votes to resist an anticipated motion for substitution that in the end was not pursued.
- The trustees deliberately and knowingly attempted to obtain the payment of fees from the bankruptcy estate of Bruce Michael Grayson
- In the bankruptcy estate of Sargant, the trustee inadvertently filed a false proof of claim, having failed to deduct from his claim the interim fees already collected.

Following the recommandations of the parties involved, the Superintendant rendered his decision:

- That the licence of Segal and Partners be restricted for a period of one month from filing any estates under the BIA
- That the licence of Todd Y. Sheriff be suspended for a period of 6 months;
- That the licence of Todd Y. Sheriff be, upon the expiration of the six month suspension, restricted thereafter to the filing and administration of corporate estates for a minimum of 18 months before the trustee can apply to appear before an Ad Hoc Oral Board to have the restriction lifted in total or in part and until such restriction is lifted;
- That the Ad Hoc Oral Board referred to previously be tasked with assessing Todd Y. Sheriff's knowledge, competence and professional ethics in relation to the administration of personal insolvencies;
- That within the next year, the trustee Todd Y. Sheriff successfully pass a business ethics course;
- That Segal & Partners Inc. must restitute to the estate of Bruce Michael Grayson the sums of $168.00 and of $90.95 and provide satisfactory evidence to that effect to the Toronto Division Assistant Superintendent within 10 days.

The Superintendent's decision is subject to a pending Application for judicial review and the enforcement of any penalty pursuant to the decision is stayed until the outcome of the judicial review is finally determined.

Superintendent's Statement on Faxed and Electronic Proofs of Claim

Recently the Office of the Superintendent of Bankruptcy has received a number of enquiries regarding the validity of Proofs of Claim filed with the trustee by fax and by a web-based mode of transmission that uses scanned images of signatures. The position of the OSB on these matters is summarized below.

Proofs of Claim Sent By Fax

Over the past number of years, facsimile transmission of documents has become a widely-accepted and efficient means of transmitting documents between parties, and questions of the validity of these documents have been largely resolved over time. The Federal Court, for example, acknowledges that the concept of the 'original signature' has over time evolved towards that of 'handwritten' signature which is sufficient to permit faxed affidavits and consents. Similarly, the OSB has accepted faxed assignment documents for several years. A safeguard exists in the fact that there is a signed and witnessed original retained by the sender, which can be produced for evidentiary purposes should the need arise.

Subsection 108(2) of the *Bankruptcy and Insolvency Act* (BIA) specifically allows for electronically transmitted proofs of claim for the purposes of voting. Trustees have the ability to require additional proof from a creditor when necessary to help them decide whether to accept or reject a claim. In their professional capacity, trustees must weigh the risks associated with accepting any claim and demand the appropriate degree of proof. Clearly, the risks are lower when no dividends will be paid.

The OSB is unaware of any current challenges to the acceptability of a document with a faxed signature, and has no particular concern with the judicious use of faxed proofs of claim.

Electronically Transmitted Proofs of Claim with Scanned Signatures

Determining the validity of an electronically transmitted proof of claim with scanned signatures is complicated by the fact that regulations for the *Personal Information Protection and Electronic Documents Act* (PIPEDA) have not as of this date been finalized, as well as by a lack of case law in this area. Section 46 of this federal statute states that the acceptable electronic equivalent of a document with a witnessed signature would contain 'secure electronic signatures'. Until such time as regulations are in force to define the features of a 'secure electronic signature', it is not possible to categorically declare whether the scanned signatures on proofs of claim are in compliance with PIPEDA or not. However, given the content of the proposed regulations on this subject, it would appear highly unlikely that a scanned signature would satisfy the exigencies of section 46.

The other salient difference is that there is no original signed and witnessed document in this situation. Trustees should be aware that they could be challenged by creditors, especially if dividends are being paid on the strength of proofs of claim with scanned signatures alone. Until such time as clear standards exist, trustees must be aware that there are risks involved in this practice, and that they could be held liable if another party can show it was prejudiced.

Meanwhile, the OSB is continuing its efforts to remove any remaining impediments to the electronic transmission of documents between insolvency stakeholders. Earlier amendments to the BIA have done much to facilitate this already. Work is currently underway to identify any remaining hurdles, and wherever appropriate to remove them. In this way we will promote a modernized insolvency system and contribute to the Government's broader agenda of connecting Canadians and encouraging innovation.

OSB Newsletter

If you have any questions or comments regarding this Newsletter or suggestions for future ones, please address them to the Newsletter Coordinator, Vivian Cousineau. She can be reached by regular mail at 301 Elgin Street, 2nd Floor, Ottawa, Ontario, K2P 2N9, by phone at (613) 941-2694, by fax at (613) 946-9205 or by e-mail at ***cousineau.vivian@ic.gc.ca***

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