Federal Court

Cour fédérale

Date: 20100128

Docket: T-327-09

Citation: 2010 FC 97

Ottawa, Ontario, January 28, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

SYLVIE LAPERRIÈRE, in her capacity as Senior Analyst – Professional Conduct of the Office of the Superintendent of Bankruptcy

Applicant

and

ALLEN W. MACLEOD and D&A MACLEOD COMPANY LTD.

Respondents

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

[1] This concerns an application submitted by Sylvie Laperrière (the "Applicant"), a Senior Analyst – Professional Conduct with the Office of the Superintendent of Bankruptcy, seeking judicial review of related decisions made by the Honourable James B. Chadwick, acting in his capacity as Delegate of the Superintendent of Bankruptcy, and under which most of the allegations of misconduct against the bankruptcy trustees Allen W. MacLeod and D. & A. MacLeod Company

Ltd. (the “Respondents”) were rejected, but however imposing a sanction in the form of a reprimand against the Respondents for delay in the administration of two estates.

Background

[2] The licencing and professional conduct of bankruptcy trustees are under the control and supervision of the Superintendent of Bankruptcy (the “Superintendent”). For these purposes, the Superintendent is entrusted with supervising the activities of bankruptcy trustees and disciplining them in appropriate circumstances. The powers of investigation and discipline of bankruptcy trustees must be carried out with due regard to the rules of fundamental justice. Consequently, a particular scheme has been established under the *Bankruptcy and Insolvency Act* , R.S., 1985, c. B-3 (the “Act”) to afford trustees a fair hearing and certain procedural safeguards prior to imposing a measure or sanction under the Act.

[3] This scheme is principally set out in sections 14.01 and 14.02 of the Act which read as follows:

> 14.01 (1) If, after making or causing to be made an inquiry or investigation into the conduct of a trustee, it appears to the Superintendent that
>
> (*a*) a trustee has not properly performed the duties of a trustee or has been guilty of any improper management of an estate,
>
> (*b*) a trustee has not fully complied with this Act, the General Rules, directives of the Superintendent or any law with regard to the proper administration of any estate, or

> 14.01 (1) Après avoir tenu ou fait tenir une investigation ou une enquête sur la conduite du syndic, le surintendant peut prendre l’une ou plusieurs des mesures énumérées ci-après, soit lorsque le syndic ne remplit pas adéquatement ses fonctions ou a été reconnu coupable de mauvaise administration de l’actif, soit lorsqu’il n’a pas observé la présente loi, les Règles générales, les instructions du surintendant ou toute autre règle de droit relative à la bonne administration de l’actif, soit lorsqu’il est dans l’intérêt public de le faire :

(*c*) it is in the public interest to do so, the Superintendent may do one or more of the following:

(*d*) cancel or suspend the licence of the trustee;

a) annuler ou suspendre la licence du syndic;

(*e*) place such conditions or limitations on the licence as the Superintendent considers appropriate including a requirement that the trustee successfully take an exam or enrol in a proficiency course;

b) soumettre sa licence aux conditions ou restrictions qu'il estime indiquées, et notamment l'obligation de se soumettre à des examens et de les réussir ou de suivre des cours de formation;

(*f*) require the trustee to make restitution to the estate of such amount of money as the estate has been deprived of as a result of the trustee's conduct; and

c) ordonner au syndic de rembourser à l'actif toute somme qui y a été soustraite en raison de sa conduite;

(*g*) require the trustee to do anything that the Superintendent considers appropriate and that the trustee has agreed to.

d) ordonner au syndic de prendre toute mesure qu'il estime indiquée et que celui-ci a agréée.

(1.1) This section and section 14.02 apply, in so far as they are applicable, in respect of former trustees, with such modifications as the circumstances require.

(1.1) Dans la mesure où ils sont applicables, le présent article et l'article 14.02 s'appliquent aux anciens syndics avec les adaptations nécessaires.

(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 subsection (1), subsection 13.2(5), (6) or (7) or section 14.02 or 14.03.

(2) Le surintendant peut, par écrit et aux conditions qu'il précise dans cet écrit, déléguer tout ou partie des attributions que lui confèrent respectivement le paragraphe (1), les paragraphes 13.2(5), (6) et (7) et les articles 14.02 et14.03.

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

(3) En cas de délégation aux termes du paragraphe (2), le surintendant ou le délégué doit :

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

a) dans la mesure où la délégation vise les syndics en général, en aviser tous les syndics par écrit;

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.

b) en tout état de cause, aviser par écrit, avant l’exercice du pouvoir qui fait l’objet de la délégation ou lors de son exercice, tout syndic qui pourrait être touché par l’exercice de ce pouvoir.

14.02 (1) Before deciding whether to exercise any of the powers referred to in subsection1 4.01(1), the Superintendent shall send the trustee written notice of the powers that the Superintendent may exercise and the reasons why they may be exercised and afford the trustee a reasonable opportunity for a hearing.

14.02 (1) Avant de décider de prendre l’une ou plusieurs des mesures visées au paragraphe 14.01(1), le surintendant envoie au syndic un avis écrit et motivé de la ou des mesures qu’il peut prendre et lui donne la possibilité de se faire entendre.

(1.1) The Superintendent may, for the purpose of the hearing, issue a summons requiring and commanding any person named in it

(1.1) Il peut, aux fins d’audition, convoquer des témoins par assignation leur enjoignant :

(*a*) to appear at the time and place mentioned in it;

a) de comparaître aux date, heure et lieu indiqués;

(*b*) to testify to all matters within their knowledge relative to the subject matter of the inquiry or investigation into the conduct of the trustee; and

b) de témoigner sur tous faits connus d’eux se rapportant à l’investigation ou à l’enquête sur la conduite du syndic;

(*c*) to bring and produce any books, records, data, documents or papers — including those in electronic form — in their possession or under their control relative to the subject matter of the inquiry or investigation.

c) de produire tous livres, registres, données, documents ou papiers, sur support électronique ou autre, qui se rapportent à l’investigation ou à l’enquête et dont ils ont la possession ou la responsabilité.

(1.2) A person may be summoned from any part of Canada by virtue of a summons issued under subsection (1.1).

(1.2) Les assignations visées au paragraphe (1.1) ont effet sur tout le territoire canadien.

(1.3) Any person summoned under

(1.3) Toute personne assignée reçoit les

subsection (1.1) is entitled to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court.

(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 and the record and the hearing are public, unless the Superintendent is satisfied that personal or other matters that may be disclosed are of such a nature that the desirability of avoiding public disclosure of those matters in the interest of a third party or in the public interest, outweighs the desirability of the access by the public to information about those matters.

(4) The decision of the Superintendent after a hearing referred to in subsection (1), together with the reasons therefore, shall be given in writing to the trustee

frais et indemnités accordés aux témoins assignés devant la Cour fédérale.

(2) Lors de l'audition, le surintendant :

a) peut faire prêter serment;

b) n'est lié par aucune règle juridique ou procédurale en matière de preuve;

c) règle les questions exposées dans l'avis d'audition avec célérité et sans formalisme, eu égard aux circonstances et à l'équité;

d) fait établir un résumé écrit de toute preuve orale.

(3) L'audition et le dossier de l'audition sont publics à moins que le surintendant ne juge que la nature des révélations possibles sur des questions personnelles ou autres est telle que, en l'espèce, l'intérêt d'un tiers ou l'intérêt public l'emporte sur le droit du public à l'information. Le dossier de l'audition comprend l'avis prévu au paragraphe (1), le résumé de la preuve orale visé à l'alinéa (2)*d*) et la preuve documentaire reçue par le surintendant.

(4) La décision du surintendant est rendue par écrit, motivée et remise au syndic dans les trois mois suivant la clôture de l'audition, et elle est

not later than three months after the conclusion of the hearing, and is public.	publique.
(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 Courts Act*.	(5) La décision du surintendant, rendue et remise conformément au paragraphe (4), est assimilée à celle d'un office fédéral et comme telle est soumise au pouvoir d'examen et d'annulation prévu à la *Loi sur les Cours fédérales*.

[4] Under the scheme, the Superintendent has delegated authority to investigate the conduct of bankruptcy trustees to certain members of the staff of his office, including, in this case, the Applicant. Once the results of an investigation allow the investigator to conclude that a bankruptcy trustee should be subjected to remedial measures or sanctions under subsection 14.1(1) of the Act, the concerned bankruptcy trustee must be provided with a notice thereof and afforded a reasonable opportunity for a hearing, which hearing may be conducted by the Superintendent himself, but which more often than not is conducted by a delegate of the Superintendent designated for this purpose.

[5] In this case, various monitoring activities were carried out over the years by the Office of the Superintendent of Bankruptcy (the "OSB") in regard to Allen MacLeod, his now deceased father Donald A. MacLeod, and their joint trustee in bankruptcy business D. & A. MacLeod Company Limited (collectively referred to as the "MacLeod bankruptcy trustees"). These monitoring activities revealed various alleged irregularities in the operations of these trustees, including particularly the operation of an interest trust account. The operation of this account, of which more will be discussed

below, appears to have been the determining factor in pursuing further investigations into the MacLeod bankruptcy trustees.

[6] These monitoring activities eventually resulted in an investigation of the MacLeod bankruptcy trustees by the Applicant, culminating in a long report dated February 27, 2007 (the “Report”), in which the Applicant alleged numerous professional conduct breaches by the MacLeod bankruptcy trustees, and recommended that sanctions be taken against these trustees as a result thereof.

[7] The Superintendent appointed the Honourable James B. Chadwick to carry out hearings in order to adjudicate these allegations. These hearings were delayed by various procedural matters concerning principally the production of documents and the disclosure of evidence. Moreover, as a result of the ill health of Mr. Donald MacLeod, the allegations against him were stayed. Mr. Donald MacLeod subsequently passed away. The proceedings thus concern Mr. Allen W. MacLeod and D. & A. MacLeod Company Limited.

[8] The hearings resulted in a first decision by the Honourable Chadwick dated December 1, 2008 (the “Liability Decision”) in which he found that almost all the allegations against the Respondents were without merit. He however found that the Respondents had not completed the administration of two estates in a timely manner, and called for written submissions from the parties regarding both the question of costs and the sanctions which would be appropriate in the circumstances.

[9] Following these submissions, the Honourable Chadwick issued a second decision on sanctions and costs dated February 5, 2009 (the "Sanctions Decision"), in which he imposed a reprimand on the Respondents and found that he had no jurisdiction to award costs under the provisions of the Act.

The Decisions

[10] In the Liability Decision dated December 1, 2008, the Delegate described the allegations against the Respondents under 12 headings, following the structure of the Report prepared by the Applicant. These headings are as follows and for purposes of consistency will be maintained throughout this judgment:

A. Bank balances of estate and insolvency files deposited in an "Interest Account".

B. Applications for trustee discharge while having a bank balance in the estate account.

C. Surplus from the consolidated trust account for summary administrations deposited in an "Interest Account".

D. Monies withdrawn for various uses from an "Interest Account".

E. Statements of Receipts and Disbursements.

F. Unauthorized fee withdrawal in a consumer proposal.

G. "Clearing Account" used to post estate transactions.

H. Co-mingling of funds in consolidated trust accounts.

I. Disbursement claimed for services performed by a related person.

J. "Third Party Account" used to post estate transactions.

K. Monies not deposited forthwith.

L. Delay in the administration of estates.

[11] The Delegate first addressed in his decision a motion to stay the proceedings which had been submitted by the Respondents on the basis of alleged prosecutorial partiality and overzealousness by the Applicant. The Delegate dismissed this motion on the basis that the issues raised by it could be better dealt with on the merits of the case.

[12] At the outset, the first issue to address on the merits was deemed by the Delegate to be the application of strict liability as opposed to absolute liability in regard to the alleged misconduct of the Respondents. The Delegate was of the view (at para. 13 of the Liability Decision) that the allegations of misconduct pursuant to the Act, its regulations and any resulting directives were strict liability offences, and consequently it was open for the Respondents to prove that they took all reasonable steps under the circumstances in order to avoid a finding of misconduct.

[13] The Delegate then commented on the objectivity of the Applicant in carrying out her investigation and drafting her Report. He concluded that her Report "had been crafted to support the allegations and lacked both impartiality and objectivity" (at para. 44 of the Liability Decision). Consequently, the Report was to be "weighed and scrutinized very carefully" (at para. 47 of the Liability Decision). He also noted that there was some controversy within the OSB about the appropriateness of proceeding with disciplinary measures against the MacLeod bankruptcy trustees in the circumstances of this case (at paras. 48-49 of the Liability Decision).

[14] Concerning the merits of the allegations, the Delegate first addressed what appeared to be the principal allegation and which was described under heading A as bank balances of estate and insolvency files deposited in an “Interest Account”. The Delegate noted that the most serious alleged irregularity related to the operation of this Interest Account by the Respondents (at para. 36 of the Liability Decision). It indeed appears from the record that the operation of this account was the kingpin underlying the investigation by the Applicant and her subsequent Report.

[15] Some background explanation is required to properly understand the circumstances surrounding this allegation.

[16] Pursuant to subsection 25(1) of the Act, a trustee in bankruptcy must deposit in a bank all funds received for an estate in a separate trust account for each estate. Moreover, sections 151 and 152 of the Act provide that when the trustee has realized all the property of the bankrupt, he must prepare a final statement of receipts and disbursements and a dividend sheet and, subject to the Act, divide the property of the bankrupt among the creditors who have proved their claims. In light of delays in closing accounts between the time the final statement of receipts and disbursements is made and the discharge of the trustee pursuant to the Act, amounts in the estate trust accounts may accumulate interest.

[17] Subsection 154(1) of the Act provides that before proceeding to discharge, the trustee must forward to the Superintendent for deposit with the Receiver General, according to the directives of

the Superintendent, the unclaimed dividends and undistributed funds that the trustee possesses. Consequently, the interest accumulated in the trust accounts between the final statement of receipts and disbursements and the discharge of the trustee may end up in the hands of the Receiver General rather than those of the creditors.

[18] This eventuality is specifically contemplated by Directive number 5 issued on November 17, 1994 by the Superintendent and concerning "Estate Funds and Banking". Section 12 of this Directive 5 states that any amount of interest earned on a trust account and not apportioned to individual estate accounts shall be remitted to the Superintendent as an undistributed asset as provided in Directive 8 entitled "Unclaimed Dividends and Undistributed Funds". However, this Directive 8 issued June 19, 1986 itself provides in its section 15 that where additional interest is received after the preparation of the statement of receipts and disbursements, the amount should be distributed to the creditors by way of an amended or additional dividend sheet where the amount available exceeds that set out in guidelines.

[19] The Respondents took an original approach to compliance with these provisions by operating an "Interest Account" in which surplus interest from the various estates would be deposited or paid out. At the time of the preparation of the final statement of receipts and disbursements, the Respondents would estimate the interest which would be earned up to the closing of the estate. If at the time of closing, the actual amount accumulated in the estate was more than the estimate, this excess amount would be transferred to the "Interest Account". Conversely, if the amount was underestimated, then this sum would be transferred into the estate from the "Interest

Account”. In this manner, the interest generated in the estates would, in principle, be returned to the creditors rather than end up in the hands of the Receiver General.

[20] Based on his assessment of the evidence, the Delegate found no impropriety or misconduct on the part of the Respondents in the operation of this account. He based this finding on the evidence submitted that the account had been authorized by the OSB pending a final decision as to its continued operation, and had been subsequently closed when the OSB requested such closure.

[21] In regard specifically to the allegations under heading D concerning monies withdrawn for various uses from the Interest Account, the Delegate found as follows at paragraph 73 of his decision: “In view of my decision in paragraph A relating to a finding that the trustees were authorized to maintain the interest account for a definite period and when directed to cease they closed the account. Since they did so, I find no misconduct on behalf of the trustees.”

[22] The allegations under headings B, E, H, J and K were all rejected on the basis that a strict liability defence had been made out by the Respondents. It was also found by the Delegate that these allegations resulted from minor administrative errors which were subsequently either corrected or had no real impact on any creditor. The Delegate however recognized at paragraph 102 of the Liability Decision that his conclusions in regard to these headings were premised on the applicability of strict liability:

> With reference to the allegations B, E, H, J, and K, these were all as a result of administrative error. If I am wrong in the interpretation of the nature of the contraventions, and they are absolute, then the trustee’s are in contravention of the various sections of the *Act*. The fact the trustees made administrative errors would have to be taken into consideration under the sanction section of this hearing.

[23] The allegations under headings C, F, G, and I were rejected on the basis that no contravention of the Act or of its related Rules or Directives had occurred.

[24] It is useful to note that the Delegate stated in paragraph 67 of the Liability Decision that most of the allegations against the Respondents were minor technical issues which had been taken out of context by the Applicant:

> Mr. MacLeod, in his evidence, testified as to the number of estates that their firm handled. Filed as an exhibit was a breakdown showing that they handled 2177 estates, which included 89,268 transactions and the dollars transacted were $21,595,694.41. When one looks at the volume of transactions and estates, the allegations against MacLeod appear to be taken out of context. It would almost appear that OSB is searching to find some irregularity, no matter how small, in order to support their allegations of misconduct.

This is a recurring theme throughout the Liability Decision, notably paragraph 84 thereof where the Delegate found that certain allegations concerned matters involving only 100th of 1% of the summary estate management of the Respondents.

[25] Finally, in regard to allegations under heading L, the Delegate found that the Respondents had not acted with celerity in the administration of two estates. The sanctions related to these two proven allegations of misconduct were dealt with under a separate decision on sanctions and costs dated February 5, 2009.

[26] Concerning sanctions, the Applicant requested that the corporate trustee licence of D. & A. MacLeod Company Limited be restricted for a period of four (4) weeks during which time it would

not be permitted to accept new appointments under the Act but would be able to administer estates for which it had already been appointed. The Applicant also requested that the trustee licence of Allen W. McLeod be suspended for four (4) weeks.

[27] Conversely, the Respondents argued that no sanctions should be imposed based on the alleged lack of impartiality and objectivity of the investigation, on the impact the investigation and related proceedings had on their trustee business, their reputation in the community, and on their emotional and economic suffering resulting from all these proceedings.

[28] The Delegate concluded that a reprimand was appropriate in the circumstances and expressed himself as follows at paragraph 20 of the Sanctions Decisions:

> In my view the sanction to be imposed upon Mr. MacLeod and D. & A. MacLeod Company Ltd. should be in the form of a reprimand. The reprimand is set out in my reasons and findings of December 1, 2008. In my view, it does not require any further reprimand or sanction. I am sure what the trustee has experienced will serve as a general deterrence to other trustees. Having spent over $150,000 to defend himself, along with all the time and effort expended over the years he does not need any more of a specific deterrence.

Position of the Applicant

[29] Those parts of the Liability Decision of the Delegate rejecting the allegation under headings C, F, G, and I are not challenged by the Applicant. The remaining parts of the Liability Decision as well as the Sanctions Decision are challenged by the Applicant on various grounds.

[30] As concerns the allegations described under heading A as bank balances of estate and insolvency files deposited in an “Interest Account”, the Applicant seeks to have this Court overturn the Delegate’s finding of fact that the Respondents had been authorized by the OSB to maintain such an account. The Applicant contends that this finding of fact runs contrary to the documentary evidence and the testimony in the record and is thus unreasonable and made without regard to the evidence.

[31] Concerning the allegations contained under heading D relating to monies withdrawn for various uses from the Interest Account, the Applicant argues that even if the Delegate did not err in finding that the authorization to operate the account was given, liability should still be found as the Respondents admitted that they did not use the Interest Account solely to maximize interests for creditors, and thus also used this account to replace monies missing in estates due to their own errors.

[32] Concerning the allegations contained under headings B, E, H, J and K, the Applicant contends that the Delegate made a reviewable error in law by applying strict liability principles to contraventions of the Act and of its related Rules and Directives. In a nutshell, the Applicant states that it is not appropriate to import the criminal law classification of offences into regulatory proceedings concerning the termination or suspension of a licence authorizing the performance of regulated activities. Consequently, the defence of due diligence should not apply to the allegations under these headings, and the Delegate erred in law in finding otherwise. For the Applicant,

evidence of due diligence is only relevant at the stage of determining which measure or sanction, if any, should be issued in the exercise of the appropriate remedies set out in section 14.01 of the Act.

[33] As a subsidiary argument concerning the allegations contained under headings B, E, H, J and K, the Applicant adds that even if the Delegate was correct to hold that the defence of due diligence was available to the Respondents, he committed reviewable errors in fact and in law by concluding that the Respondents discharged their burden of proving due diligence.

[34] The Applicant also argues that the Delegate erred in law by issuing a reprimand against the Respondents for acting without celerity in the administration of two estates. The Applicant argues that a reprimand is not a measure provided for in section 14.01 of the Act.

[35] Finally, the Applicant argues that the Delegate erred both in law and in fact in finding that her Report lacked objectivity and impartiality. First, it is argued that it is an error in law to require an investigator to be impartial. Impartiality is a procedural guarantee required from an adjudicator and is a notion at odds with the functions performed by an investigator in disciplinary proceedings. In addition, the Applicant adds that the findings of partiality were not supported by the evidence.

[36] Consequently, the Applicant asks this Court to set aside both the Liability Decision and the Sanctions Decision and to refer the matter back to the Superintendent to be dealt with in conformity with section 14.01 of the Act, with costs being awarded in favour of the Applicant.

Position of the Respondents

[37] A few days prior to the hearing on the merits of this judicial review, the Respondents submitted a motion to the Court challenging the Applicant's right to submit the Application in regard to the Liability Decision on the basis of tardiness and the fact that the Application concerned both the Liability Decision and the Sanctions Decision, thus contravening Rule 302 of the *Federal Courts Rules*. I have rejected these arguments for the reasons set out in a separate decision on the motion issued concurrently with this judgment.

[38] The Respondents note that they have been made to endure a seven year process of monitoring, auditing, and investigations characterized by delays, refusal to provide full disclosure, demonstrated bias and a lack of objectivity. They note the strong words used by the Delegate in criticising the OSB in the conduct of this investigation. They argue that this Court should thus consider this judicial review application against the same backdrop of unfairness, impropriety and inappropriate treatment of the Respondents by the OSB as found by the Delegate.

[39] As concerns the allegations described under heading A as bank balances of estate and insolvency files deposited in an "Interest Account", the Respondents note that they did not believe they were contravening any rules when they opened the Interest Account, and they took no personal advantage from this account. The Interest Account was operated in an attempt to increase the return to the stakeholders in the bankruptcy system. When the OSB first questioned their operation of the Interest Account, the matter was discussed extensively with the concerned officials since the operation of the account was far from being viewed as inappropriate. The Respondents sought to

continue to operate the account pending a final determination on the matter, and an authorization to proceed with the continued operation of the account was provided to them by the OSB. When the final decision was made by the OSB to close the account, they complied. The Respondents thus submit that the Applicant is barred from arguing that there was any impropriety in the manner in which the Interest Account was operated since it was operated with the knowledge and authorization of officials from the OSB.

[40] The Delegate made findings of fact concluding that the continued operation of the Interest Account had been authorized by the OSB. These findings of fact were based on the assessment of the credibility of the witnesses who testified and were reasonable given the totality of the evidence submitted. Consequently, the Respondents argue that this Court should not disturb such findings of fact in judicial review.

[41] Alternatively, even if the continued operation of the Interest Account was not approved, the Respondents argue that no impropriety was established in regard to its operation. The Applicant failed to adduce any evidence to prove that any creditor lost money as a result of the operation of the Interest Account. Moreover, subsection 154(1) of the Act requires the trustee to forward to the Superintendent the unclaimed dividends in estate accounts. When the Respondents were required to close the account, they complied and remitted the balance of $19,553.27 in the account to the Superintendent with the detail trial balance for the account when it was closed. Overall, taken as a whole, the operations of the account were not in contravention of the Act and were to the benefit of

the estates. Consequently, no breach of conduct can be found to have occurred irrespective of whether or not the account had been authorized.

[42] Concerning the allegations contained under heading D relating to monies withdrawn for various uses from the Interest Account, the Respondents argue that the impugned transactions in the Interest Account were known to the OSB prior to its approval of the continued operation of this account. The Applicant refused to admit that the account approval had been provided; consequently the Applicant adduced no evidence of the parameters of this approval or establishing that the Respondents exceeded this approval. The Delegate was thus justified in concluding that these operations were within the ambit of the authorization provided, and he certainly committed no reviewable error in so finding.

[43] The Respondents argue that all the allegations, including those set out under headings B, E, H, J and K, are subject to principles of strict liability, and consequently a defence of due diligence is available to them to counter these allegations, and that consequently the Delegate did not err in so finding.

[44] The Respondents further argue that the Delegate did not err in finding that they had proved due diligence countering the allegations under headings B, E, H, J and K. They note that for the period of 1993 to 2007 covered by the allegations made against them, they would have managed approximately 9,954 estates representing close to $100 million in transactions. They also note that the average transaction size was $241.92 and that there were approximately 108,160 transactions.

They further note that they did not benefit financially from any errors nor were the estates or creditors deprived of any monies.

[45] Finally, the Respondents argue that it was open for the Delegate to issue a reprimand as a sanction for the two minor offences he found them to have committed, since the range of sanctions set out in subsection 14.01 of the Act should not be construed as limited to those enumerated therein.

[46] Consequently, the Respondents ask this Court to dismiss the judicial review application with costs against the Applicant.

The Issues

[47] The principal issues to be dealt with in this judicial review can be stated as follows:

(a) What is the applicable standard of review?

(b) Did the Delegate commit reviewable errors in finding as a matter of fact that the operations of the Interest Account had been authorized (allegations under headings A and D)?

(c) Are the allegations under headings B, E, H, J and K subject to a due diligence defence?

(d) If these allegations are subject to a due diligence defence, did the Delegate commit reviewable errors in finding that such a defence had been made out to counter the allegations under headings B, E, H, J and K?

(e) Is a reprimand an available remedy or sanction under the scheme of the Act?

(f) Are prosecutorial partiality and overzealousness factors to take into account in proceedings under sections 14.01 and 14.02 of the Act, and if so, did the Delegate commit reviewable errors in finding as a matter of fact that such factors were present in this case?

The Standard of Review

[48] The Applicant asserts on the basis of *Jacques Roy v. Sylvie Laperrière*, 2006 FC 1386, *Canada (Attorney General) v. Jacques Roy*, 2006 FC 1387 and *Canada (Attorney General) v. Jacques Roy*, 2007 FCA 410, that questions of law decided by the Delegate are reviewable on a standard of correctness, while questions of fact are to be reviewed on a standard of reasonableness.

[49] On the other hand, the Respondents asserts on the basis of *Jacques Roy v. Sylvie Laperrière, supra*, and *Sheriff v. Canada (Attorney General)*, 2005 FC 305, that both questions of fact and mixed questions of fact and of law decided by the Delegate are reviewable on a standard of reasonableness. Moreover, the Respondents add, on the basis of *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 ("*Dunsmuir*"), that certain questions of law are also reviewable on a standard of reasonableness, most notably questions of law in the interpretation of an administrative tribunal's constitutive legislation or for which the administrative tribunal has special expertise. The Respondents argue that the determination of whether strict liability as opposed to absolute liability applies to trustee misconduct allegations under the Act is one of those issues of law reviewable on a

standard of reasonableness, as is the issue of the availability of a reprimand as a remedy or sanction under the Act, since both these issues of law fall under the special expertise of the Delegate.

[50] *Dunsmuir*, at para. 62 established a two-step process for determining the standard of review. First, the Court ascertains whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, the Court must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[51] Prior jurisprudence has held that issues of jurisdiction, fundamental justice and procedural fairness arising out of proceedings before delegates of the Superintendent acting under section 14.01 of the Act are to be reviewed on a standard of correctness: *Sam Lévy & Associés v. Canada (Superintendent of Bankruptcy)*, 2005 FC 702, at paragraphs 26-27; *Sheriff v. Canada (Attorney General)*, 2006 FCA 139 at paragraph 24. Likewise, questions of law arising in such proceedings have also been held to be subject to review on a standard of correctness: *Jacques Roy v. Sylvie Laperrière*, 2006 FC 1386 at paragraph 70; *Canada (Attorney General) v. Jacques Roy*, 2006 FC 1387 at paragraph 21; *Sheriff v. Canada (Attorney General)*, 2005 FC 305 at paragraph 32. However, questions of mixed law and fact have been held reviewable on the standard of reasonableness *simpliciter*: *Jacques Roy v. Sylvie Laperrière*, *supra*, at paragraphs 21 to 23; *Canada (Attorney General) v. Jacques Roy*, *supra*, at paragraph 19; *Sheriff v. Canada (Attorney General)*, *supra*, at paragraph 30.

[52] Since this judicial review is the first to arise in the context of sections 14.01 and 14.02 of the Act since the decision of the Supreme Court of Canada in *Dunsmuir*, and since the Respondents are arguing that pursuant to *Dunsmuir*, a standard of reasonableness rather than that of correctness should be applied to the issues of law raised by these proceedings, it is appropriate to carry out a standard of review analysis in this case.

[53] *Dunsmuir* states at paragraph 64 that the standard of review analysis must be contextual and is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal.

[54] Here the decision of the Delegate is not protected by a privative clause. This tends to imply that a lesser degree of deference, particularly on issues of law, is to be shown by a reviewing court. No appeal is provided for, however subsection 14.02(5) of the Act specifically sets out that a decision of the Superintendent, and by implication of his Delegate, concerning the professional misconduct of a bankruptcy trustee, may be reviewed and set aside pursuant to the *Federal Courts Act*. Though this provision may be inserted in the concerned section principally in order to clearly point out the exclusive jurisdiction of the Federal Court in reviewing decisions of the Superintendent or his delegate under sections 14.01 and 14.02 of the Act, it nevertheless indicates a clear intention by Parliament to subject such decisions to judicial review, and it constitutes to some extent an explicit legislative repudiation of any privative clause in regard to such decisions.

[55] The purpose of such proceedings under the Act is also instructive. The Superintendent is entrusted under paragraphs 5(3) (a) and (b) of the Act to issue a licence to a bankruptcy trustee and to monitor the conditions under which such licence has been issued, and to take appropriate action if these conditions no longer exist. The Superintendent also has vast powers under paragraphs 5(4) (c), (d) and (d.1) of the Act to issue directives relating to the powers, duties and functions of trustees, governing the criteria to be applied in determining whether a trustee licence is to be issued, governing the qualifications and activities of trustees, and respecting the rules governing hearings held for the purposes of section 14.02 of the Act.

[56] Accordingly, subsection 14.01(1) of the Act specifically empowers the Superintendent to carry out an investigation into the conduct of a trustee. Where, following such an investigation, it appears that the trustee has not properly performed his duties, has improperly managed an estate, has not fully complied with the Act, its General Rules, or the directives of the Superintendent, or any law with regard to the proper management of an estate, or if it is in the public interest to do so, and following a notice to this effect and subject to the trustee being afforded a reasonable opportunity for a hearing under section 14.02 of the Act, the Superintendent may cancel or suspend the licence of a trustee, place conditions or limitations on such licence, and require the trustee to make restitution to an estate.

[57] These vast powers, and the general scheme of the Act, tend to imply a high degree of deference to the Superintendent in the management of bankruptcy trustees and of the licencing scheme concerning such trustees. These powers are clearly geared to the protection of the public,

and their purpose is to ensure that, in light of the key role played by bankruptcy trustees under the overall scheme of the Act, that a very high standard of probity, honesty and competence be maintained by such trustees across Canada, and that this be accomplished through a serious licencing scheme involving ongoing supervision and review by the Superintendent and providing for remedial measures and sanctions in appropriate circumstances.

[58] It should be noted that the expertise of the Superintendent is not at stake here. Rather, under the scheme set out under sections 14.01 and 14.02 of the Act, the Superintendent has, for the most part, delegated his authorities under these sections to senior members of his staff in regard to the prosecutorial aspect of these provisions, and to outside third parties, more often then not retired superior court judges or practicing lawyers, in regard to the adjudicative aspects of these provisions (see *Sam Lévy & Associés v. Canada (Superintendent of Bankruptcy)*, 2005 FC 702 at para. 145 and 156). The delegations of the prosecutorial aspects are long term delegations, while the adjudicative delegations are rather made on an *ad hoc* basis.

[59] The questions at issue in this case principally involve facts or issues of mixed law and fact. Such issues are generally reviewed on a standard of reasonableness: *Dunsmuir, supra*, at paragraph 53. The nature of the regime set out in the Act and the nature of the questions of fact and of mixed law and fact here at issue lead me to conclude that the appropriate standard of review in this case involving issues of fact or mixed issues of law and fact is reasonableness.

[60] However, there are two questions of law which were addressed by the Delegate and which must be reviewed here, namely if the allegations under headings B, E, H, J and K are subject to strict liability or absolute liability, and whether the Act provides for a reprimand as a form of sanction or remedy. The absence of a privative clause, the nature of the regime set out in the Act, the nature of the two questions of law at issue, and the *ad hoc* basis on which adjudicative delegations are made under the Act, lead me to conclude that the appropriate standard of review on these two questions of law is correctness.

[61] The Respondents argue that under the principles set out in *Dunsmuir* these two issues should be reviewed on a standard of reasonableness. I disagree. The Supreme Court in *Dunsmuir* noted that not every question of law is subject to the standard of correctness, and that consequently in certain circumstances, such as when an administrative tribunal is interpreting its home statute, reasonableness could govern the standard of review. However, while reiterating this principle, the Supreme Court of Canada took care in *Canada (Citizenship and Immigration) v. Khosa* [2009] 1 S.C.R. 339 at paragraph 44 to state that "[e]rrors of law are generally governed by a correctness standard". The principle, therefore, is that questions of law are to be reviewed on a standard of correctness; and the exception is that they should be reviewed, in certain particular circumstances, under a standard of reasonableness.

[62] One of these exceptions is where the administrative tribunal is interpreting its enabling or "home" statute. In such circumstances there is a presumption that the tribunal's interpretation of such statute is normally reviewable on a standard of reasonableness, provided the administrative

tribunal has explicit or implied authority to decide questions of law: *Dunsmuir, supra*, at paras. 54-55: *Association des courtiers et agents immobiliers du Québec v. Proprio Direct Inc.*, [2008] 2 S.C.R. 195 at para. 21, *Khosa, supra*, at para. 25; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 at paras. 33 and 34; *Canadian Federal Pilots Association v. Canada (Attorney General)*, 2009 FCA 223 at paras. 36 and 51.

[63] This presumption can however be rebutted, particularly where questions of law of central importance, or true questions of jurisdiction or *vires* are at issue in the interpretation of the enabling statute: *Dunsmuir, supra*, at paras. 55, 60 and 61. The circumstances under which the presumption may be rebutted are not limited to those set out in *Dunsmuir.* Thus, as example, the presumption can also be rebutted where an administrative tribunal has developed two conflicting lines of authority concerning the interpretation of its enabling statute: *Canada (Attorney General) v. Mowat*, 2009 FCA 309, at para. 45; *Abdoulrab v. Ontario (Labour Relations Board)*, 2009 ONCA 491 at para. 48.

[64] In this case, it is first useful to note that the *Bankruptcy and Insolvency Act* is not a "home statute" in the same sense as statutes setting up comprehensive labour relations dispute settlement mechanisms may be. The Act is a comprehensive scheme for the orderly resolution of bankruptcy and insolvency cases across Canada, and superior courts are generally called upon to interpret and apply its often complex provisions pursuant, notably, to section 183 of the Act. Since the licencing scheme for bankruptcy trustees and the related disciplinary scheme set out in sections 14.01 and 14.02 of the Act are intimately related to the entire scheme of the Act itself, it would be incongruent

to somehow apply a principle of judicial deference to the multiple legal issues arising from the Act simply because they are being dealt with within the context of a professional misconduct hearing.

[65] In addition, the two issues of law at issue here transcend the interests of the parties in this case. Applying strict liability with its attending defence of due diligence rather than absolute liability in the context of professional misconduct proceedings is a legal issue of importance which does not attract a standard of deference. The defence of due diligence is either available or not, and it would be unacceptable if, on a standard of reasonableness, different legal principles would apply to such a critical issue. Such a result would discredit the legal system.

[66] Third, the concept of absolute liability and the creation of a demarcation between strict liability and absolute liability flow from the common law and are a creation of the judiciary: *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at pages 1324-25 ("*Sault Ste. Marie*"). Consequently, the exception relating to the interpretation of the home statute clearly does not apply to that legal issue.

[67] The same conclusion on the standard of review is reached in regard to the availability of a reprimand as a sanction under subsection 14.01(1) of the Act. As noted by Brown, Donald J. M. and Evans, J. M., in *Judicial review of administrative action in Canada*, Canvasback Publishing, 1998 (loose-leaf), at 14:4523:

> "Today, notwithstanding a standard-of-review analysis, courts typically determine on the basis of correctness whether a tribunal had the authority to award compensation, exemplary damages, interest, costs, to substitute one penalty for another, or to make other remedial orders.

> Of course, if the various remedies are *within* the jurisdiction of an agency, then generally its exercise of discretion in the selection of the remedy will be subject to curial deference on review.” [Emphasis added].

[68] This approach was moreover followed in *Jacques Roy v. Sylvie Laperrière, supra*, at paragraph 70 where a standard of correctness was applied to the interpretation of subsection 14.01(1) of the Act concerning the availability of possible sanctions under that provision.

[69] In conclusion, a standard of reasonableness shall be applied to the review of all issues of fact or of mixed law and fact in this case, and a standard of correctness shall be applied to the two questions of law raised by these proceedings.

Did the Delegate commit reviewable errors in finding as a matter of fact that the operations of the Interest Account had been authorized (allegations under headings A and D)?

[70] As noted above, findings of fact by the Delegate are to be reviewed on a standard of reasonableness.

[71] The Applicant alleges that the findings of fact by the Delegate in regard to the operation of the Interest Account and various related allegations run contrary to the documentary evidence and the testimony in the record and are thus unreasonable.

[72] The decision of the Delegate in this matter is entirely based on his assessment of the evidence, and particularly his assessment of the credibility of the testimony of the various witnesses

he heard. The Delegate decided to accept the testimony of Mr. Allen W. MacLeod over that of other witnesses. This is dealt with extensively by the Delegate in paragraphs 55 to 61 of the Liability Decision:

> [55] After it was recommended that the account be closed, the trustees wrote to Claude Leduc, the District Assistant Superintendent at the Office of the Superintendent in Bankruptcy. The letter read in part as follows:
>
> > …The monitors state that we should not be including the estimated interest in the ordinary accounts that the interest account should be closed and the funds in this account should be forwarded to the Superintendent of Bankruptcy as undistributed assets. This matter was discussed with the monitor at some length, and while he agreed with some of our arguments, he said the final decision rests with you. We'd like to discuss this matter with you in more detail.
>
> [56] According to the evidence of Allen MacLeod, which I accept, he arranged to meet with Mr. Leduc to discuss the matter. He met with him on September 24, 2001 as noted in Mr. Allen MacLeod's daybook. There was no follow-up confirmation, but according to Allen MacLeod, Mr. Leduc authorized them to continue with the interest account.
>
> [57] Claude Leduc testified at the hearing and all he could say was he did not recall any meeting. He could not deny that such a meeting took place. He did say, however, he did not think he would have authorized the continuation of the interest account.
>
> [58] Mr. Leduc has been retired for a number of years and, unfortunately, all his files and records were either destroyed or lost. As a result, he had no way in which to refresh his memory or to verify or reject the evidence of Allen MacLeod. I therefore accept the evidence of Allen MacLeod and conclude they were authorized to continue the interest account until they received notice in March of 2003 from Jean-Louis Boucher, then a senior analyst with the OSB, to close the account and to forward all monies to the Superintendent of Bankruptcy.
>
> [59] Although there is some issue as to whether the trustees forwarded all of the monies, I am satisfied with the explanation given

> by Allen MacLeod that any discrepancy was as a result of adjustments made to the estates.
>
> [60] On March 31, 2003 Jean-Louis Boucher wrote to Donald MacLeod confirming that they received the monies and there was a balance of $1126.00 owing in order to close the account. In that letter, he concludes by stating:
>
> > This should conclude our concerns relating to the accumulation of undistributed funds in the account called interest.
>
> [61] On that basis, I find that there was no impropriety or misconduct on behalf of the trustees in the operation of the interest account.

[73] The Applicant contends that the Delegate should have considered the documentary evidence in deciding the credibility of the testimony of Mr. MacLeod, and in particular notes that the Respondents failed to notify the OSB of the authorization to operate the account though they had many opportunities to do so in response to various reports and correspondence with the OSB concerning this matter. This, the Applicant contends, renders suspicious the assertion of Mr. MacLeod that he had forgotten about the authorization, but that at a meeting in September of 2006 he had jogged his memory when the issue was raised and had remembered receiving the authorization.

[74] The record however shows that there was ample evidence before the Delegate to justify his findings of fact on the authorization of the Interest Account. Indeed, in response to a report from the OSB requesting the closure of the Interest Account, the Respondents wrote to Claude Leduc, the then District Assistant Superintendent of the OSB, on September 21, 2001, seeking further

discussions on the matter in light of the fact that representatives of the OSB agreed with some of the arguments of the Respondents concerning the appropriateness of maintaining such an account and the perceived benefits which may accrue to creditors. The pertinent extract of that letter is set out in paragraph 55 of the Liability Decision.

[75] The testimony of the Respondent Allen W. MacLeod on this issue, reproduced in the transcript of hearing pages 690 to 706 (Application Record Vol. 11 pages 2622 to 2638), shows that a meeting was subsequently held with Mr. Leduc to discuss this matter. This meeting was recorded by the Respondent in his appointment book. The Respondent Allen MacLeod testified as to what was discussed at that meeting and confirmed that an authorization to operate the account pending a final decision on the matter had been provided by Mr. Leduc.

[76] On the other hand, Mr. Leduc had no recollection of the meeting, but since he was meeting quite often with the Respondent, he could not deny that this specific meeting had been held (transcript of hearing pages 575 to 588, reproduced in the Application Record Vol. 11 pages 2508 to 2522). In cross-examination, Mr. Leduc noted that “I’m not saying there was not a meeting. I’m just saying I don’t remember it.”(transcript of hearing at page 581, reproduced in the Application Record Vol. 11 page 2514). It should also be noted that all the records of Mr. Leduc with the OSB had been destroyed following his retirement.

[77] Some time subsequent to this meeting, Mr. Jean-Louis Boucher, who was a senior analyst with the OSB, sent an email to the Respondents in March of 2003 confirming that the OSB no

longer had concerns about the Interest Account. In addition, Mr. Boucher's letter of March 2003 confirming the settlement of all matters related to the Interest Account was further confirmed in a memo dated January 27, 2005 from Richard Hunter of the OSB, the pertinent extracts of which are reproduced at paragraph 49 of the Liability Decision. In that memo, Mr. Hunter confirmed that Mr. Boucher "did not acknowledge the seriousness of what had been done to the audit report, <u>adding that everything seemed to be settled"</u> [emphasis added].

[78] All leads to the conclusion that the findings of the Delegate in regard to the authorization of the account are reasonable and fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47).

[79] The Applicant further argues that even if the Interest Account was authorized, this authorization could not extend to certain of the transactions which occurred in the account. This argument forms the basis of the Applicant's allegations under heading D.

[80] However, since the Delegate found that the operation of the Interest Account had been authorized by the OSB until the decision to close it was made effective, and in light of the fact that the OSB was aware of impugned transactions referred to in the allegations under heading D when this authorization was provided, the finding of the Delegate that no misconduct had occurred in relation to these heading D allegations flows from his finding of fact under heading A. Moreover, as noted above, Mr. Boucher of the OSB further confirmed to the Respondents in March 2003 that all

concerns related to the Interest Account were resolved. All this leads to the conclusion that the findings of the Delegate in regard to the allegation under heading D are also reasonable.

[81] With all due respect, the Applicant is seeking to have this Court carry out a new assessment of the evidence and of the credibility of the witnesses, and to substitute this alternative assessment to the assessment carried out by the Delegate. The case law has consistently noted that a reviewing court has no authority to proceed in such a fashion, and this Court will not do so in this case.

[82] Consequently, the findings of the Delegate respecting the allegations under headings A and D shall not be disturbed.

Are the allegations under headings B, E, H, J and K subject to a defence of due diligence?

Review of the jurisprudence

[83] Under the principles set out by the Supreme Court of Canada in *Sault Ste. Marie*, offences are classified under three categories: those for which a culpable intent (or *mens rea*) must be established by the prosecution, those said to be of "absolute liability" for which proof of the commission of the prohibited act entails culpability, and those said to be of "strict liability", where proof of the prohibited act *prima facie* imports the offence, but the accused may avoid liability by proving either that he reasonably believed in a mistaken set of facts which, if true, would render the act innocent, or either that he took all reasonable care to avoid the act : *Sault Ste. Marie* at pages 1325-26.

[84] It did not take long for this approach to be applied to professional misconduct situations. Indeed, in *Ghilzon v. Royal College of Dental Surgeons*, [1979], 94 D.L.R. (3d) 617, [1979] O.J. No. 4037, the Divisional Court of the High Court of Justice of Ontario, sitting in appeal from a decision of the Discipline Committee of the Royal College of Dental Surgeons of Ontario, found that the professional misconduct offence of the dentist at issue in that case fell under the category of strict liability set out by the Supreme Court of Canada in the *Sault Ste. Marie* case, and that consequently the concerned dentist could avoid liability by proving that he took all reasonable care to avoid the offence.

[85] The availability of strict liability defences within the framework of professional disciplinary proceedings appears to be well settled in Quebec (see among other decisions *Chauvin c. Beaucage,* 2008 QCCA 922 at para. 88). It is also recognized in New Brunswick under *Mann v. New Brunswick Pharmaceutical Society*, (1987) 35 D.L.R. (4th) 426, a case involving professional misconduct by a pharmacist, and in British Columbia in a case involving professional misconduct of a teacher: *Stuart v. British Columbia College of Teachers*, (2005) 254 D.L.R. (4th) 154. In *Mann*, the following sentence summarizes the applicable principle (at page 428):

> In my opinion the offence of professional misconduct in failing to maintain the professional standard set out in s. 13.12 of the Regulations, in the circumstances of this case, must be classified as a public welfare or strict liability offence with respect to which an accused person may rely on a defence of due diligence or reasonable care."

[86] Though the parties also referred to numerous cases involving liquor licences, the vast majority of which recognize the availability of strict liability defences, I find these cases of little

pertinence to the issue at stake here: *Papa Holding Ltd. v. Northwest Territories*, [1987] N.W.T. R. 96; *Whistler Mountain Ski Corp. v. British Columbia*, 2002 BCCA 426; *Shooters 222 Restaurant v. Ontario (Securities Commission)*, [2004] O.J. No. 5595; *504174 N. B. Ltd. (c.o.b. Choo Choo's) v. New Brunswick (Minister of Public Safety)*, 2005 NBCA 18.

[87] Notwithstanding the numerous case law recognizing the availability of strict liability defences in professional misconduct proceedings, the Applicant argues that a reconsideration of the issue was carried out by the Ontario Divisional Court in *Gordon Capital Corp. v. Ontario*, (1991), 50 O.A.C. 258; [1991] O.J. No. 934 (QL) ("*Gordon Capital*") and in *Carruthers v. College of Nurses of Ontario*, (1996) 31 O.R. (3d) 377; [1996] O.J. No. 4275 (QL) ("*Carruthers"),* and that consequently this Court should follow this second line of jurisprudence and deny strict liability defences to bankruptcy trustees involved in professional misconduct proceedings under the Act. The Applicant further argues that the scheme of the Act regarding the licencing of trustees would be better served by such an approach.

[88] *Gordon Capital* concerned an appeal from a decision of the Ontario Securities Commission placing conditions on the registration of Gordon Capital Corporation ("Gordon") as an investment dealer under the Ontario *Securities Act* and thus prohibiting Gordon from carrying out certain stock trading activities for a period of 10 days. This suspension followed unintended and inadvertent breaches of provisions of the *Securities Act* concerning take-over bid rules and insider reporting rules in the context of heavy trading in the securities of ITL Industries Limited by a Toronto Stock Exchange floor trader working for Gordon. Accordingly, a strict liability defence of due diligence

was raised by Gordon but rejected by the Ontario Securities Commission. On appeal, the Divisional Court noted the following concerning the availability of such a defence (at para. 28 and 33 to 35):

> As indicated earlier, Gordon is not charged with an offence. We have not been referred to any case holding, either expressly or by analogy, that the due diligence defence applies to a subsection 26(1) hearing.
>
> The general legislative purpose of the Act and the OSC's role thereunder is to preserve the integrity of the capital markets of Ontario and protect the investing public. In this context, the proceedings against Gordon and Bond under subsection 26(1) of the Act are properly characterized as regulatory, protective or corrective. The primary purpose of the proceedings is to maintain standards of behaviour and regulate the conduct of those who are licensed to carry on business in the securities industry. The proceedings are not criminal or quasi-criminal in their design or punitive in their object. This distinction has been made in a number of cases involving proceedings of a regulatory or public protective nature such as that under Subsection 26(1) of the Act. […]
>
> Of course if Gordon had been charged with breaches of the Act under s. 118, the defence of due diligence would have been available to it. Such charges result in criminal or quasi-criminal proceedings with penal consequences; a conviction under s. 118 can lead to a fine or imprisonment or to both.
>
> The decisions in the last mentioned cases support the proposition that the classification of criminal and quasi-criminal offenses into categories of "absolute liability", "strict liability" and full "mens rea" as defined in *R. v. Sault Ste. Marie* is irrelevant to proceedings under subsection 26(1). The fact that Gordon may have acted without malevolent motive and inadvertently is not determinative of the right of the OSC to exercise its regulatory and discretionary powers to impose a sanction upon Gordon.
>
> For the above reasons, Gordon has failed to demonstrate that the OSC has committed any error in law in rejecting the defence of due diligence.

[89] In *Carruthers*, decided a few years after *Gordon Capital*, the Divisional Court was sitting in appeal of the Discipline Committee of the College of Nurses of Ontario which had found the appellant nurse guilty of professional misconduct for having inappropriately kissed a mental patient under her care. In the past, the patient had had a traumatic lesbian relationship with a nurse. The appellant admitted having kissed the patient, but claimed she intended no harm and thus raised a strict liability defence of a reasonable, albeit mistaken, belief in the therapeutic value of her conduct. The Divisional Court found that it was up to the disciplinary committee to determine if, in the circumstances, the allegation of professional misconduct had occurred. In so doing, the Divisional Court questioned the availability of strict liability defences in the context of disciplinary proceedings (at pages 392-93 of *Carruthers*). However, the Divisional Court further found that a determination whether the conduct of the nurse in that case constituted professional misconduct involved a consideration of all the circumstances, including "the intent, purpose or motive of the member engaging in the conduct" (at pages 391 and 393-94 of *Carruthers*). Consequently, though the availability of strict liability defences on the basis of *Sault Ste. Marie* was questioned in that case, the professional misconduct at issue was nevertheless determined according to a *sui generis* approach incorporating the consideration of the intent, purpose or motive involved in the alleged wrongdoing.

[90] The *sui generis* nature of professional misconduct proceedings has been recognized by the Federal Court of Appeal within the context of proceedings involving bankruptcy trustees in *Canada (Attorney General) v. Roy* , 2007 FCA 410 at paragraph 11, referring to the decision of the Quebec Court of Appeal in *Béliveau v. Comité de discipline du Barreau du Québec*, [1992] R.J.Q. 1822.

Consequently, principles of criminal law do not necessarily apply to professional conduct proceedings. However, though professional conduct proceedings are *sui generis*, “there are similarities and overlapping elements in terms of the fault required for a finding of guilt” *Canada (Attorney General) v. Roy, supra,* at paragraph 11).

[91] A *sui generis* approach to professional misconduct cases appears to be appropriate in determining if a particular alleged professional misconduct is subject or not to a defence of due diligence or reasonable care. The availability of such a defence in a particular case will depend on the nature of the alleged misconduct and on the terms of the legislative or regulatory provisions which are claimed to have been breached. A review of these provisions will, in most cases, show if an element of reasonable care is involved or not in the circumstances of a particular professional activity. If the legislative or regulatory provision at issue shows that an element of reasonable care is involved, then the defence of due diligence will generally be available to counter an allegation of professional misconduct in regard to that activity.

Pertinent provisions of the Bankruptcy and Insolvency Act and Related Rules

[92] Determinations as to the availability of strict liability defences for the Respondents cannot be carried out in a vacuum. It is therefore important in each case to clearly review the legislative or regulatory provisions under which the alleged professional misconduct is said to have occurred in order to ascertain if these provisions include an element of reasonable care or can be otherwise interpreted as making available to the Respondents a strict liability defence.

[93] In this case, a review of the Act and Rules shows that for each of the professional misconduct allegations under headings B, E, H, J and K, the concerned sections of the Act and the Rules, read together, refer to wording such as “due care” or “reasonably ought to know”, which imply that, for these provisions at least, a defence of due diligence is available to the Respondents.

[94] The allegations under heading B, concerning applications for discharge while still having a bank balance in an estate, are said by the Applicant in paragraph 32 of her Report to involve breaches of sections 13.5 and subsection 154(1) of the Act as well as to sections 36 and 45 of the *Bankruptcy and Insolvency General Rules* (the “Rules”). When these provisions are read together, it becomes apparent that an element of “due care” is involved on the part of the trustee, leading to the conclusion that a defence of due diligence is thus available to counter these professional misconduct allegations:

13.5 A trustee shall comply with the prescribed Code of Ethics.	13.5 Les syndics sont tenus de se conformer au code de déontologie prescrit.
154. (1) Before proceeding to discharge, the trustee shall forward to the Superintendent for deposit, according to the directives of the Superintendent, with the Receiver General the unclaimed dividends and undistributed funds that the trustee possesses, other than those exempted by the General Rules, and shall provide a list of the names and the post office addresses, in so far as known, of the creditors entitled to the unclaimed dividends, showing the amount payable to each creditor.	154. (1) Avant de procéder à sa libération, le syndic fait parvenir au surintendant, pour qu’ils soient déposés, conformément aux instructions de ce dernier, chez le receveur général, les dividendes non réclamés et les fonds non distribués qui restent entre ses mains, pourvu que ces dividendes et ces fonds ne fassent pas l’objet d’une exemption aux termes des Règles générales; il fournit une liste des noms et des adresses postales, dans la mesure où ils sont connus, des créanciers qui ont droit aux dividendes non réclamés en indiquant le montant

	payable à chacun d'eux.
36. Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care.	36. Le syndic s'acquitte de ses obligations dans les meilleurs délais et exerce ses fonctions avec compétence, honnêteté, intégrité, prudence et diligence.
45. Trustees shall not sign any document, including a letter, report, statement, representation or financial statement that they know, or reasonably ought to know, is false or misleading, and shall not associate themselves with such a document in any way, including by adding a disclaimer of responsibility after their signature. [Emphasis added]	45. Le syndic ne signe aucun document, notamment une lettre, un rapport, une déclaration, un exposé et un état financier, qu'il sait ou devrait raisonnablement savoir être faux ou trompeur, ni ne s'associe de quelque manière à un tel document, y compris en y joignant sous sa signature un déni de responsabilité.

[95] The provisions of section 36 of the Rules clearly refer to the concepts of "competence" and "due care", thus implying the availability of a due diligence defence.

[96] Moreover, the provisions of section 45 of the Rules were reviewed by the Federal Court of Appeal in *Canada (Attorney General) v. Roy*, *supra*. In that case, it was found that section 45 establishes objective responsibility incompatible with a requirement of a *mens rea* of intent to deceive. The Federal Court of Appeal however found, at paragraph 25 of that decision, that the objective responsibility under this section 45 is to be assessed following the principles set out by the Supreme Court of Canada in *R v. Creighton*, [1993] 3 S.C.R. 3 at page 58:

> Objective *mens rea*, on the other hand, is not concerned with what the accused intended or knew. Rather, the mental fault lies in the failure to direct the mind to a risk which a reasonable person would have appreciated. Objective *mens rea* is not concerned with what

> was actually in the accused mind, but with what should have been there, had the accused proceeded reasonably. [Emphasis added]

[97] Consequently, a defence of due diligence was open to the Respondents in regard to the allegations set out under heading B.

[98] This is also the case concerning the allegations under heading E involving minor errors in certain statements of receipts and disbursements. In respect to allegations under heading E, the Applicant refers in paragraphs 46 to 50 of her Report to alleged breaches to section 13.5 and to subsections 23(1.3), 152(1) and 246(3) of the Act and to sections 36, 39 and 45 of the Rules. As already noted, sections 36 and 45 of the Rules, reproduced above, clearly allow for a defence of due diligence. Consequently, a defence of due diligence was also open to the Respondents in regard to the allegations set out under heading E.

[99] The allegations under heading H concern the co-mingling of funds in consolidated trust accounts. In respect to allegations under this heading, the Applicant refers in paragraphs 68, 69 and 72 of her Report to alleged breaches concerning principally subsections 5(5) and 25(1) of the Act and sections 5 and 13 of Directive no. 5 issued November 17, 1994 and concerning Estate Funds and Banking. These provisions read as follows:

5. (5) Every person to whom a directive is issued by the Superintendent under paragraph (4)(*b*) or (*c*) shall comply with the directive in the manner and within the time specified therein.	5. (5) Les personnes visées par les instructions du surintendant sont tenues de s'y conformer.

25. (1) When acting under the authority of this Act, a trustee shall, without delay, deposit in a bank all funds received for an estate in a separate trust account for each estate.	25. (1) Lorsqu'il exerce les pouvoirs que lui confère la présente loi, le syndic dépose sans délai dans une banque tous les fonds reçus pour le compte de chaque actif dans un compte en fiducie ou en fidéicommis distinct.
5. Subject to section 6, an individual trustee may, with the approval of the District Assistant Superintendent, operate one consolidated trust account for summary administrations pursuant to paragraph 155(g) of the Act and another for consumer proposals pursuant to subsection 66.26(2) of the Act […]	5. Sous réserve de l'article 6, un syndic individuel peut, avec l'approbation du surintendant adjoint de district, gérer un compte bancaire consolidé en fiducie dans les cas d'administrations sommaires, en vertu de l'alinéa 155g) de la Loi, et un autre pour les propositions de consommateurs, en vertu du paragraphe 66.26(2) de la Loi […]
13. Where an estate is converted from a summary to an ordinary administration, and where the estate funds therein were previously held in a consolidated trust bank account, a trustee shall immediately open a separate trust bank account to hold such estate funds.	13. Lorsqu'un actif passé d'une administration sommaire à une administration ordinaire et que les fonds de l'actif sont détenus dans un compte bancaire consolidé en fiducie, un syndic doit immédiatement ouvrir un compte bancaire en fiducie distinct pour y déposer ces fonds.

[100] These provisions do not in themselves impart an element of due diligence in the conduct required from a trustee. The provisions rather require that a separate trust account for each ordinary administration estate be maintained, and that a separate bank account be set up immediately upon conversion of an estate from a summary to an ordinary administration. However, these provisions cannot be read in isolation. Section 36 of the Rules, reproduced above, sets out as a general principle that trustees are to perform their duties with "due care". Moreover, section 52 of the Rules also sets out the following principle:

52. Trustees, in the course of their professional engagements, shall apply due care to ensure that the actions carried out by their employees, agents or mandataries or any persons hired by the trustees on a contract basis are carried out in accordance with the same professional standards that those trustees themselves are required to follow in relation to that professional engagement. [Emphasis added]	52. Dans toute activité professionnelle, le syndic veille avec prudence et diligence à ce que les actes accomplis par ses mandataires, ses employés ou toute personne engagée par lui à contrat respectent les mêmes normes professionnelles qu'il aurait lui-même à appliquer relativement à cette activité.

[101] Consequently, on a proper construction of the Act, the Rules and of Directive number 5, a defence of due diligence was open to the Respondents to disclaim professional misconduct for the allegations set out under heading H.

[102] The allegations under heading J concern the use of a "Third Party Account" to post certain estate transactions. The Applicant refers in paragraph 82 of her Report to alleged breaches of section 13.5 and subsections 25(1) and (2) of the Act and of paragraph 48b) of the Rules. Section 13.5 and subsection 25(1) of the Act are reproduced above, while subsection 25(2) of the Act and paragraph 48b) of the Rules read as follows:

25. (2) All payments made by a trustee under subsection (1) shall be made by cheque drawn on the estate account or in such manner as is specified in directives of the Superintendent.	25. (2) Tous paiements faits par un syndic sont opérés au moyen de chèques tirés sur le compte de l'actif ou de la manière qui peut être spécifiée par les instructions du surintendant.
48. Trustees who hold money or other property in trust shall […]	48. Le syndic qui détient de l'argent ou d'autres biens en fiducie ou en fidéicommis :

	[…]
(*b*) administer the money or property with due care, subject to the laws, regulations and terms applicable o the trust.	b) sous réserve des lois, règlements et conditions applicables à la fiducie ou au fidéicommis, administre l'argent et les biens avec prudence et diligence.

[103] The administration of estate monies and property is subject to a standard of conduct based on due care. Consequently, a professional misconduct allegation based on paragraph 48b) of the Rules is subject to a defence of due diligence. A defence of due diligence was thus open to the Respondents in regard to the allegations set out under heading J.

[104] The allegations under heading K concern certain relatively small amounts of money received by the Respondents but not deposited forthwith in an account. The Applicant refers in paragraphs 87 and 88 of her Report to alleged breaches of section 13.5 and of subsection 25(1) of the Act reproduced above and of section 36 and paragraph 48b) of the Rules also reproduced above.

[105] As already noted, section 36 of the Rules requires that a bankruptcy trustee perform his duties with "due care", while paragraph 48b) of the Rules requires trustees to administer money or property with "due care". Consequently, a defence of due diligence was also open to the Respondents in regard to the allegations set out under heading K.

[106] In conclusion, the Delegate was correct in finding that a defence of due diligence was available to the Respondents in regard to the allegations under headings B, E, H, J and K.

Did the Delegate commit reviewable errors in finding as a matter of fact that a defence of due diligence had been made out to counter the allegations under headings B, E, H, J and K?

[107] Since the defence of due diligence was open to the Respondents under headings B, E, H, J and K, the Applicant submits that the Delegate made reviewable errors in finding that such a defence had been properly made out by the Respondents to counter all these allegations under these headings. This raises issues of mixed law and fact which are to be reviewed on a standard of reasonableness.

[108] In *Sault Ste. Marie*, at pages 1326 and 1331, the type of evidence required to make out such a defence, was described as follows:

> [Strict liability offences leave] it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.
>
> […]
>
> Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. For a useful discussion of this matter in the

> context of a statutory defence of due diligence see *Tesco Supermarkets v. Nattras* [[1972] A.C. 153.]. [Emphasis added]

[109] Though the evidentiary burden of establishing due diligence was on the Respondents, in this case the Delegate found that this burden had been discharged.

[110] The Delegate, at paragraphs 62 to 68 of his Decision, reviewed the evidence submitted concerning the alleged irregularities under heading B concerning applications for trustee discharge while having a bank balance in the estate account. The Delegate noted that these allegations concerned minor irregularities which had been taken out of context by the Applicant. The Delegate further found that these heading B irregularities had been unintentional, and the result of administrative errors with no ensuing prejudice to the estates or creditors, and with no benefits to the Respondents. The Delegate also noted that some of the allegations related to old estates.

[111] In regard to the due diligence defence relating to the irregularities under heading B, the Delegate accepted the Respondents' evidence that they had handled 2177 estates in the concerned period, which included 89,268 transactions with a dollar transaction value of $21,595,694. The Delegate obviously inferred from this evidence that the Respondents had thus established a successful due diligence defence in light of the fact that the minor and somewhat petty allegations under heading B represented a minuscule segment of the overall transactions carried out by the Respondents.

[112] Deference is to be shown to findings of fact and of mixed law and fact made by the Delegate, and it is not the role of this Court to re-evaluate the evidence submitted before the Delegate.

[113] Suffice to say that in regard to the allegations under heading B, and after carefully reviewing the record, including the transcripts of the testimony submitted before the Delegate, the findings of fact and the inferences from these findings made by the Delegate in this case concerning the defence of due diligence in regard to the allegations under heading B fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir, supra*, at paragraph 47). Consequently, these findings will not be disturbed.

[114] Concerning the allegations under heading E related to alleged inaccurate statements of receipts and disbursements, the Delegate also found, at paragraph 75 of his Decision, that the defence of due diligence had been made out by the Respondents. The Delegate noted that these were minor administrative errors made by the Respondents' staff and which resulted in no financial benefit to the Respondents. The Delegate, though not specifically so stating, was obviously again accepting the evidence of the Respondents that these irregularities represented a minuscule segment of their business, thus leading to the inference that the Respondents had maintained due diligence overall in their bankruptcy trustee business.

[115] Here again, these are findings of fact and inferences from findings of fact which squarely fall within the mandate of the Delegate, and which are therefore entitled to a high degree of

deference by this Court. After reviewing the record, I also find that these findings of the Delegate fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[116] Concerning the allegations under heading H, the Delegate accepted the evidence submitted by the Respondents showing that the summary estates which had been converted into an ordinary administration and for which a bank account had not been opened "forthwith" represented an infinitesimal proportion of the overall estates administered by the Respondents during the relevant period. The evidence submitted in this regard, and which was accepted by the Delegate, indicated that the allegations represented 100th of 1% of the summary estates which had been managed by the Respondents, thus leading to the inference that the remaining 99.99% of these estates were properly managed with due care.

[117] The Applicant takes exception with these findings of fact, both in regard to the methodology used and the resulting inference made. However, here again, the Applicant is seeking from this Court a reevaluation of the evidence, an exercise which this Court is not entitled to carry out. The issue to address here is whether the findings of fact and the inferences of fact and of mixed fact and law drawn by the Delegate fall within a range of possible outcomes defensible in respect of the facts and law. This is not an exercise of reevaluating the evidence. In the circumstances of this case, and after careful review of the record submitted, the findings of fact and the inferences drawn by the Delegate from the evidence submitted concerning the allegations under heading H are reasonable

since they fall within an acceptable range of possible outcomes. These findings shall therefore not be disturbed.

[118] A different conclusion is however warranted in regard to the allegations under headings J and K. The allegations under heading J concern the use of a "Third Party Account" to post certain estate transactions, while the allegations under heading K concern the receipt of certain payments by the Respondents which were not deposited in the concerned estate accounts. The Respondent Allen W. MacLeod admitted at the hearing before the Delegate that he had made mistakes with regard to the allegations under both headings J and K.

[119] The Delegate recognized these admissions at paragraphs 92 and 93 of his Decision, and made no comments as to any additional evidence on a due diligence defence to these allegations under headings J and K. A review of the transcript of hearing also shows that no such evidence was tendered by the Respondents to counter the allegations under headings J and K.

[120] The entire defence of the Respondents to these allegations is set out in the testimony in examination-in-chief of the Respondent Allen W. MacLeod before the Delegate on October 9, 2008 and which is reproduced at pages 726 to 729 of the transcript (reproduced at Volume 11 pp. 2658 to 2661 of the Applicant's Record):

> Q. Now I want to talk about allegation J.
> […]
> Q. What did you do here and what is your explanation with respect to this?
> A. This is an administrative error.
> Q. Was there any money lost, Mr. MacLeod?

> A. No.
> Q. Allegation K. […] When did you first become aware that there was anything missing?
> A. We prepared the report on the bankruptcy application for discharge for Mr. and Mrs. Deady, which is required to be sent to all of the parties involved in an estate including the bankrupt, the creditors and the OSB.
> After that was sent, Mrs. Deady called me – I can't tell you the specific date – and said to me, it appears that there is money missing with respect to money that we paid to you. While I spoke to her, as my recollection, I checked the account in case there was a misallocation between her and her husband, between some other Deady, and we looked and there was no money there for her. I told her at that point send me a copy of your receipt so I have it. I will look in our file to see what we have, and I suspect it has just been put into a wrong account.
> […]
> Q. Did you take that money, Mr. MacLeod?
> A. No.
> Q. What happened to that money?
> A. No idea. I thought it might show up, but it didn't.

[121] With no evidence of due diligence from the Respondents on these headings J and K allegations, and no explanation by the Delegate in the Liability Decision as to why and how a due diligence defence was sustained in regard to these allegations, this Court must respectfully conclude that these findings of the Delegate are such as to warrant intervention. Indeed, as noted in *Dunsmuir, supra*, at paragraph 47, in judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. In light of the clear admission of wrongdoing by the Respondents regarding the allegations under headings J and K, the absence of any evidence tendered by the Respondents in regard to a due diligence defence to these allegations, and the absence of explanations by the Delegate in the Liability Decision as to why a due diligence defence was held to have been made out to counter

these allegations, this Court concludes that the findings of the Delegate concerning the adequacy of a due diligence defence to these allegations cannot be sustained.

Is a reprimand an available remedy or sanction under the scheme of the Act?

[122] As already noted above, in the Sanctions Decision, the Delegate imposed a reprimand to the Respondents for the breaches set out in the allegations under heading L concerning certain delays in the administration of two estates. The Applicant challenges the legality of such a sanction.

[123] Subsection 14.01(1) of the Act sets out the measures which are available in the event professional misconduct of a bankruptcy trustee is found to have been established. It is useful to reproduce again here those provisions of this subsection dealing with the remedial measures or sanctions available in such circumstances:

14.01 (1) […] the Superintendent may do one or more of the following:	14.01 (1) […] le surintendant peut prendre l'une ou plusieurs des mesures énumérées ci-après, […] :
(*d*) cancel or suspend the licence of the trustee;	*a*) annuler ou suspendre la licence du syndic;
(*e*) place such conditions or limitations on the licence as the Superintendent considers appropriate including a requirement that the trustee successfully take an exam or enrol in a proficiency course;	*b*) soumettre sa licence aux conditions ou restrictions qu'il estime indiquées, et notamment l'obligation de se soumettre à des examens et de les réussir ou de suivre des cours de formation;
(*f*) require the trustee to make restitution to the estate of such amount of money as the estate has been deprived of as a result of the trustee's conduct; and	*c*) ordonner au syndic de rembourser à l'actif toute somme qui y a été soustraite en raison de sa conduite;

(*g*) require the trustee to do anything that the Superintendent considers appropriate and that the trustee has agreed to.	*d*) ordonner au syndic de prendre toute mesure qu'il estime indiquée et que celui-ci a agréée.

[124] The overriding objective of this provision is to ensure the protection of the public: *Sam Lévy & Associés Inc. v. Canada (Superintendent of Bankruptcy), supra*, at paras. 127-128. For these purposes, two sets of measures are contemplated. The first are remedial in nature and seek to have the situation corrected for the future through measures involving the requirement for additional training, the restitution of amounts to estates and any other measure agreed to by the trustee which would be appropriate to remedy the situation. The second set of measures is disciplinary in nature and involves placing limitations or conditions on a licence, suspending a licence or, in appropriate and extreme cases, cancelling a licence. These remedial measures and disciplinary sanctions can be combined.

[125] It is also useful to note that the use of the word "may" (in French "peut") in the introductory provision of subsection 14.01(1) of the Act makes it clear that the option of not imposing any remedial measure or sanction against a trustee is available, even where the allegations of misconduct have been made out. The decision to impose or not such a measure or sanction is thus discretionary and falls within the exclusive authority or mandate of the Superintendent or his Delegate, taking into account all the circumstances of a particular case. This was conclusively decided in *Jacques Roy v. Sylvie Laperrière, supra*, at paras. 75 to 80.

[126] In this case, the Delegate imposed what he called a “reprimand”. A “reprimand” is not specifically provided for under subsection 14.01(1) of the Act. In light of the disciplinary nature of a reprimand, and taking into account the principle that disciplinary authority should be interpreted restrictively, the sanction of a reprimand was not available to the Delegate. However, it is important to go beyond the use of specific expressions and to actually examine what the Delegate was attempting to achieve in the Sanctions Decision.

[127] Though the use of the notion of a “reprimand” was unfortunate, when reading the Sanctions Decision as a whole, it becomes apparent that the Delegate was of the view that no specific sanction or measure contemplated by subsection 14.01(1) was required in this case principally in light of the fact the Respondents had been put through a rigorous investigation and ensuing hearing and decision, and this was sufficient punishment for the Respondents. The Delegate was also of the view that what the Respondents experienced in the disciplinary process will serve as a general deterrence to other trustees (para. 20 of the Sanctions Decision).

[128] Thus, as I read the Sanctions Decision of the Delegate, no specific remedial measure or sanction under subsection 14.01 of the Act was deemed appropriate by the Delegate. Though expressed in terms of a “reprimand”, the net result was that the Delegate decided that in the particular circumstances of this case, no specific sanction or measure contemplated by subsection 14.01(1) of the Act was required since the Liability Decision and the process leading to it served the purposes of the Act. As noted by Justice Martineau in *Sam Lévy & Associés v. Canada (Superintendent of Bankruptcy), supra*, at paragraph 105, “[…] the public nature of the disciplinary

record and the hearing, together with the publicity of the tribunal's proceedings and decisions, are likely to have a negative impact on the reputation, if not the future career, of any individual whose conduct is considered by the tribunal."

[129] Though the determination of the spectrum of available remedial measures or sanctions is a question of law to be reviewed on a standard of correctness, the determination of which remedial measure or sanction, if any, is to be imposed in a particular case is an issue which falls squarely within the authority of the Delegate and which is to be reviewed on a standard of reasonableness: *Dunsmuir* at para. 53; *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369) at para. 59; *Cartaway Resources Corp*., [2004] 1 S.C.R. 672; *Donnini v. Ontario Securities Commission* (2005), 76 O.R. (3d) 43 (Ont. C.A.) at paras. 73-74; *Canada (Attorney General) v. Envoy Relocation Services* (2007), 283 D.L.R. (4th) 465, 2007 FCA 176 at paras 15 and 17.

[130] In this case, though drafted in terms of a "reprimand", the Delegate found in fact that no specific measure or sanction contemplated by subsection 14.01(1) of the Act was required. This option was available to the Delegate, and in light of the particular circumstances of this case, I find that, when viewed globally, the decision of the Delegate to choose this option was reasonable.

[131] Of course, since this case will be returned to the Delegate for re-determination of the appropriate remedies or sanctions in light of this judgment, the Delegate will need to determine anew which remedial measures or sanctions set out under subsection 14.01(1) of the Act are

appropriate in the circumstances, including the option of imposing no measure or sanction in light of the particular circumstances of this case.

Are prosecutorial partiality and overzealousness factors to take into account in proceedings under sections 14.01 and 14.02 of the Act, and if so, did the Delegate commit reviewable errors in finding as a matter of fact that such factors were present in this case?

[132] As I noted to counsel at the hearing on this judicial review, I am of the view that this issue has little bearing on these proceedings. The Applicant raised this issue in her Application for Judicial Review and in her Memorandum of Fact and Law, taking offence with the findings of the Delegate that her Report lacked objectivity and impartiality.

[133] I note that prosecutorial partiality and overzealousness may result in a stay of proceedings against a bankruptcy trustee under sections 14.01 and 14.02 of the Act: *In the Matter of the Disciplinary Hearing of the Trustees PricewaterhouseCoopers Inc. and Robert Brochu and Serge Morency and Serge Morency & Associates Inc*, January 19, 2005, Marc Mayrand.

[134] In this case, a motion to stay the proceedings against the Respondents based on prosecutorial partiality and overzealousness was submitted to the Delegate, who dealt with it in paragraphs 1 to 17 of the Liability Decision. The Delegate decided to dismiss this motion on the basis that the "matters raised by the trustees in their stay application can be dealt with in dealing with the allegations on their merits." (Liability Decision at para. 17)

[135] The Delegate further addressed the issue of prosecutorial partiality and overzealousness in reviewing the evidence which had been submitted to him, particularly in paragraphs 44 to 50 of the Liability Decision. Yet the Delegate's conclusions at paragraph 47 of this decision concerning the lack of objectivity and impartiality in the Report prepared by the Applicant are not referred to later in the Liability Decision concerning the merits of the allegations against the Respondents or in the Sanctions Decision determining the appropriate remedial measures or sanctions.

[136] In these circumstances, I see no reason to address this issue further.

Conclusions

[137] At the hearing on the merits of this Application, counsel for both the Applicant and the Respondents agreed that should I allow the Application in whole or in part, the case could be returned to the Honourable Chadwick insofar as he was willing and capable of acting.

[138] For the reasons set out herein, the case shall be returned to the Honourable James B. Chadwick solely for the purpose of determining the appropriate remedial measures or sanctions, if any, warranted pursuant to subsection 14.01(1) of the Act concerning the proven allegations against the Respondents under headings J, K and L.

[139] In light of the particular circumstances of this case, I have decided to exercise my judicial discretion not to award costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed in part only, and the case is returned to the Honourable James B. Chadwick solely for the purpose of determining the appropriate remedial measures or sanctions, if any, warranted pursuant to subsection 14.01(1) of the *Bankruptcy and Insolvency Act* in regard to the proven allegations against the Respondents under headings J, K and L, the whole without costs.

"Robert M. Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-327-09
STYLE OF CAUSE:	SYLVIE LAPERRIÈRE, in her capacity as Senior Analyst – Professional Conduct of the Office of the Superintendent of Bankruptcy v. ALLEN W. MACLEOD ET AL
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 14, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Mainville J.
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APPEARANCES:

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