Federal Court of Appeal | Cour d'appel fédérale

Date: 20071221

Docket: A-579-06

Citation: 2007 FCA 410

CORAM: **RICHARD C.J.**
DÉCARY J.A.
LÉTOURNEAU J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

JACQUES ROY, in his capacity as trustee

Respondent

Hearing held at Montréal, Quebec, on December 13, 2007.

Judgment delivered at Ottawa, Ontario, on December 21, 2007.

REASONS FOR JUDGMENT: LÉTOURNEAU J.A.

CONCURRED IN BY: RICHARD C.J.
DÉCARY J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Appeal, cross-appeal and issues

[1] The appellant is challenging a decision of Mr. Justice Simon Noël of the Federal Court (reported at 2006 FC 1387) in which the judge dismissed two of the claims submitted by the appellant for judicial review. He alleges the following:

(a) the judge erred in law in determining that in order to establish the existence of an offence under section 45 of the *Bankruptcy and Insolvency General Rules*, C.R.C., 1978, c. 368,

(Rules), i.e. signing a false or misleading document, the signatory's *mens rea* had to be established; and

(b) the judge erred in law in determining that a trustee's time sheets are not estate documents within the meaning of section 26 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (Act).

[2] On the other hand, the respondent is appealing the part of the judge's decision stating that a trustee in bankruptcy violates the Code of ethics when the trustee does any of the things set out under section 30 of the Act without the prior authorization of the inspectors to do so. The respondent views this as an error in law by the judge.

The relevant statutory and regulatory provisions

[3] Before summarizing the judge's decision on these points, it is important to refer to the relevant statutory and regulatory provisions to better grasp the judge's statements and, then, the parties' arguments:

Act

13.5 A trustee shall comply with such code of ethics respecting the conduct of trustees as may be prescribed.	**13.5** Les syndics sont tenus de se conformer aux codes de déontologie régissant leur conduite qui peuvent être prescrits.

14.01 (1) Where, after making or causing to be made an 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...

...

19. (1) The trustee may prior to the first meeting of creditors obtain such legal advice and take such court proceedings as he may consider necessary for the recovery or protection of the property of the bankrupt.

(2) In the case of an emergency where the necessary authority cannot be obtained from the inspectors in time to take appropriate action, the trustee may obtain such legal advice and institute such legal proceedings and take such action as he may deem necessary in the interests of the estate of the bankrupt.

...

26. (1) The trustee shall keep proper books and records of the administration of each estate to which he is appointed, in which shall be entered a record of all moneys received or disbursed by him, a list of all creditors filing claims, the amount and disposition of those claims, a copy of all notices sent out, the original signed copy of all minutes, proceedings had, and resolutions passed

14.01 (1) Après avoir tenu ou fait tenir 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...

[...]

19. (1) Le syndic peut, antérieurement à la première assemblée des créanciers, obtenir un avis juridique et prendre les procédures judiciaires qu'il peut juger nécessaires pour recouvrer ou protéger les biens du failli.

(2) Dans un cas d'urgence où il est impossible d'obtenir des inspecteurs, en temps utile, l'autorisation requise pour prendre les mesures qui s'imposent, le syndic peut obtenir l'opinion d'un conseiller juridique, intenter les procédures judiciaires et prendre les mesures qu'il juge nécessaires dans l'intérêt de l'actif.

[...]

26. (1) Le syndic tient des livres et registres convenables de l'administration de chaque actif auquel il est commis, dans lesquels sont inscrits tous les montants d'argent reçus ou payés par lui, une liste de tous les créanciers produisant des réclamations, en indiquant le montant de ces

at any meeting of creditors or inspectors, court orders and all such other matters or proceedings as may be necessary to give a complete account of his administration of the estate.

(2) The estate books, records and documents relating to the administration of an estate are deemed to be the property of the estate, and, in the event of any change of trustee, shall forthwith be delivered to the substituted trustee.

...

30. (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

(*a*) sell or otherwise dispose of for such price or other consideration as the inspectors may approve all or any part of the property of the bankrupt, including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt, by tender, public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;

(*b*) lease any real property or immovable;

(*c*) carry on the business of the bankrupt, in so far as may be necessary for the beneficial administration of the estate of the bankrupt;

dernières et comment il en a été disposé, ainsi qu'une copie de tous les avis expédiés et le texte original et signé de tout procès-verbal, de toutes procédures entamées et résolutions adoptées à une assemblée de créanciers ou d'inspecteurs, de toutes les ordonnances du tribunal et toutes autres matières ou procédures qui peuvent être nécessaires pour fournir un aperçu complet de son administration de l'actif.

(2) Les livres, registres et documents de l'actif concernant l'administration d'un actif sont considérés comme étant la propriété de l'actif et, advenant un changement de syndic, ils sont immédiatement remis au syndic substitué.

[...]

30. (1) Avec la permission des inspecteurs, le syndic peut :

a) vendre ou autrement aliéner, à tel prix ou moyennant telle autre contrepartie que peuvent approuver les inspecteurs, tous les biens ou une partie des biens du failli, y compris l'achalandage, s'il en est, ainsi que les créances comptables échues ou à échoir au crédit du failli, par soumission, par enchère publique ou de gré à gré, avec pouvoir de transférer la totalité de ces biens et créances à une personne ou à une compagnie, ou de les vendre par lots;

b) donner à bail des immeubles ou des biens réels;

(*d*) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

(*e*) employ a barrister or solicitor or, in the Province of Quebec, an advocate, or employ any other representative, to take any proceedings or do any business that may be sanctioned by the inspectors;

(*f*) accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time, subject to such stipulations as to security and otherwise as the inspectors think fit;

(*g*) incur obligations, borrow money and give security on any property of the bankrupt by mortgage, hypothec, charge, lien, assignment, pledge or otherwise, such obligations and money borrowed to be discharged or repaid with interest out of the property of the bankrupt in priority to the claims of the creditors;

(*h*) compromise and settle any debts owing to the bankrupt;

(*i*) compromise any claim made by or against the estate;

(*j*) divide in its existing form among the creditors, according to its estimated value, any property that from its peculiar nature or other special circumstances cannot be readily or advantageously sold;

c) continuer le commerce du failli, dans la mesure où la chose peut être nécessaire pour la liquidation avantageuse de l'actif;

d) intenter ou contester toute action ou autre procédure judiciaire se rapportant aux biens du failli;

e) employer un avocat ou autre représentant pour engager des procédures ou pour entreprendre toute affaire que les inspecteurs peuvent approuver;

f) accepter comme contrepartie pour la vente de tout bien du failli une somme d'argent payable à une date future, sous réserve des stipulations que les inspecteurs jugent convenables quant à la garantie ou à d'autres égards;

g) contracter des obligations, emprunter de l'argent et fournir des garanties sur tout bien du failli par voie d'hypothèque, de charge, de privilège, de cession, de nantissement ou autrement, telles obligations devant être libérées et tel argent emprunté devant être remboursé avec intérêt sur les biens du failli, avec priorité sur les réclamations des créanciers;

h) transiger sur toute dette due au failli et la régler;

i) transiger sur toute réclamation faite par ou contre l'actif;

j) partager en nature, parmi les créanciers et selon sa valeur estimative, un bien qui, à cause de sa nature

(*k*) elect to retain for the whole part of its unexpired term, or to assign, surrender, disclaim or resiliate any lease of, or other temporary interest or right in, any property of the bankrupt; and

(*l*) appoint the bankrupt to aid in administering the estate of the bankrupt in such manner and on such terms as the inspectors may direct.

(2) The permission given for the purposes of subsection (1) is not a general permission to do all or any of the things mentioned in that subsection, but is only a permission to do the particular thing or things or class of thing or things that the permission specifies.

particulière ou d'autres circonstances spéciales, ne peut être promptement ni avantageusement vendu;

k) décider de retenir, durant la totalité ou durant une partie de la période restant à courir, ou de céder, abandonner ou résilier tout bail ou autre droit ou intérêt provisoire se rattachant à un bien du failli;

l) nommer le failli pour aider à l'administration de l'actif de la manière et aux conditions que les inspecteurs peuvent ordonner.

(2) La permission n'est pas une permission générale visant tous les pouvoirs mentionnés, mais est restreinte à un ou plusieurs pouvoirs précisés, ou à une catégorie de pouvoirs précisés.

31. (1) With the permission of the court, an interim receiver or a trustee, prior to the appointment of inspectors, may make necessary or advisable advances, incur obligations, borrow money and give security on the property of the debtor in such amounts, on such terms and on such property as may be authorized by the court and those advances, obligations and money borrowed shall be repaid out of the property of the debtor in priority to the claims of the creditors.

...

38. (4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to

31. (1) Avec la permission du tribunal, un séquestre intérimaire ou un syndic, avant la nomination d'inspecteurs, peut consentir des avances nécessaires ou opportunes, contracter des obligations, emprunter de l'argent et donner une garantie sur les biens du débiteur aux montants, selon les conditions et sur les biens que le tribunal autorise. Ces avances, obligations et emprunts sont remboursés sur les biens du débiteur et ont priorité sur les réclamations des créanciers.

[...]

institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

...

117. (1) The trustee may call a meeting of inspectors when he deems it advisable and he shall do so when requested in writing by a majority of the inspectors.

...

120. (3) The inspectors shall from time to time verify the bank balance of the estate, examine the trustee's accounts and inquire into the adequacy of the security filed by the trustee and, subject to subsection (4), shall approve the trustee's final statement of receipts and disbursements, dividend sheet and disposition of unrealized property.

(4) Before approving the final statement of receipts and disbursements of the trustee, the inspectors shall satisfy themselves that all the property has been accounted for and that the administration of the estate has been completed as far as can reasonably be done and shall determine whether or not the disbursements and expenses incurred are proper and have been duly authorized, and the fees and remuneration just and reasonable in the circumstances.

38. (4) Lorsque, avant qu'une ordonnance soit rendue en vertu du paragraphe (1), le syndic, avec la permission des inspecteurs, déclare au tribunal qu'il est prêt à intenter les procédures au profit des créanciers, l'ordonnance doit prescrire le délai qui lui est imparti pour ce faire, et dans ce cas le profit résultant des procédures, si elles sont intentées dans le délai ainsi prescrit, appartient à l'actif.

[...]

117. (1) Le syndic peut convoquer une assemblée des inspecteurs lorsqu'il l'estime utile, et il doit le faire lorsque la majorité des inspecteurs l'en requiert par écrit.

[...]

120. (3) Les inspecteurs vérifient le solde en banque de l'actif, examinent ses comptes, s'enquièrent de la suffisance de la garantie fournie par le syndic et, sous réserve du paragraphe (4), approuvent l'état définitif des recettes et des débours préparé par le syndic, le bordereau de dividende et la disposition des biens non réalisés.

(4) Avant d'approuver l'état définitif des recettes et des débours du syndic, les inspecteurs doivent s'assurer eux-mêmes qu'il a été rendu compte de tous les biens et que l'administration de l'actif a été complétée, dans la mesure où il est raisonnablement possible de le faire, et doivent établir si les débours et dépenses subis sont appropriés ou non et ont été dûment autorisés et si les honoraires et la rémunération sont

justes et raisonnables en l'occurrence.

Rules

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.

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.

...

[...]

61. (1) An application of a trustee for discharge must

(*a*) be made in prescribed form; and

(*b*) be accompanied by a copy of the notice of final dividend and application for discharge of trustee, a copy of the final statement of receipts and disbursements as taxed, both in prescribed form, and a dividend sheet.

61. (1) La demande de libération du syndic:

a) est établie en la forme prescrite;

b) est accompagnée d'une copie de l'avis de dividende définitif et de demande de libération du syndic et d'une copie de l'état définitif des recettes et des débours taxés, lesquels sont en la forme prescrite, ainsi que du bordereau de dividende.

(2) At the time of discharge, the trustee must satisfy the court that

(*a*) the statements made in connection with the discharge are true;

(*b*) the final statement of receipts and disbursements is an accurate and correct statement of the administration of the estate, and has been approved by the inspectors and taxed by the court;

(2) Au moment de sa libération, le syndic démontre au tribunal qu'il a rempli les conditions suivantes :

a) les déclarations relatives à sa libération sont vraies;

b) l'état définitif des recettes et des débours constitue un état exact et fidèle de l'administration de l'actif et a été approuvé par les inspecteurs et taxé par

(*c*) every disbursement included in the final statement of receipts and disbursements is accurate and proper;

(*d*) all the property of the bankrupt for which the trustee was accountable has been sold, realized or disposed of in the manner described in the final statement of receipts and disbursements;

(*e*) every claim subject to a dividend was properly examined and that
(i) to the best of the trustee's knowledge, the dividend sheet presented to the court contains a true and correct list of the claims of creditors entitled to share in the estate,
(ii) all payments shown on the dividend sheet have been duly made, and
(iii) unclaimed dividends and undistributed funds have been forwarded to the Superintendent by the trustee in accordance with subsection 154(1) of the Act;

(*f*) the trustee has not received, does not expect to receive, and has not been promised, any remuneration or consideration other than as shown in the final statement of receipts and disbursements;

(*g*) the trustee has complied with subsection 170(2) of the Act; and

(*h*) the final statement of receipts and disbursements, the dividend sheet and the notice of application for discharge of trustee have been sent to the registrar, the Division Office, the bankrupt and every creditor whose claim has been proved.

le tribunal;

c) les débours indiqués dans cet état sont exacts et justifiables;

d) les biens du failli dont il était responsable ont été vendus, réalisés ou disposés de la manière indiquée dans cet état;

e) les réclamations ayant fait l'objet d'un dividende ont été dûment examinées et :
(i) pour autant qu'il sache, le bordereau de dividende soumis au tribunal donne une liste véridique et fidèle des réclamations des créanciers ayant droit à une partie de l'actif,
(ii) les paiements mentionnés dans ce bordereau ont été dûment effectués,
(iii) il a fait parvenir les dividendes non réclamés et les fonds non distribués au surintendant conformément au paragraphe 154(1) de la Loi;

f) il n'a reçu ni ne compte recevoir et il ne lui a été promis aucune rémunération ou rétribution autre que celle figurant sur l'état définitif des recettes et des débours;

g) il s'est conformé au paragraphe 170(2) de la Loi;

h) l'état définitif des recettes et des débours, le bordereau de dividende et l'avis de demande de libération du syndic ont été envoyés au registraire, au bureau de division, au failli et à chaque

...

65. Unless the court otherwise orders, the trustee who completes the administration of an estate shall keep, for not less than six years from the date of his discharge, the estate books, records and documents referred to in subsection 26(2) of the Act.

créancier dont la réclamation a été prouvée.

[...]

65. À moins que le tribunal n'en ordonne autrement, un syndic doit conserver pendant au moins six (6) ans après la date de sa libération, les livres, registres et documents mentionnés au paragraphe 26(2) de la Loi.

[Emphasis added.]

Directive

Directive No. 7 (Pre-1992)

Retention of Documents by the Trustee

...

Books, Records and Documents relating to the Administration of the Estate

The books, records and documents pertaining to the administration of the estate referred to in subsection 26(2) of the Act are the documents generated for or by the trustee reflecting his decisions and actions in the administration (trustee's own administration file).

This will generally involve the proofs of claims, the various notices to creditors, reports to creditors, the Court and the Superintendent, the correspondence, petitions and court

Directive No. 7 (Pré-1992)

Rétention de documents par le syndic

[...]

Livres, registres et documents concernant l'administration d'un actif

Les livres, registres et documents de l'actif concernant l'administration d'un actif mentionnés au paragraphe 26(2) de la Loi sont les documents produits pour ou par le syndic durant sa propre administration pour justifier ses décisions et démarches (le dossier d'administration du syndic).

Ceci consistera généralement en preuves de réclamations, avis divers aux créanciers, multiples rapports aux créanciers, au tribunal et au surintendant, la correspondance, les

orders, all minutes of meetings, the banking records and the accounting records showing the receipts and disbursements of the funds as well as the supporting documents for the various disbursements.	requêtes et les ordonnances, tous les procès-verbaux d'assemblées, les effets bancaires et les relevés comptables démontrant les entrées et dispositions de fonds ainsi que les pièces justificatives pour les divers déboursés.

Summary of the judge's decision

[4] Relying on the definitions of the words "false" and "misleading" in French and English dictionaries, the judge determined at paragraphs 35 and 36 of the reasons of the decision, that intent is implied by the words "false" and "misleading".

[5] The substance of his determination is found at paragraphs 39 and 40 of his reasons. This was intended to respond to the appellant's arguments, which are found at paragraph 38. I refer to these three paragraphs because they are at the heart of my subsequent analysis of the judge's finding:

> [38] Counsel for the Attorney General argued that the use of the words "that they know, or reasonably ought to know, is false or misleading" (in French: "*qu'il sait ou devrait raisonnablement savoir être faux ou trompeur*") does not require evidence of an intent to mislead by the signatory. In their view, if a reasonable person ought to have known that the document was false or misleading, the Rule has been broken, regardless of whether or not an actual intention to mislead has been proven. This is an objective test that does not consider the actual intention of the person in question.
>
> [Emphasis in original.]
>
> [39] According to my reading of the Rule, the trustee must have knowledge that the document signed is false or misleading. The wording of the Rule links the trustee with the verb *to know* or *reasonably ought to know*, with respect to the document's false or misleading nature. The adjectives "false" or "misleading" connote the intentional element of

> the knowledge that one actually has or reasonably ought to have with regard to the document's false or misleading nature. I do not see how the words "reasonably ought to know is false or misleading" can in themselves operate to set aside the trustee's knowledge and instead establish an objective test. The trustee's intent in signing a document that he knows or reasonably ought to know is false or misleading seems to me to be an essential element in determining whether or not the disciplinary breach is well founded, based on the wording of Rule 45.
>
> [Emphasis added.]
>
> [40] The delegate's conclusion that Rule 45 includes the guilty intent to associate oneself with a false or misleading document is correct. His conclusion to the effect that there is no evidence on record showing that the trustee intended to utter a false or misleading document is not put in doubt. It is consistent with the applicable law and is correct.
>
> [Emphasis added.]

[6] The judge's reasoning regarding the legal status of a trustee's time sheets appears at paragraphs 68 to 80 of his reasons. In essence, he states that in his view the words "estate documents" of section 26 of the Act did not include the trustee's time sheets. He viewed these documents as "personal documents used to calculate, if necessary, fees for an eventual assessment or a request for a special fee": paragraph 77 of his reasons for decision.

[7] Finally, in regard to section 30 of the Act, authorizing a trustee to do a certain number of things with the permission of the inspectors, the judge used other provisions of the Act, *inter alia* sections 19, 31, 38 and 117, to establish that the role played by the inspectors is not merely a figurative one. Their presence and their prior acquiescence to certain things that may be done by a trustee are intended to ensure a sound administration of the estate for the creditors' benefit.

[8] While recognizing consistent case law to the effect that a third party should not be prejudiced by something done by a trustee without the inspectors' permission, he determined – and I phrase this in my own words – that from a disciplinary point of view, a trustee cannot ignore the inspectors, act alone and ignore the imperative provisions of the Act with impunity: see paragraphs 61 to 66 of his reasons.

[9] I will therefore now address, in order, the two grounds of the principal appeal and cross-appeal.

Analysis of the judge's decision and the grounds of the principal appeal

(a) the judge's alleged error regarding the *mens rea* of the prohibition to sign a false or misleading document

[10] I have already set out the appellant's position regarding the prohibition contained in section 45: the signatory's liability is engaged if he knows or reasonably ought to know that the document the signatory is signing is false or misleading.

[11] Naturally, the respondent supports the judge's decision. He refers to ample case law bearing on the forging and use of false documents. I will return to this point later. But first, it would not be inappropriate to refer to certain principles of criminal and disciplinary liability. That said, I am well aware that disciplinary law is *sui generis* and that the principles of criminal law do not all apply to it: see *Béliveau v. Comité de discipline du Barreau du Québec*, [1992] R.J.Q. 1822 (Que. C.A.),

Létourneau and Robert, *Code de procédure pénale du Québec annoté*, 7th ed., Wilson and Lafleur Ltée, 2007, at pages 8 and 9, for a description of certain differences between the two laws. However, there are similarities and overlapping elements in terms of the fault required for a finding of guilt.

[12] Except for strict liability offences, where merely committing the act gives rise to liability, the act must be accompanied by either an objective fault or an element of moral culpability, termed subjective fault, i.e. *mens rea: The Queen v. Sault Ste-Marie*, [1978] 2 S.C.R.1299; *Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec inc.*, [2006] 1 S.C.R.420. In the case of disciplinary law, this would be a professional or disciplinary fault which may be subjective or objective: see *Béliveau*, *supra*, Létourneau and Robert, *supra*.

[13] The *mens rea* of an offence, when required, either expressly or implicitly by the wording used, varies according to the material or constituent elements of this offence, i.e. of the *actus reus*. In the case of an offence made up of several material elements, the *mens rea* will be in various forms, adapted to each of the material elements. Two examples borrowed from the criminal law for the purposes of the case will be sufficient to illustrate the operation of the relationship between these two concepts. I retained one as a second that can be likened to the prohibition of section 45, but is different and lends a better understanding of its scope.

[14] Therefore, a charge of possession of drugs with the intent to traffic requires evidence, in terms of *mens rea*, that the possessor had knowledge of the nature of the substance in his possession and that the possessor intended to traffic that substance.

[15] Forging a false document, prohibited by section 366 of the *Criminal Code*, occurs when a person "makes a false document, knowing it to be false, with intent", for example, "that it . . . be used . . . as genuine, to the prejudice of any one". This Code offence indicates, like the previous example, the need to establish double *mens rea*: first, the knowledge that the document is false and second, intent as to the use of this document.

[16] In the case before us, the material elements of the prohibition under section 45 are simple, namely the signing of a document that the signatory knew or reasonably ought to have known was false or misleading. The prohibition requires *mens rea* of knowledge regarding the false or misleading nature of the document, no more. It is limited, in regard to its material elements, to the mere fact and act of signing such a document. Contrary to the belief of the judge and the delegate who first decided the issue, section 45 does not create an offence of forgery of a false document with the intent to use it to the prejudice of any one. The false document may have been forged by someone else. The Rules condemn the trustee for a disciplinary wrong, not a criminal wrong, for having signed it.

[17] The judge's misunderstanding of the nature of the prohibition inexorably led him to misunderstand the *mens rea* required under section 45 by requiring evidence that the trustee

"intended to utter a false or misleading document": see paragraph 40 of his reasons. He also erred as to the very nature of the knowledge necessary to establish a breach of section 45.

[18] The appellant properly stated that the words "know, or reasonably ought to know, is false or misleading" of section 45 establish an objective test for determining the knowledge that the trustee has of the false or misleading nature of the document: on the meaning of these words in terms of fault, see *Canada v. Gates*, [1995] 3 F.C. 17, at pages 19 and 20 (F.C.A.); Côté-Harper and Turgeon, *Droit pénal canadien*, 3rd ed., supplement, Les Éditions Yvon Blais Inc., pages 63 to 65. Contrary to what the judge stated at paragraph 39 of his reasons, these words do not in themselves eliminate the trustee's knowledge: to the contrary, they assign knowledge that is not there but that, under the circumstances, it would be reasonable for the trustee to have.

[19] In fact, the knowledge that a person has of something may be actual or implied. It is actual when, for example, the person knows what is in a parcel because that person placed it there. It is implied when, even though the person has no knowledge of what the package contains, the person is nevertheless deemed to know, either as a result of wilful blindness, or because a reasonable person in the same circumstances would have known it. While implied knowledge as a result of wilful blindness refers to the accused's state of mind, the knowledge implied by the play of objective *mens rea* "is not concerned with what was actually in the accused's mind, but with what should have been there, had the accused proceeded reasonably": see *R. v. Creighton*, [1993] 3 S.C.R.3, at page 58.

[20] Further, by referring to the "trustee's intent in signing a document that he knows or reasonably ought to know is false or misleading" confusion and ambiguity are cast over an explicit and clear provision [Emphasis added.]: *id.*, at paragraph 39.

[21] In short, section 45 has two tests, one subjective (if the trustee knows), the other objective (if the trustee reasonably ought to know), to establish the knowledge that the signatory of the document has of the false or misleading nature of this document. It is sufficient to satisfy either of these tests. There will be evidence of a breach of the prohibition under section 45 if the prosecutor establishes that:

(a) the trustee that is prosecuted signed the document at issue;

(b) this document was false, i.e. contrary to the truth, or misleading, i.e. misguiding; and

(c) the trustee knew it, or reasonably ought to have known it.

[22] Contrary to what I initially believed on reading the respondent's memorandum of fact and law, the respondent does not deny the existence of these two tests, subjective and objective, or the fact that one or the other could be applied to establish the trustee's knowledge.

[23] The exchange that took place at the hearing between the members of the panel and the respondent's counsel made it possible to offer particulars on the respondent's argument regarding *mens rea* under section 45.

[24] The respondent based his arguments on the use of the words "false" or "misleading" found in section 45. Initially, the respondent's counsel argued that these words used by Parliament necessarily involved, implicitly, an intention to deceive. Following an exchange with the Court, he referred to a risk of causing prejudice.

[25] If the required *mens rea* is not specified in the text of section 45 and if the words were not those of reasonable objectivity "reasonably ought to know", the argument could have merit. But since section 45 establishes objective responsibility, we cannot require that the trustee have an intention to deceive by signing the document since he did not know it was false. The intent to deceive necessarily refers to the trustee's state of mind while objective responsibility "is not concerned with what was actually in the [trustee's] mind, but with what should have been there, had the accused proceeded reasonably": *R. v. Creighton*, *supra*. In other words, the requirement for an intent to deceive is inconsistent with the words "reasonably ought to know" of section 45. It has the effect of rendering them inoperative.

[26] As for the requirement of a risk of causing prejudice, this is still satisfied, independent of the notions of fault or *mens rea*, since a false or misleading document, by definition, risks causing

prejudice. The risk is born of the false or misleading nature of the document, whether or not the signatory signed it intentionally, aware of its nature, without concern for it or without knowing it.

[27] In my opinion, the first ground of appeal of the Attorney General of Canada must be allowed.

(b) The judge's alleged error regarding the legal status of a trustee's time sheets

[28] It is accepted that the concept of "estate documents" appearing at subsection 26(2) of the Act is not defined in the Act or in the Rules.

[29] The appellant acknowledges that the trustee's time sheets are not expressly mentioned n subsection 26(2) as part of the estate documents. He also admits that they are not included in the terms "books and records" of subsection 26(1).

[30] But he contends that they are implicitly included under subsection 26(2) since, according to subsection 26(1), the trustee must keep a copy of "all such other matters or proceedings as may be necessary to give a complete account of his administration of the estate". In his opinion, the trustee's time sheets are documents which are used to "give a complete account of his administration of the estate" within the meaning of section 26 of the Act.

[31] The appellant also calls to his aid Directive No. 7, *supra*, which states that "[t]he books, records and documents pertaining to the administration of the estate . . . are the documents generated for or by the trustee reflecting his decisions and actions in the administration (trustee's own administration file)." In short, the Directive refers to the trustee's administration file.

[32] The second paragraph of the Directive sets out what this file will generally contain. The brief list ends with the words "as well as the supporting documents for the various disbursements." According to the appellant, the time sheets are supporting documents for the various disbursements. They are useful for the taxation of fees, the discharge of the trustee and all subsequent reviews.

[33] While these documents are useful for the above-mentioned purposes, the appellant acknowledges that they are also neither mandatory nor necessary. In fact, first, a trustee is not bound by law to keep time sheets. Second, rather than claiming payment based on an hourly rate, the trustee may request the statutory compensation of 7½ percent provided under subsection 39(2) of the Act.

[34] In this context, it is difficult to identify a rational basis for this position of the appellant where a disciplinary offence would be committed by a trustee who keeps time sheets, has his fees taxed accordingly, is discharged and then disposes of it, while a trustee who does not keep time sheets and claims overall fees higher than the statutory remuneration would not be committing any offence.

[35] I agree with the respondent's counsel that the taxation mechanism for the statement of receipts and disbursements by the Court, which contains the trustee's fees, provides sufficient guarantees to prevent abuse which, it would appear, would dissuade the disciplinary offence: see subsection 61(2) of the Rules. Trustees who cannot adequately justify their fees risk having them refused or reduced by the Court pursuant to subsection 39(5) of the Act: see *Scott and Le Groupe Bourdreau Richard Inc. and the Superintendent of Bankruptcy*, J.E. 2002-147 (S.C. Que.); *Brosseau and Marchand Trustees Inc. and al.*, S.C.M. No. 500-11-003915-838, August 16, 2006; and *Airobec Inc. and Marchand Trustees Inc.*, S.C.M. Nos. 500-11-003111-925 and 500-11-003112-923, July 9, 2007.

[36] Creditors are still entitled to contest the fees on receipt of a copy of the taxed statement which must be sent to them pursuant to section 152 of the Act.

[37] In the absence of an express provision requiring it or a provision that is sufficiently explicit and unequivocal to determine that it was Parliament's intent, we cannot presume that a trustee in bankruptcy has the obligation to keep time sheets, failing which the trustee will face disciplinary sanctions. A disciplinary offence is never presumed to exist, even if disciplinary law accepts that the offence may be framed in broad terms.

[38] Moreover, we must remember that disciplinary law may have grave consequences for an offending licence holder: see *Sheriff v. Canada (Attorney General)*, 2006 FCA 139 at paragraphs 31 and 32; and *Howe v. Institute of Chartered Accountants* (1994), 19 O.R. (3d) 483 (C.A.).

[39] Trustees in bankruptcy, acting professionally and concerned about complying with the Act and the Rules, must be able to reasonably identify and be aware of the disciplinary restraints they are subject to so that they are able to comply with the Act. For the purposes of the obligation provided under section 65 of the Rules, the appellant is invoking a broad and far-reaching definition of the concept of "estate documents" which, in regard to the time sheets, was not accepted in *Cochard, Re* (2004), 7 C.B.R. (5th) 73, where, at paragraph 49, Madam Justice Veit of the Alberta Court of Queen's Bench determined that they were not "records required to be produced under s. 26". To accept the appellant's position would require that the concept be stretched to the point of weakening it in order to definitively create, judicially, a disciplinary offence, through interpretative meandering. Our Court does not have this power. Parliament is free do so if it so desires and if it clearly expresses this meaning.

[40] For these reasons, I would dismiss the appellant's second ground of appeal. This now leads me to consider the merits of the cross-appeal.

Analysis of the judge's decision and the grounds of the cross-appeal

[41] Setting aside the delegate's decision, we bear in mind that the judge determined that the failure to obtain the prior permission of the inspectors to do one of things provided under section 30 of the Act was a disciplinary offence. I believe that it is worthwhile to refer to the three counts.

[42] These counts read as follows:

> [TRANSLATION]
>
> Offence #2
>
> The trustee did not obtain the inspectors' permission to sell accounts receivable to Isomur and accept in consideration a sum of money payable at a future time, thereby contravening paragraphs 30(1)(*a*) and (*f*) of the Act.
>
> Offence #3
>
> The trustee did not obtain the inspectors' approval to employ counsel to file a motion to recover funds against Isomur and Mr. Rivard and Mr. Genest, thereby contravening paragraph 30(1)(*e*) of the Act.
>
> Offence #4
>
> The trustee did not obtain the inspectors' approval to compromise the claim for $15, plus interest and the scheduled indemnity, made by the estate against Isomur pursuant to the judgment of January 4, 1995, thereby contravening paragraph 30(1)(*i*) of the Act.

On reading this, we see the allegation that section 30 was breached.

[43] Section 30 is entitled "Powers exercisable by trustee with permission of inspectors." [Emphasis added.] The introductory words of this section read: "The trustee may, with the permission of the inspectors." [Emphasis added.]

[44] Section 30 is a provision which confers to the trustee the discretion to carry out certain operations or transactions. The provision defines the subjects of these operations or transactions as well as the conditions for exercising these powers. For example, the trustee may "carry on the business of the bankrupt, in so far as may be necessary for the beneficial administration of the estate

of the bankrupt": paragraph 30(1)(*c*). Exercising this power requires an appreciation of the need to operate the business under the circumstances.

[45] One of the preconditions for exercising the discretionary power applicable to each of the operations contemplated under section 30, is to obtain the inspectors' permission. Further, aside from the inspectors' permission, exercising the powers conferred under paragraphs 30(1)(*a*), (*e*), (*f*) and (*l*) requires an additional intervention by the inspectors.

[46] In the case of paragraph 30(1)(*a*), it is also necessary to obtain the inspectors' approval in regard to the price or consideration of the sale or disposal of the bankrupt's property.

[47] Paragraph 30(1)(*e*) requires additional approval from the inspectors to have counsel undertake any matter other than taking proceedings.

[48] While a trustee, with the inspectors' permission, may accept as consideration for the sale of any property of the bankrupt a sum of money payable at a future time, this power can only be exercised "subject to such stipulations as to security and otherwise as the inspectors think fit": see paragraph 30(1)(*f*).

[49] Finally, according to paragraph 30(1)(*l*), the bankrupt can only be appointed to aid in administering the estate "in such manner and on such terms as the inspectors may direct."

[50] Section 30 of the Act confers a significant power to inspectors. We can see it in the role and functions assigned to them under subsections 120(3) and (4) of the Act. To use the expression of Professor P.E. Bilodeau in his work entitled *Précis de la faillite et de l'insolvabilité*, 2nd ed., 2004, Publications CCH Ltée, Brossard, at page 53, referring to *In re Feldman* (1931-32), 13 C.B.R. 313 (Ont. S.C.) and *Keddy Motor Inns Ltd. (Re)* (2000), 15 C.B.R. (4th) 48 (N.S.S.C.), [TRANSLATION] "the inspectors are the governing authority in bankruptcy administration". In *In Re Bryant Isard & Co.* (1923), 4 C.B.R. 41, at page 48, Mr. Justice Fisher of the Supreme Court of Ontario wrote:

> Inspectors stand in a fiduciary relation to the general body of creditors and should perform their duties impartially and in the interests of the creditors who appoint them. They should see that the trustee acts in accordance with the *Bankruptcy and Insolvency Act*.

See also *Bennet on Bankruptcy*, 9th ed. 2007, CCH Canadian Limited, 2006, at pages 322-323, Houlden and Morawetz, *Bankruptcy and Insolvency Act*, Thomson Carswell, 2006, at pages 556-557.

[51] In short, the inspectors are an important mechanism in the administration of a bankrupt's estate. Parliament wanted them to be responsible for ensuring the sound administration of the estate to the benefit to the body of creditors. On this point, the author Bennet, *supra*, writes at page 322:

> The inspectors are the supervisors of the trustee, and it is their function to instruct the trustee to take whatever steps they consider appropriate to protect the estate and the creditors. The inspectors are statutory officials appointed under subsection 116(1) of the Act to represent the creditors. They must act independently of the trustee.

It is from this perspective of immediate and ongoing control of a trustee's administration that the powers were conferred to the inspectors under section 30 of the Act.

[52] Naturally, the issue of the validity of the things done by the trustee is raised when the conditions for exercising these powers, including *inter alia* obtaining the inspectors' permission, are not respected. As the respondent's counsel submitted, more than sixty (60) years of consistent case law from the courts has confirmed at civil law the validity of the things done without the prior permission of inspectors and the absence of inspectors' permission cannot be raised as a defence: see *Brown v. Gentleman*, [1971] S.C.R.501, at page 511; *Cie du Trust National Ltée v. Trottier*, [1989] R.J.Q. 1769, at page 1774 (C.A. Que.); *Pratchler Agro Services Inc. (Trustee of) v. Cargill Ltd.* (1999), 11 C.B.R. (4th) 107, at page 109 (S.Q.B.); *Canadevim Ltée v. Verdier and Associés Inc. and al.*, S.C. Hull No. 550-11-006383-021, June 20, 2005; and *Graphicshoppe Ltd., Re* (2005), 15 C.B.R. (5th) 207, at paragraph 24 where the Court of Appeal of Ontario refers to the 1923 and 1929 decisions.

[53] According to this case law, the trustee who does not first obtain the inspectors' permission engages the trustee's personal liability if exercising the power should prejudice a third party. The appellant submits that in assigning personal liability to the trustee, the civil law recognizes a civil fault and that it would therefore not be inconsistent to juxtapose it with a disciplinary fault.

[54] He contends that subsection 14.01(1) of the Act, specifically the terms "has not fully complied with this Act, the General Rules, directives of the Superintendent . . ." found therein, is the source of the disciplinary fault and the justification for prosecutions of this nature. [Emphasis added.] With respect for the contrary opinion, I believe he is correct.

[55] I must point out that civil fault giving rise to civil liability does not result from the failure to obtain the inspector's permission, as the appellant's position would suggest, but rather from wrongfully exercising the power, thereby causing prejudice to a third party.

[56] In any event, by making the trustee personally liable, the courts developed a corresponding appropriate civil remedy to this assignment of powers under section 30 when, for one reason or another, the inspectors' permission was not first obtained.

[57] But it is well known that the civil law does not rule out disciplinary, criminal or penal. A civil sanction may be supplemented by a disciplinary sanction.

[58] Section 14.01 of the Act confers to the Superintendent a power to investigate as well as the power to take measures to ensure compliance with the Act. Among these measures, there are those imposing conditions or restrictions on a trustee's licence, suspension and cancellation measures and the option of resorting to conservatory measures under section 14.03 to protect the estate.

[59] It goes without saying that in regard to property that is perishable or likely to depreciate rapidly in value, a trustee may summarily dispose of it in the interest of the bankrupt's estate: see section 18 of the Act and also section 19 where, in the event of an emergency, the trustee may, without the inspectors' permission, take necessary measures to protect the estate.

[60] It is also recognized that transactions made pursuant to section 30 without the prior permission of the inspectors may later be ratified by them: see Albert Bohémier, *Bankruptcy and Insolvabilité*, Les Éditions Thémis, volume 1, 1992, at page 777.

[61] But can we truly state that a trustee who, repeatedly, even systematically or abusively, exercises the powers of section 30 of the Act without ever obtaining the inspectors' permission is a trustee who is complying with the Act? Can we find that trustees who act this way may continue to do so without the possibility of a review by the Superintendent pursuant to section 14.01 of the Act, because at civil law there is a remedy developed by the courts to protect third parties and the bankrupt's estate against claims resulting from exercising those powers? I believe that, in both cases, the question is asked and answered.

[62] In conclusion, Parliament intended to ensure compliance with the Act and the Rules. To this end, Parliament gave the Superintendent a supervisory role. It invested the Superintendent with the powers necessary to achieve the realization of that mandate through section 14.01.Some of these powers have a disciplinary component and result in measures likely to prompt the offender to observe the Act and the Rules and to comply with them. These measures may be modified and

gradated, as the Superintendent free to choose the one most likely to achieve the objective. The judge was entitled to find that the inspectors' permission was required for the operations described n the three offences alleged against the respondent and to return the matter to the delegate to decide the issue.

[63] For these reasons, I would dismiss the cross-appeal with costs.

Findings on the principal appeal

[64] I would allow the principal appeal with costs and I would set aside in part the judgment of the Federal Court dated November 17, 2006. Proceeding to render the judgment that the Court should have rendered, I would allow with costs the part of the application for judicial review bearing on the interpretation of section 45 and I would refer the matter to the Court for it to diligently return it to the delegate, Lawrence Poitras, so that, taking into account the reasons of this decision and the judgment of this Court, he can make a new decision regarding the allegations of the following offences:

> [TRANSLATION]
>
> **Jacob bankruptcy:**
>
> (1) The trustee signed false and misleading minutes on the conduct of the meeting on October 7, 1999, regarding his confirmation as trustee by the creditors and the failure to indicate that the meeting was suspended to make certain verifications, thereby contravening section 13.5 of the *Bankruptcy and Insolvency Act* and section 45 of the Rules.

...

(8) The trustee signed a statement of receipts and disbursements indicating that the entire estate had been realized, when he ought reasonably to have known that collection of the proceeds of sale of accounts receivable had not yet been realized, and he then signed an application for discharge supported by an incorrect affidavit, thereby contravening section 13.5, subsections 41(1) and 152(1) of the Act and section 45 and subsection 64(2) of the Rules (subsection 61(2) of the Rules as of April 30, 1998).

(9) The trustee signed a statement of receipts and disbursements indicating that the entire estate had been realized, when he should reasonably have known that realization of the amounts receivable from BCL was not complete, and he then signed an application for discharge supported by an incorrect affidavit, thereby contravening section 13.5, subsections 41(1) and 152(1) of the Act and section 45 and subsection 64(2) of the Rules (subsection 61(2) of the Rules as of April 30, 1998).

[65] I would order the delegate, Lawrence Poitras, to convene a conference call with counsel of the parties within thirty days of the judgment herein, so that a hearing date may be scheduled as soon as possible.

Findings on the cross-appeal

[66] I would dismiss the cross-appeal with costs.

"Gilles Létourneau"
J.A.

"I concur
J. Richard, C.J."

"I concur
Robert Décary, J.A."

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-579-06
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. JACQUES ROY, in his capacity as trustee
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	December 13, 2007
REASONS FOR JUDGMENT:	LÉTOURNEAU J.A.
CONCURRED IN BY:	RICHARD C.J. DÉCARY J.A.
DATE OF REASONS:	December 21, 2007

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