Date: 20061117

Docket: T-360-05

Citation: 2006 FC 1386

Ottawa, Ontario, the 17th day of November 2006

Present: The Honourable Mr. Justice Simon Noël

BETWEEN:

JACQUES ROY

Applicant

and

LAWRENCE A. POITRAS

Respondent

and

SYLVIE LAPERRIÈRE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review made by Jacques Roy, trustee in bankruptcy ("the trustee"), with regard to complementary and ongoing disciplinary decisions dated December 3, 2004 (concerning the merits of disciplinary offences, or lack thereof) and January 31, 2005 (determination of the sanction) by Lawrence A. Poitras, in his capacity as delegate of the Superintendent of Bankruptcy (the "delegate" or "delegate Poitras") under section 14.01 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("the Act"). In addition, another application for judicial review of the delegate's decision dated December 3, 2004 involving some of the same parties was initiated by the Attorney General of Canada (see *A.G. Canada v. Jacques Roy, in his capacity of trustee* – T-402-05).

[2] In his decisions, the delegate ruled that the trustee had committed four (4) of the fifteen (15) disciplinary offences with which he was charged, including those which were withdrawn during the hearing. Moreover, the delegate concluded that seven (7) other breaches of discipline were unfounded. Accordingly, a suspension of the trustee's licence for one (1) week was appropriate. For the purposes of this decision, instead of using the word "offence", I will use the term "breach", which is more appropriate, considering the facts in this case.

[3] In his application for judicial review, the trustee is challenging the merits of the determination made concerning each of the four (4) breaches of discipline, as well as the determination made concerning the sanction applied.

I. Facts

[4] Since 1986, the trustee has held a trustee's licence issued under the Act and has no disciplinary record.

[5] In connection with the administration of the assets in the bankruptcy of Distribution Sunliner (1985) Inc. ("Sunliner bankruptcy"), one of the company's shareholders, Mr. Paris, wrote a letter to the Office of the Superintendent of Bankruptcy ("OSB") on December 7, 1995, requesting an investigation [TRANSLATION] "into the conduct of the trustee in bankruptcy Jacques Roy".

[6] Josée Plourde ("Ms. Plourde") from the OSB was assigned to follow up on the request for an investigation, and she prepared a report explaining certain factual situations connected with specific work performed in the Sunliner bankruptcy. In a letter sent to the trustee on May 9, 1997, Ms. Plourde issued the following opinion:

> [TRANSLATION]
> - In general, the administration of this file seems to be in compliance with the provisions of the *Bankruptcy and Insolvency Act*, the *Bankruptcy Rules* and the directives issued by the Superintendent.
>
> - … the bill of costs was approved by the inspectors and assessed by the Court. As far as the trustee's fees and disbursements are concerned, we leave everything to the Court, which will award you fair and reasonable compensation according to the circumstances.
>
> (Parties' joint record, volume XI, tab B-15, letter from Josée Plourde to Jacques Roy dated May 9, 1997).

[7] On July 23, 1997, the Deputy Registrar signed a judgment discharging the trustee from the administration of the Sunliner bankruptcy. A final statement of receipts and disbursements, signed by the trustee on November 19, 1996, was included in the documents enclosed with the application for discharge.

[8] On June 8, 1999, Ms. Plourde attended a new meeting with Mr. Paris, Mr. Gallant, and a representative of the Royal Canadian Mounted Police. During this meeting, they discussed the administration of the Sunliner bankruptcy, the involvement of Yves Lemaire ("Mr. Lemaire") in the administration of the bankruptcy, the monies received by the National Bank, and the cashing of cheques issued by a company named BCL, some of which had been cashed by Mr. Lemaire.

[9] On June 10, 1999, in light of these new facts, the OSB assigned this case to Mr. Nolet of the audit section. He signed a report on October 21, 1999.

[10] On March 2, 2000, Ms. L. MacDonald, Acting National Director, Compliance and Investigation, recommended to the OSB, Quebec City District, that the trustee face a disciplinary committee further to the complaints made by Mr. Paris, based on the [TRANSLATION] "new facts" revealed at the June 8, 1999 meeting, the trustee's reply, and Mr. Nolet's audit report.

[11] On November 24, 1999, in the bankruptcy file of Pierre-André Jacob ("Jacob bankruptcy"), a complaint was filed against the trustee by a creditor involved in the bankruptcy. The issues raised in this case concerned a trustee substitution and due diligence. The facts will be discussed in the analysis.

[12] On March 23, 2000, the OSB assigned Sylvie Laperrière, a senior analyst of professional conduct ("analyst Laperrière"), to investigate the trustee's professional conduct in the Jacob and Sunliner bankruptcies.

[13] Ms. Laperrière signed her report on April 17, 2001. It was amended on November 2, 2001. In her report, Ms. Laperrière concluded that the trustee's conduct in the administration of the Jacob and Sunliner bankruptcies gave rise to fifteen (15) alleged breaches of the Act and/or the *Bankruptcy and Insolvency Rules*, C.R.C., 1978, c. 368 (the "Rules") and of the directives issued by the Superintendent of Bankruptcy. This report was submitted to the Superintendent for a hearing under sections 14.01 and 14.02 of the Act. The Superintendent had delegated his authority under sections 14.01, 14.02 and 14.03 of the Act to delegate Poitras (the Superintendent's first choice as

delegate had died, and delegate Poitras was subsequently chosen), in accordance with subsection 14.01(2).

[14] In the fall of 2004, the delegate chaired a disciplinary hearing for the fifteen (15) breaches complained of, some of which were withdrawn, and accepted only four (4), which read as follows:

> Pierre-André Jacob file
>
> [TRANSLATION]
>
> (2) The trustee did not perform his duties in a timely manner and did not carry out his functions with due care by not accepting the application for substitution by representatives of Trans-Canada Credit and by delaying the preparation of minutes of the creditors' meeting of November 18, 1999, thereby contravening section 13.5 of the Act and Rule 36.
>
> Distribution Sunliner (1985) Inc. file
>
> [TRANSLATION]
>
> (1) The trustee failed to obtain a statement from an officer of Distribution Sunliner (1985) Inc., from which it would have been possible to confirm the accuracy at the time of the bankruptcy of the inventory dated March 8, 1994, thereby contravening subsection 5(5) of the Act and paragraphs 6 and 7 of Directive No. 31 on taking inventory of the bankrupt's property, issued by the Superintendant of Bankruptcy on August 18, 1989.
>
> (5) The trustee did not document his file:

- on the reconveyance to the trustee by Isomur of the Bay Distributors' account receivable of $6,031.43;

- on the results obtained regarding collection of the said account receivable by the trustee and the balance of $9,000 payable by Isomur;

- and on the decision to postpone *sine die* proceedings for recovery against Messrs. Georges Rivard and Jean-Yves Genest, of the amount owed under the judgment of January 4, 1995,

thereby contravening subsection 5(5) of the Act and paragraph 5 of Directive No. 22 on the realization of the estate's assets, issued by the Superintendent of Bankruptcy on December 22, 1988.

(7) The trustee did not carry out his functions with due care:

- by not documenting his file on the instructions given by the trustee to Yves Lemaire of Gérance Mauricie, to follow up on the trustee's behalf on the recovery of money from BCL, and by not documenting his file on the change in status of Mr. Lemer (*sic*), who according to the trustee was acting for the National Bank of Canada in the collection of these amounts;

- by not informing BCL that it should send cheques to Yves Lemaire of Gérance Mauricie after learning of the instructions obtained from the National Bank of Canada by the latter;

- and by authorizing the said Yves Lemaire of Gérance Mauricie to open the trustee's mail,

thereby contravening section 13.5 and subsection 5(5) of the Act and paragraph 5 of Directive No. 22 on the realization of estate assets, issued by the Superintendent of Bankruptcy on December 22, 1988, as well as Rules 36 and 52.

It should be noted that the numbering of the breaches follows the numbering used by the delegate in his decision dated December 3, 2004.

[15] The trustee challenges these determinations of the delegate, as well as the sanction ordering a one-week suspension of his trustee's licence.

II. Issues

[16] Considering the foregoing, the issues to be dealt with are as follows:

1) What is the standard of review applicable to each of the issues?
2) Should the breaches concerning the Sunliner bankruptcy be dismissed because Ms. Plourde of the OSB was satisfied with the conduct of the trustee in bankruptcy in that case?
3) Did the delegate err in concluding that the trustee did not perform his duties in a timely manner and with due care in the Jacob bankruptcy, contrary to Rule 36?
4) Did the delegate err in concluding that in the Sunliner bankruptcy the trustee infringed Directive 31 of the Superintendent of Bankruptcy, which requires that a statement confirming the accuracy of the inventory of assets of the bankrupt be filed?
5) Did the delegate make a mistake of fact in concluding that in the Sunliner bankruptcy the trustee infringed paragraph 5 of Directive 22 of the Superintendent of Bankruptcy, which requires that the trustee document his files?
6) Did the delegate err in concluding that the trustee did not perform his duties with due care in the Sunliner bankruptcy case?
7) Was the delegate's decision to suspend the trustee's licence for one week legal and proper in the circumstances of the case?

III. Analysis

1) What is the standard of review applicable to each of the issues?

[17] The Superintendent has a statutory duty to supervise and administer estates in bankruptcy in Canada. To this end, the Act grants the Superintendent numerous powers to oversee the administration of estates in bankruptcy in the interest of creditors, debtors, bankrupts, and any other interested parties. One of the control mechanisms used is the licensing of trustees, as well as the supervision of their activities, taking into consideration the Act, Regulations and obligations under the directives issued by the Superintendent. For the purposes of this issue, I will reproduce some relevant sections from the legislation:

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

(*e*) from time to time make or cause to be made such inspection or investigation of estates or other matters to which this Act applies, including the conduct of a trustee or a trustee acting as a receiver or interim receiver, as the Superintendent may deem expedient and for the purpose of the inspection or investigation the Superintendent or any person appointed by the Superintendent for the purpose shall have access to and the right to examine and make copies of all books, records, data, including data in electronic form, documents and papers pertaining or relating to any estate or other matter to which this Act applies;

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

5. (4) The Superintendent may
[…]

5. (3) Le surintendant, sans que soit limitée l'autorité que lui confère le paragraphe (2) :
[…]

e) effectue ou fait effectuer les investigations ou les enquêtes, au sujet des actifs et autres affaires régies par la présente loi, et notamment la conduite des syndics agissant à ce titre ou comme séquestres ou séquestres intérimaires, qu'il peut juger opportunes et, aux fins de celles-ci, lui-même ou la personne qu'il nomme à cet effet a accès, outre aux données sur support électronique ou autre, à tous livres, registres, documents ou papiers se rattachant ou se rapportant à un actif ou à toute autre affaire régie par la présente loi, et a droit de les examiner et d'en tirer des copies;

f) reçoit et note toutes les plaintes émanant d'un créancier ou d'une autre personne intéressée dans un actif, et effectue, au sujet de ces plaintes, les investigations précises qu'il peut déterminer;
[…]

5. (4) Le surintendant peut :
[…]

(*b*) issue, to official receivers, trustees, administrators of consumer proposals made under Division II of Part III and persons who provide counselling pursuant to this Act, directives with respect to the administration of this Act and, without restricting the generality of the foregoing, directives requiring them

(i) to keep such records as the Superintendent may require, and

(ii) to provide the Superintendent with such information as the Superintendent may require;

b) donner aux séquestres officiels, aux syndics, aux administrateurs au sens de la section II de la partie III et aux personnes chargées de donner des consultations au titre de la présente loi des instructions relatives à l'exercice de leurs fonctions, et notamment leur enjoindre de conserver certains dossiers et de lui fournir certains renseignements;

(*c*) issue such directives as may be necessary to give effect to any decision made by the Superintendent pursuant to this Act or to facilitate the carrying out of the purposes and provisions of this Act and the General Rules, including, without limiting the generality of the foregoing, directives relating to the powers, duties and functions of trustees, of receivers and of administrators as defined in section 66.11;

c) donner les instructions nécessaires à l'exécution de toute décision qu'il prend en vertu de la présente loi ou susceptibles de faciliter l'application de la présente loi et des Règles générales, et notamment en ce qui touche les attributions des syndics et des séquestres et celles des administrateurs au sens de l'article 66.11;

(*d*) issue directives governing the criteria to be applied by the Superintendent in determining whether a trustee licence is to be issued to a person and governing the qualifications and activities of trustees; and

[…]

d) donner des instructions régissant les critères relatifs à la délivrance des licences de syndic, les qualités requises pour agir à titre de syndic et les activités des syndics;

[…]

5. (6) A directive issued by the Superintendent under this section shall be deemed not to be a statutory instrument within the meaning and for the purposes of the *Statutory Instruments Act.*

5. (6) Les instructions données par le surintendant ne sont pas des textes réglementaires au sens de la *Loi sur les textes réglementaires*.

[18] The relevant provisions of sections 14.01 and 14.02 of the Act which interest the Court read as follows:

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

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, soit lorsqu'il est dans l'intérêt public de le faire :

(*a*) a trustee has not properly performed the duties of a trustee or has been guilty of any improper management of an estate,

a) annuler ou suspendre la licence du syndic;

(*b*) a trustee has not fully complied with this Act, the General Rules, directives of the Superintendent or

b) soumettre sa licence aux conditions ou restrictions qu'il estime indiquées, et notamment l'obligation de

any law with regard to the proper administration of any estate, or

(*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;

(*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, and

(*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.

se soumettre à des examens et de les réussir ou de suivre des cours de formation;

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

(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 et 14.03.

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

14.02 (1) Lorsqu'il se propose de prendre l'une des mesures visées au paragraphe 14.01(1), le surintendant envoie au syndic un avis écrit et motivé de la mesure qu'il entend prendre et lui donne la possibilité de se faire entendre.

[19] Bankruptcy law is a specialized field that has its own administration through structures created by the Act: the Superintendent, the Official Receiver, the trustee, and the Quebec Superior Court (Bankruptcy Division) (on this point, see *Sam Lévy & Associés Inc. v. Mayrand*, 2005 FC 702 at paragraph 135).

[20] Because of this specialization, persons who are called upon to assume responsibilities must rely on their training and experience to develop an in-depth knowledge of this field, its practices, and its customs. Accordingly, ethical standards, established by legislation and the directives, are part of the daily work in this field.

[21] According to the pragmatic and functional approach advanced in *Dr. Q. v. College of Physicians and Surgeons*, [2003] 1 S.C.R. 226 at paragraphs 21 and 22 (the absence of a privative clause or a right of appeal; the expertise of the decision-maker relative to that of the reviewing court; the purposes of the legislation and the provision in particular; and the nature of the question – law, fact, or mixed fact and law), it seems to me that the Superintendent has the necessary qualifications to be recognized as an expert in such matters. The Act does not include a privative clause and does not grant any right of appeal (see subsection 14.02(5) of the Act), except for specific recognition of a power to review and set aside decisions as specified in the *Federal Courts Act*, R.S.C. 1985, c. F-7. On the basis of the purpose of the Act and the content of sections 14.01 *et seq*., it seems to me that the standard of review applicable to a disciplinary report and to the decision concerning the sanction is that of reasonableness *simpliciter*. The reviewing court must show a degree of deference. On this point, I note that Mr. Justice MacKay in *Sheriff v. Canada (Superintendent of Bankruptcy)*, 2005 FC 305, at paragraphs 30 and 31, came to the same conclusion:

> 30. In the context of the pragmatic and functional approach to the standard of review as confirmed by the Supreme Court of Canada in Law *Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paras. 20, 26-27 and in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at paras. 21-22, the decisions on the merits of the report and on any penalties are both decisions for which the standard of review is reasonableness. That standard rests on my assessment of the comparative expertise of the Superintendent relative to the Court in the supervision of trustees and of estates, of the purpose of the Act in general, and of sections 14.01 and 14.02 in particular, to ensure an appropriate exercise of fiduciary responsibilities in

> administration of estates, and of the nature of the ultimate issues for each decision, which are mixed questions of law and fact.
>
> 31 In review of those decisions the Court owes deference to the conclusions reached by the Superintendent. Unless they are clearly unreasonable in light of the evidence considered by the Superintendent, the Court will not disturb his decisions on the merits and on penalties. That is particularly the case where in the course of a hearing the Superintendent "is not bound by any legal or technical rules of evidence" (the Act, subsection 14.02(2)(*b*)).

For the purposes of this decision, I will refer to the reasons stated by MacKay J. concerning the applicable standard of review, but I will add additional reasons here and there in the paragraphs that follow.

[22] Having said this, I note that one of the issues, the one concerning whether the trustee performed his duties in a timely manner and with due care in the Jacob bankruptcy (issue No. 3), raises questions of fact in connection with the evidence submitted. Here, the applicable standard of review is that of patent unreasonableness (see *Marchand Syndics Inc. v. Laperrière*, 2004 FC 1584, at paragraph 60).

[23] To sum up, for the purposes of this case, I intend to use the standard of reasonableness *simpliciter* for questions of mixed law and fact and that of patent unreasonableness for questions of fact. When analyzing each individual issue in dispute, I will begin by stating the applicable standard of review for greater precision and to allow for a better understanding of the decision.

[24] Before concluding on this first issue, counsel for the trustee argued that delegate Poitras should not receive the same degree of deference as the Superintendent, since he does not have the same expertise as Superintendent Marc Mayrand. The objective of such an argument is to ensure that the standard applied is that of correctness. No affidavit offering any evidence on this point was submitted. It is public knowledge that the chosen delegate was a judge and Chief Justice of the

Quebec Superior Court, and in this capacity he has heard numerous and varied proceedings, including Bankruptcy Division cases. In his capacity as delegate, he was called upon to apply the Act, regulations and the directives to the facts submitted in evidence, render a decision, and ultimately decide on a sanction. He has done this for a large part of his life. I do not see how I could apply a standard of review other than those already mentioned above. Considering the circumstances in this case, such an argument must fail.

2) Should the breaches concerning the Sunliner bankruptcy be dismissed because Ms. Plourde of the OSB was satisfied with the conduct of the trustee in bankruptcy in that case?

[25] I would stress that this argument was not developed in any significant manner in the memorandum of the trustee. Having said this, counsel for the trustee claimed that Ms. Plourde's investigation, which began in 1995 and ended in 1997 in the Sunliner bankruptcy, concluded that the administration of the Sunliner estate in bankruptcy was in compliance with the Act, the regulations and the directives; accordingly, this determination by Ms. Plourde should be taken into consideration for the purposes of the disciplinary investigation to such an extent that the breaches in question should be dismissed.

[26] Counsel did not cite any authors or submit any case law in support of this argument. He merely argued that the investigation conducted by Ms. Plourde of the OSB and the decision to discharge the trustee were in themselves sufficient to show that no other conclusion could be reached concerning the disciplinary breaches.

[27] In answer to this argument, I underline that the evidence showed that new facts were adduced from the complaints made by Mr. Paris in the summer of 1999 (including, but not limited to, the role played by Yves Lemaire with the National Bank, the cashing of two (2) cheques from BCL by him, and the follow-up to a decision rendered against the company Isomur and two other defendants). These new facts explain the intervention of the OSB starting in the summer of 1999. These were slightly different from the facts which were the subject of Ms. Plourde's investigation up to 1997.

[28] With regard to the argument that all legal procedures in the Sunliner case were followed up to the discharge of the trustee, that at no time was any negative comment made about the administration of the estate and that, accordingly, the alleged breaches should be dismissed, there is a distinction to be made between the supervision of the estate by a Superintendent as specified under the Act and a disciplinary investigation. One is not necessarily done to the exclusion of the other. On this point, Mr. Justice Martineau made the following comment in *Sam Lévy & Associés et al.*, *supra*:

> [195] Although subsection 48(1) of the Act discharges the trustee as to any act or default in the administration of the bankrupt's property and as to his conduct as trustee, the provision does not address all the Superintendent's supervisory powers under sections 14.01 *et seq.* of the Act. It is the Superintendent who has the exclusive power of issuing trustee licences and making the obtaining of such licences subject to certain conditions.
>
> [196] Additionally, a discharge order made by the Bankruptcy Court only affects the trustee's conduct in respect of third parties and any person who has an interest in the bankruptcy. In this regard, the discharge procedure is not a proceeding for examining the professional conduct of a trustee, at the conclusion of which a trustee may be subject to a disciplinary penalty. Any other conclusion would essentially amount to giving the Bankruptcy Court the power to place bankruptcy trustees beyond the reach of any disciplinary penalty, which would be to usurp the exclusive jurisdiction of the Superintendent . . . .
>
> 197] Further, I consider that subsection 41(8.1) of the Act clearly reflects the situation that existed before it was adopted. That provision only confirmed the state of the law, by expressly laying down a rule which had already emerged from the general scheme of the Act. Consequently,

> despite the fact that subsection 41(8.1) of the Act might not be applicable here, since it is not retroactive in application, I consider that the discharge order made by the Bankruptcy Court is not a legal bar to the prosecution of disciplinary proceedings brought against the applicant Roy.

I entirely agree with these reasons.

[29] I note that this argument does not in any way affect the Jacob bankruptcy case.

3) Did the delegate err in concluding that the trustee did not perform his duties in a timely manner and with due care in the Jacob bankruptcy, contrary to Rule 36?

[30] The standard of review applicable to this issue is that of patent unreasonableness. This concerned a request by the trustee for a determination as to whether the delegate [TRANSLATION] "correctly interpreted the evidence adduced at the hearing ", thus raising a question of fact.

[31] The delegate concluded as follows:

> [T]he trustee did not perform his duties in a timely manner and did not carry out his functions with due care, by not accepting the application for substitution by the representatives of Trans-Canada Credit at the time of the meeting, namely November 18, 1999, and by delaying the preparation and forwarding of the minutes of the creditors' meeting of November 18, 1999, contrary to section 13.5 of the Act and Rule 36.
>
> (Joint record, volume I, tab 2, Decision of the delegate dated December 3, 2004, at page 19).

[32] The delegate's conclusion had two parts. First of all, the trustee did not accept the application for the substitution of the trustee at the meeting held on November 18, 1999, and secondly, he took too long to prepare and submit the minutes of the meeting of November 18, 1999.

[33] Rule 36 provides as follows:

36. Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care. [Emphasis added]	**36.** Le syndic s'acquitte de ses obligations dans les meilleurs délais et exerce ses fonctions avec compétence, honnêteté, intégrité, prudence et diligence. [Je souligne]

[34] The delegate determined that the starting point of the application for the substitution of the trustee by the creditor was November 18, 1999. The trustee argued that on this date he had to contact Mr. Sévigny, the creditor's titular head, to discuss the reasons at the root of the application for substitution. At this meeting, no instructions to substitute the trustee were given, so the trustee claims.

[35] In addition, the trustee added that it was only in mid December 1999 that he concluded there actually was a substitution of trustee, following the receipt of a letter from the Official Receiver advising that the creditor had made a complaint and following a telephone conversation with Mr. Sévigny. The minutes of the November 18, 1999 meeting, which mentioned the substitution of the trustee, were submitted on December 28, 1999. Therefore, according to him, he had acted with due care, because he took action as soon as he received the letter from the Official Receiver.

[36] As mentioned in the preceding, the delegate determined that the starting point for the trustee to act on the application for substitution was November 18, not mid-December 1999. The delegate assessed the evidence as submitted. The evidence of the analyst on this point (testimonies of Mr. Sévigny, Mr. Pitt and his affidavit, etc.) allowed the delegate to conclude as he did.

[37] Under Rule 36, the trustee must perform his duties in a "timely manner" and with "due care". More than 39 days had gone by before the trustee acted. This is not acting in a "timely

manner" or with "due care", even if we take into account that it was the holiday season. There is no need to consider the legal interpretation of the duty to act in a "timely manner" and with "due care", as the time elapsed speaks for itself, and there is no reason to conclude that this is a patently unreasonable decision.

4) Did the delegate err in concluding that in the Sunliner bankruptcy the trustee infringed Directive 31 of the Superintendent of Bankruptcy, which requires that a statement confirming the accuracy of the inventory of assets of the bankrupt be filed?

[38] The standard of review applicable to this issue is that of reasonableness *simpliciter*, as it raises a question of mixed law and fact.

[39] The delegate concluded as follows:

> We conclude that the trustee failed to obtain a statement from an officer, of Distribution Sunliner (1985) Inc. from which it would have been possible to confirm the accuracy at the time of the bankruptcy of the inventory dated March 8, 1994, thereby contravening section 5(5) of the Act and paragraphs 6 and 7 of Directive No. 31 on taking inventory of the bankrupt's property, issued by the Superintendent of Bankruptcy on August 18, 1989.
>
> (Joint record, volume I, tab 2, Decision of the delegate dated December 3, 2004, at page 19).

[40] Subsection 16(3) of the Act provides as follows:

16(3) The trustee shall, as soon as possible, take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory, and for the purpose of making an inventory the trustee is entitled to enter, subject to subsection (3.1), on any premises on which the deeds, books, records, documents or property of the bankrupt may be, even if they are in the possession of an executing officer, a secured creditor or other claimant to them.	**16(3)** Le plus tôt possible, le syndic prend possession des titres, livres, dossiers et documents, ainsi que de tous les biens du failli, et dresse un inventaire; pour lui permettre de préparer un inventaire, il a le droit, sous réserve du paragraphe (3.1), de pénétrer en tout lieu où peuvent se trouver les titres, livres, dossiers, documents ou biens du failli, quoiqu'ils puissent être en la possession d'un huissier-exécutant, d'un créancier garanti ou d'une autre personne qui les réclame.
[Emphasis added]	[Je souligne]

[41] Under paragraphs 5(4)(*c*)(*d*) and (*e*) of the Act, the Superintendent is authorized to issue directives to facilitate the application of the Act and Rules. Subsection 5(5)of the Act adds the following:

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. [Emphasis added]	**5(5)** Les personnes visées par les instructions du surintendant sont tenues de s'y conformer. [Je souligne]

[42] Directive 31, which has now been replaced by Directive 7, specifies the content of the inventory (see paragraph 4 of Directive 31 and its subparagraphs) and requires that the bankrupt or the bankrupt's representative sign a statement (see the Appendix of the Directive) certifying:

> . . . that to the best of my knowledge and belief this final inventory listing . . . represents the quantities, descriptions (and valuation, if applicable) of all estate property, goods and assets . . . .

If such a statement has not been obtained, the trustee must note its absence (see paragraph 7 of Directive 31).

[43] The trustee has admitted that the statement required under Directive 31 was not obtained, and the delegate noted this in his decision.

[44] The trustee argued that the statement was not compulsory, because the bankruptcy balance sheet had been filed with a sworn statement. He argued that this was sufficient to certify the accuracy of the inventory made a few days before the bankruptcy and that, accordingly, the objective of paragraphs 158(*d*) and (*e*) of the Act had been respected.

[45] A simple reading of the bankruptcy balance sheet shows that it does not contain the information required under paragraph 4 of Directive 31. All that was mentioned under the inventory of the bankruptcy balance sheet was an amount of $120,000 at item “c” and a reference to a list under the heading “inventory”, where we find a book value of $442,914 and an estimated realizable value of $120,000. There is no list of property.

[46] The report of the inventory taken a few days before the bankruptcy does not contain the statement required under paragraph 7 of Directive 31. Only the signature of the person who took the inventory appears in the report.

[47] In addition, counsel for the trustee argued that the delegate had erred in law by not rendering a decision on the importance of the requirements of subsection 5(5) of the Act and paragraphs 6 and 7 of Directive 31, because the interrelationship between the duly sworn bankruptcy balance sheet and the inventory taken a few days before the bankruptcy allowed the trustee to argue that he:

> [TRANSLATION]
>
> . . . complied with all the requirements of the Act, and any criticism on this point is based on a strictly legalistic and technical reading of the Act and/or Directive 31.
>
> (Applicant’s memorandum, at page 10, paragraph 39)

[48] The trustee was of the opinion that the objective of Directive 31 had been met, as was shown by the evidence submitted. The delegate made another finding, specifically that the evidence on record did not show non-compliance with the Directive in not filing the statement in support of the inventory.

[49] Without delving into the details of paragraphs 158(*d*) and (*e*) of the Act and of Directive 31, it seems to me that there is a marked difference between a bankruptcy balance sheet and an inventory of estate assets. One document cannot be substituted for the other, and vice versa. The balance sheet of a bankruptcy does not necessarily have an inventory of assets as required under paragraph 4 of Directive 31. The sworn statement of the balance sheet of a bankruptcy does not confirm the content of the inventory. Accordingly, the delegate did not have to be concerned with the requirements of subsection 5(5) and paragraphs 6 and 7 of Directive 31, because the trustee's evidence was insufficient to counteract the requirements of Directive 31.

[50] With these findings, I come to the same conclusion as the delegate did in his decision, that is, that the requirement under Directive 31 concerning the statement of the bankrupt or of the bankrupt's representative was not respected. Consequently, the delegate's decision is reasonable and in no way warrants intervention by this Court.

5) Did the delegate make a mistake of fact in concluding that in the Sunliner bankruptcy the trustee infringed paragraph 5 of Directive 22 of the Superintendent of Bankruptcy, which requires that the trustee document his files?

[51] Because this is a question of mixed law and fact the standard of review is that of reasonableness *simpliciter*.

[52] The delegate concluded that the trustee's files were not properly documented in the following situations:

- Isomur's reassignment to the trustee of the account receivable in the amount of $6,031.43 from Bay Distributors;
- the results obtained in connection with the collection of the said account receivable by the trustee and of the balance of $9,000 owed by Isomur;
- the decision to postpone *sine die* the actions to be taken by the trustee in order to recover from Georges Rivard and Jean-Yves Genest the amount of money owing pursuant to a judgment dated January 4, 1995.

[53] The delegate stated the following:

> This directive [paragraph 5 of Directive 22] confirms that the trustee has a duty to realize on all the assets of the estate. It is up to him to prove that he was unable to document everything that took place in his office regarding the receipts, disbursements and actions taken. The trustee's response that [TRANSLATION] "this would create a mountain of paper" is clearly inadequate.
>
> (Joint record, volume I, tab 2, Delegate's decision dated December 3, 2004, at page 19).

[54] The Court underlines the fact that, under subsection 5(5) of the Act, trustees have the obligation to abide by the directives issued by the Superintendent.

[55] Paragraph 5 of Directive 22 reads as follows:

5. As it is a statutory obligation on the part of a trustee to realize on all assets for the benefit of the estate, it is therefore expected that a trustee will document his files as much as possible in support of the receipts, disbursements and actions taken on all the transactions. The Official Receiver may, at his discretion, request from the trustee a copy of <u>that documentation</u>. [Emphasis added]	**5.** Étant donné que le syndic a l'obligation statutaire de réaliser tous les biens de l'actif pour le bénéfice des créanciers, il importe donc que le syndic justifie, autant que possible, toutes ses transactions quand (sic) aux recettes, déboursés et actions prises. Le séquestre officiel, lorsqu'il le juge à propos, peut demander au syndic de lui fournir une copie de <u>ces documents</u>. [Je souligne]

[56] In addition to the argument to the effect that the delegate did not give reasons for determination because he did not specifically mention the documents which should have been on record, counsel for the trustee submitted the following:

> [TRANSLATION]
> [T]he applicant was found liable not because of his incompetence or negligence, but because he reported details to the representatives of the Superintendent of Bankruptcy orally rather than placing written memos in his files.

[57] The evidence shows that the trustee's files did not contain documents explaining the following situations in a summary manner or otherwise:

- further to the sale of the accounts receivable to Isomur, the undertaking made by certain debtors to pay $9,000 to the trustee rather than $15,000;
- the trustee's responsibility to recover an amount of $6,031;
- the fact that the amount of $9,000 mentioned above was not recovered and a decision was made not to continue recovery proceedings because of the insolvency of the persons and corporations involved.

[58] It was only later, in August 1999, further to questions from auditor Nolet of the OSB that the trustee and the lawyer involved in the bankruptcy gave any explanations (see the Joint record, volume X, tab 49, letter from the trustee to Industry Canada, dated August 20, 1999, and Joint record, volume X, tab 49-D, letter from counsel for the trustee to the trustee, dated August 18, 1999). It is obvious that the explanations given in these letters were not documented in the trustee's files at the time of the events in question.

[59] A simple reading paragraph 5 of Directive 22 shows that it does not refer to verbal explanations, but rather to documents concerning <u>all</u> transactions in connection with the receipts,

disbursements and actions taken. In such circumstances, it is up to the trustee to explain why it was not possible to document all relevant transactions. The trustee's defence to the effect that he subsequently gave oral and written explanations does not meet the requirements of paragraph 5 of Directive 22. This paragraph requires that trustees document their administration, not subsequently explain it. The trustee's answer to the effect that [TRANSLATION] "it will create a mountain of paper" is unjustified.

[60] With regard to the argument that the delegate did not give sufficient reasons for his decision insofar as he did not specifically mention the documents which should have been in the files, I can only note that the evidence was to the effect that there were no documents directly or indirectly explaining the follow-up on the $15,000 judgment in the trustee's favour, the defendants' undertaking to pay $9,000, the not-sufficient-funds cheque, the decision not to continue recovery from the defendants, or the trustee's agreement to recover $6,031.43 from another debtor. Accordingly, criticizing the delegate for not having specified the documents which should have been in his files seems to me to be a moot point, because, *a priori*, letters of explanation sent after the events would have been sufficient, or *a fortiori*, an ongoing correspondence as the case progressed would also have been sufficient. There was no obligation to give any more details. The delegate's decision concerning the fourth issue is reasonable, considering the case as a whole, the evidence and the applicable law.

6) Did the delegate err in concluding that the trustee did not perform his duties with due care in the Sunliner bankruptcy case?

[61] I intend to apply the same standard of review as that applied to the fourth issue, that is, reasonableness *simpliciter*.

[62] The delegate concluded that the trustee did not perform his duties with due care:

- by not documenting his files to report the mandate he gave to Yves Lemaire of Gérance Mauricie to follow up on the recovery of money from BCL, and by not documenting the change in status of Mr. Lemaire, who according to the trustee was acting for the National Bank of Canada in the collection of these amounts;
- by not advising BCL to forward cheques to Yves Lemaire after having learned about the mandate Mr. Lemaire obtained from the National Bank of Canada; and
- by authorizing Yves Lemaire to open the trustee's mail,

contrary to subsection 5(5) and section 13.5 of the Act, Rules 36 and 53 of the regulations, and paragraph 5 of Directive 22.

[63] The Court has already cited subsection 5(5) of the Act concerning the obligation of a trustee to comply with the Superintendent's directives, as well as the obligation to document files as required under paragraph 5 of Directive 22 and Rule 36, which obliges trustees to perform their duties in a timely manner and with due care.

[64] For the purposes of this issue, section 13.5 of the Act specifies the following:

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.

Furthermore, Rule 52 states the following:

52. Trustees, in the course of their professional engagements, shall apply due care to ensure that the actions carried out by their agents, employees 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.	**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.

[65] The evidence shows that Mr. Lemaire's involvement in the Sunliner bankruptcy was not documented so as to show his role in the recovery of money from BCL, the new role he played in recovering this money for the National Bank, and the role Mr. Lemaire played in opening the trustee's mail.

[66] The fact that Mr. Lemaire's role was not documented in the Sunliner bankruptcy was explained some time later by the trustee. When conducting his audit, Mr. Nolet, an auditor from the Office of the Superintendent of Bankruptcy, in a letter following a meeting on July 23, 1999, obtained information concerning the role played by Mr. Lemaire in connection with the trustee. The trustee answered by giving explanations in his letters dated August 20 and November 19, 1999, including a letter from Mr. Lemaire dated August 10, 1999 regarding his role and the accounts receivable involving BCL. Moreover, his explanations were complemented by the testimony he gave at the hearing before the delegate.

[67] The evidence shows that in 1997, Mr. Lemaire, who had access to the trustee's mail at his other office in Trois-Rivières, cashed two (2) BCL cheques for the National Bank, as per his mandate. These cheques were payable to the order of the trustee. A third cheque from BCL was cashed by the trustee in 2000, after he had been discharged from the administration of the Sunliner bankruptcy on July 23, 1997.

[68] In conducting the analysis of the preceding issues, I have already mentioned the trustee's obligation to document the bankruptcy files in compliance with paragraph 5 of Directive 22. The evidence is clearly to the effect that this had not been done in the Sunliner bankruptcy with regard to the role played by Mr. Lemaire and the undocumented mandate he was given. It would have been prudent to document the role played by Mr. Lemaire, but this was not done.

[69] Having studied the evidence in relation to the ethical standards established by legislation and the Directives, and after having studied the reasons and the conclusion which the delegate reached, I conclude that his decision is reasonable.

7) Was the delegate's decision to suspend the trustee's licence for one week legal and proper in the circumstances of the case?

[70] This issue raises two questions of law, that is, the interpretation to be given to a statutory provision such as subsection 14.01(1) of the Act concerning the possible choices of sanctions to be considered and the question as to whether the delegate's decision provided sufficient reasons. The

standard of review applicable to such matters is that of correctness. However, assuming that the delegate's decision reflects the choice of sanctions specified in subsection 14.01(1) and is supported with adequate reasons, I am asked to assess it by taking into consideration the evidence and the sanction of a suspension of one (1) week. In such a case, the standard of review applicable is that of reasonableness *simpliciter* (see paragraph 21 of this decision and the *Sherriff* decision, *supra*, at paragraph 30).

[71] For the purposes of this analysis, it is important to once again reproduce in full subsection 14.01(1) of the Act:

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	**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, soit lorsqu'il est dans l'intérêt public de le faire :
(*a*) a trustee has not properly performed the duties of a trustee or has been guilty of any improper management of an estate,	*a*) annuler ou suspendre la licence du syndic;
(*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	*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;
(*c*) it is in the public interest to do so,	*c*) ordonner au syndic de rembourser à l'actif toute somme qui y a été soustraite en raison de sa conduite.
the Superintendent may do one or more of the following:	
(*d*) cancel or suspend the licence of the trustee;	
(*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, and	
(*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.

[72] In his decision on the sanction dated January 31, 2005, after having eliminated option C, which is not relevant in this case, the delegate wrote the following concerning subsection 14.01(1) of the Act:

> Having practised as a trustee over a period of some 25 years and having been a member of the Board of Directors then vice-president of the Association québécoise des professionnels en restructuration et en insolvabilité (*the Quebec association of professionals in debt restructuring and insolvency*), there is no need to either require him to successfully undergo any examinations or proficiency courses. We are thus left with the option of cancelling or suspending his license as trustee.
>
> [Emphasis added]
>
> (Joint record, volume I, tab 2, Delegate's decision dated January 31, 2005, at page 36).

[73] With all due respect to delegate Poitras, I do not think that after having eliminated certain options—that of reimbursing the estate, which is inapplicable to this case, and that of taking proficiency courses— there were only two left, namely, either cancelling or suspending the trustee's licence.

[74] My reading of subsection 14.01(1) of the Act shows that Parliament used the verb "may do one of the following" ("*peut*" in French) and not the verb "must" ("*doit*" in French). Accordingly, Parliament gave the Superintendent or his delegate the additional discretionary option of not applying any sanction if the circumstances of the case warrant it. Such an interpretation of the word "may" is clearly stated in section 11 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which reads as follows:

11. The expression "shall" is to be construed as imperative and the expression "may" as permissive. [Emphasis added]	**11.** L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de

> facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.
> [Je souligne]

In addition, in *Khadr v. Canada (Attorney General)*, 2006 FC 727, at paragraphs 107 and 108, Mr. Justice Phelan effectively summarized the case law bearing on the interpretation to be given to the word "may":

> **107** Characterizing "may" as permissive implies that it imports discretion upon the person it grants the permissive authority. Although this implication of discretion arises, it is not in itself conclusive. In *R. v. S. (S.)*, [1990] 2 S.C.R. 254 at 273-274, Dickson C.J. indicates that, although "may" implies discretion, it does not preclude obligation. In *R. v. S. (S.)*, Dickson C.J. refers to the judgment of Lord Cairns in the House of Lords case of *Julius v. Lord Bishop of* Oxford (1880), 5 App. Cas. 214 where a distinction was drawn between a power coupled with a duty and a complete discretion. The relevant portion of this judgment is as follows:
>
> > [The words "shall be lawful"] confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.
> >
> > . . .
> >
> > [W]here a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.
>
> **108**. The Nova Scotia Court of Appeal, in *Brown v. Metropolitan Authority* (1996), 150 N.S.R. (2d) 43 (C.A.), fully adopted the reasoning in *Julius*, holding that once the conditions were met (conditions as set out in a particular statute imposing a duty on the Metropolitan Authority to pay compensation for damages that arose out of its actions), a duty arose to exercise this power in spite of the fact that the words empowering the Authority were "may pay".

[75] In my opinion, taking into consideration the *Interpretation Act*, the Act and case law, it is a mistake to construe the verb "may" within the meaning of the Act as implying an obligation to impose a sanction of cancellation or suspension of the licence. I do not find anywhere in the words

used by Parliament an obligation to do anything on the basis of the verb “may” (“*peut prendre*”, “may do one or more of the following”) as used in subsection 14.01(1) of the Act.

[76] Counsel for analyst Laperrière suggested that the delegate’s decision is to the effect that the verb “may” must be understood as meaning all the discretion that is granted to him, which would include the option of taking all the evidence into consideration and not imposing a specific sanction.

[77] On reading the decision of January 31, 2005, it is impossible for me to agree with such an interpretation and find in it an implied understanding. The delegate clearly and specifically stated, “We are thus left with the option of cancelling or suspending his licence as trustee” (Joint record, volume I, tab 2, Delegate’s decision dated January 31, 2005, at page 36). It is difficult to see an implicit understanding of discretionary power when the delegate demonstrates an explicit understanding of his power.

[78] My reading of the whole decision does not allow me to attenuate the delegate’s explicit understanding. In fact, the text of the decision follows the line of reasoning resulting from the delegate’s understanding of subsection 14.01(1) of the Act.

[79] At the hearing, particularly during the oral arguments, I asked if the delegate had expressed verbally his understanding of subsection 14.01(1) of the Act and the options he had, including that of not imposing any sanction, taking the complete record into consideration. I was told that he had not said anything on this point.

[80] The delegate's understanding of subsection 14.01(1) of the Act is an error in law which calls into question the entire decision rendered on January 31, 2005. He needed to bear in mind an understanding that included all the options to be considered and needed a clear understanding that it was a discretionary power that had been granted to him. This seems to me to be vital for a disciplinary decision-maker when he or she must assess the appropriateness of a sanction on the basis of the evidence on record.

[81] Having concluded that the decision of January 31, 2005 contained an error for the above-mentioned reason, the case must be returned to the delegate so that he may take the appropriate measures for a new decision to be rendered on the sanction, taking into consideration the discretionary power and all options available under subsection 14.01(1) of the Act. Therefore, it will not be necessary to deal with the trustee's two (2) other arguments, that is to say, the lack of reasons for the decision concerning the sanction and the merit of the decision suspending the trustee's licence for a period of one (1) week.

IV. Costs

[82] Costs were discussed at the hearing of the application for judicial review. Considering the result in this case and in accordance with the discretionary power granted to me under section 400 of the *Federal Courts Rules*, SOR/98-106, and its subsections, costs are awarded to the trustee.

JUDGMENT

THE COURT ORDERS that:

- The application for judicial review be allowed in part, the decision of January 31, 2005, is set aside, and the case is returned to the delegate for redetermination of the sanction;
- Costs to the trustee.

"Simon Noël"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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