

Federal Court



Cour fédérale

Date: 20100222

Docket: T-49-09

Citation: 2010 FC 181

Ottawa, Ontario, February 22, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

**HENRY SZTERN and
HENRY SZTERN & ASSOCIÉS INC.**

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Henry Sztern (the applicant) and Henry Sztern & Associés Inc. (together, the applicants) of an ongoing disciplinary decision of Delegate André Deslongchamps (the Delegate), in his capacity as a delegate of the Superintendent of Bankruptcy, pursuant to section 14.01 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the Act). The Delegate ordered that the trustee licences of Henry Sztern and Henry Sztern & Associés Inc. be cancelled.

[2] Henry Sztern was self-represented at the hearing before the Court. For ease of reference, the Court will refer in its decision to Henry Sztern as the applicant and Henry Sztern & Associés Inc. as the applicants.

[3] Henry Sztern has held a licence as an individual trustee since 1985 and Henry Sztern & Associés Inc. have held a licence as a corporate trustee since September 27, 1991. These two licences were not renewed by their holder in 2004.

[4] The Office of the Superintendent of Bankruptcy (OSB) supervises the administration of all the estates and matters to which the Act applies, including trustees' and debtors' compliance with the Act (subsection 5(2) of the Act).

[5] After an initial report on the administration of the Henry Sztern and Henry Sztern & Associés Inc., the Hon. Benjamin Greenberg approved the agreement reached between the Superintendent and the applicants on August 29, 2001. Pursuant to this order, Henry Sztern's personal trustee licence was suspended from December 1, 2001 to June 30, 2002 and the corporate trustee licence of Henry Sztern & Associés Inc. was subject to limitations for a two-month period beginning December 1, 2001.

[6] On April 2, 2003, following these disciplinary actions and as a result of several complaints received by the Office of the Superintendent of Bankruptcy, Alain Lafontaine, the Superintendent's deputy, issued conservatory measures pursuant to section 14.03 of the Act.

[7] Following new revelations, Alain Lafontaine issued new conservatory measures in order to safeguard the assets under the administration of the applicants on April 14, 2003. All open files were transferred to a guardian trustee, H.H. Davis & Associates Inc. (the Guardian Trustee), who was directed to take possession and control of the applicants' files. The taking of an inventory on April 14, 2003 indicated the existence of 1,349 files under the Henry Sztern's responsibility in his capacity as trustee.

[8] Alain Lafontaine issued further conservatory measures on May 6, 2003 and appointed Gilles-Normand Lavallée and/or Bernadette Blain as official receivers to complete the administration of the applicants' files.

[9] Following an order by Justice Pinard of this Court dated June 27, 2003, representatives of the Superintendent's deputy went to the residence of Henry Sztern on June 30, 2003 and took possession and/or obtained missing electronic data.

[10] Following the issuance of the first conservatory measures, the OSB ordered an investigation into the conduct of the applicants pursuant to subsection 5(3)(e) of the Act. The mandate was first given to Senior Analyst Deborah Jazey in March 2003 and subsequently to Senior Analyst Sylvie Laperrière (the Senior Analyst) on April 23, 2004.

[11] The investigation revealed numerous irregularities in the applicants' conduct. Notice was given to the Superintendent of Bankruptcy by way of a written report prepared by the Senior

Analyst on August 26, 2005 and later amended on December 6, 2007. A written notice was transmitted to Henry Sztern in a letter dated August 29, 2005. The report contained 35 allegations of offences against provisions of the Act, the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 (the Rules) and the Superintendent's Directives, allegedly committed by Henry Sztern and Henry Sztern & Associés Inc. The Senior Analyst's allegations of offences are as follows:

- A. False and misleading accounting system
 - 1. The trustees maintained a second accounting system which did not indicate the unauthorized withdrawals made by the trustees. In doing so, the trustees maintained an accounting system that they knew or ought to have known to be false and misleading, thereby contravening section 13.5 of the Act and sections 36 and 45 of the Rules (attachment 10)

- B. Unauthorized withdrawals
 - 2. Between the months of February 1998 and April 2003, the trustees made premature draws totalling \$305,217.73 (including taxes) from the trust accounts for 399 summary administration estates and withdrew amounts in excess of the tariff totalling \$156,205.48 from the trust accounts for 187 of these summary administration estates, thereby contravening section 156 of the Act and section 128 of the Rules, section 13.5 of the Act and section 48 of the Rules (attachment 11)

 - 3. Between the months of June 1997 and April 2003, the trustees made withdrawals in excess of the tariff totalling \$574,687.91 from the trust accounts for 201 consumer proposal files, thereby contravening section 66.26 of the Act and section 129 of the Rules, section 13.5 of the Act and section 48 of the Rules (attachment 12)

- C. Prohibited actions while the licence of trustee: Henry Sztern was suspended between December 1, 2001 and July 1, 2002:
 - 4. The trustee Henry Sztern exercised his powers as trustee while his licence was suspended by:
 - a) making 6 withdrawals totalling \$3,300 from the consumer proposal file of Alain Germain between January 2002 and June 2002; (attachments 14 and 15)

- b) making 7 withdrawals totalling \$2,450 from the consumer proposal file of Benoît Kollar & Chantal Séguin between January 2002 and July 2002; (attachments 14 and 16)
- c) making 6 withdrawals totalling \$950 from the summary bankruptcy files of Alain Bazinet, Chet Rom, Duc Trong Nguyen, Jacques Rondeau & Dany Huppé, Sébastien Lamontagne & Sylvain Gagné, on or about March 12, 2002; (attachments 14 and 17)
- d) making a withdrawal of \$6,700 from the summary bankruptcy files of Duc Trong Nguyen on or about January 15, 2002; (attachments 13, 14, 17 and 18)
- e) making a withdrawal of \$450 on or about February 1, 2002 from the summary bankruptcy file of Jacques Rondeau & Dany Huppé; (attachment 17)
- f) making a withdrawal of \$100 from the summary bankruptcy file of Sylvain Gagné on or about March 22, 2002; (attachment 17)
- g) making 6 withdrawals totalling \$2,520 from the consumer proposal file of Jean-Jacques Vigier & Pierrette Laprade between January 2002 and June 2002; (attachment 10)
- h) making a withdrawal of \$2,500 on or about January 22, 2002 and a withdrawal of \$850 on or about January 25, 2002 from the trust account of the bankruptcy file of Service de Mini-Remorque H.C.H. Inc.; (attachment 19)
- i) making a withdrawal of \$6,000 on or about April 4, 2002 and a withdrawal of \$5,000 on or about April 5, 2002 from the trust account of the bankruptcy file of 176984 Canada Inc., (attachment 20);

thereby contravening the Trustee Suspension Order issued on August 29, 2001 by the Honourable Benjamin J. Greenberg, delegate of the Superintendent of Bankruptcy, section 13.5 of the Act and section 34 and 36 of the Rules (attachment 2).

5. The trustee Henry Sztern, while his licence was suspended, predated cheques November 30, 2001 to:

a) make a withdrawal of \$550 from the trust account in the consumer proposal file of Alain Germain on or about March 12, 2002; (attachments 14 and 15)

b) make a withdrawal of \$350 from the trust account in the consumer proposal file of Benoît Kollar & Chantal Séguin on or about March 12, 2002; (attachments 14 and 16)

c) make 5 withdrawals totalling \$2,095 from the consumer proposal file of Jean-Jacques Vigier & Pierrette Laprade between January 2002 and June 2002; (attachment 10)

d) make a withdrawal of \$2,500 on or about January 22, 2002 and a withdrawal of \$850 on or about January 25, 2002 from the trust account in the bankruptcy file of Service de Mini-Remorque H.C.H. Inc.; (attachments 13 and 19)

e) make a withdrawal of \$6,000 on or about April 4, 2002 and a withdrawal of \$5,000 on or about April 5, 2002 from the trust account in the bankruptcy file of 176984 Canada Inc., (attachment 20)

thereby contravening section 13.5 of the Act and sections 45 and 48 of the Rules.

- E. Moneys not deposited in estate and insolvency trust accounts
7. Between 1999 and April 2003, the trustees did not deposit in a bank all moneys received for the account of each estate in the trust account, which amount totalled \$89,782.43 received in 183 summary bankruptcy administration files and \$43,648.62 received in 42 consumer proposals, thereby contravening subsections 5(5) and 25(1) of the Act and subsections 3b), 4(1)a) and 4(1)b) of Directive 5 of the Superintendent of Bankruptcy on Estate Funds and Banking issued on November 17, 1994 (attachment 22).
- F. Moneys received as indemnification not deposited in a proper account
8. The trustee did not deposit the funds received as indemnification:
- an amount of \$2,000 received in the matter of the bankruptcy file of Pisos Inc. on or about October 24, 2001; (attachments 23, 25, 26 and 27)
 - an amount of \$1,500 received on or about October 22, 2001 and \$2,000 received on or about October 24, 2001 in the matter of the

bankruptcy file of Création Liboria Ltée; (attachments 24, 25, 26 and 27)

in the estate bank trust account, in a separate bank account clearly identified for that purpose or in a separate bank trust account containing the aggregate of all such funds held, thereby contravening subsection 25(1) of the Act, subsection 5(5) of the Act and sections 16 and 17 of Direction N^o 5R of the Superintendent of Bankruptcy on Third Party Deposits and Guarantees.

- G. Bankruptcy of Linh Khan Nguyen
9. In April 1998, the trustees made an unauthorized withdrawal of \$84,000 from the trust account of the estate of Linh Khan Nguyen, thereby contravening subsection 25(1.3) of the Act (attachments 28 and 29).
- H. Bankruptcy of L.C.T. Metal Inc.
10. Between the months of January 2000 and May 2000, the trustees made unauthorized withdrawals totalling \$32,522.88 (including taxes) from the trust account of the estate of L.C.T. Metal Inc., thereby contravening subsection 25(1.3) of the Act (attachments 30 and 31).
- I. Bankruptcy of 176984 Canada Inc.
11. Between the months of August 1993 and May 2002, the trustees made unauthorized withdrawals totalling \$82,018.89 (including taxes) from the trust account of the estate of 176984 Canada Inc., thereby contravening subsection 25(1.3) of the Act (attachment 32).
- J. Bankruptcy of Mecco Limited
12. Between the months of February 1992 and February 2001, the trustees made eight payments totalling \$173,105.59 to the lawyer of the estate from the trust account of the estate of Mecco Limited without previously submitting their bill of costs to the court for taxation, thereby contravening subsection 197(4) of the Act and subsection 18(1) of the Rules (attachments 33, 34 and 35).
13. On or about July 7, 1998, the trustees wired a payment of \$446,499.04 to “LORNE GOLDMAN ‘IN TRUST’” from the trust account of the estate of Mecco Limited, even though this lawyer’s bill of costs was only taxed by order dated December 20, 2000, thereby contravening subsections 25(1.3), 25(2) and 197(4) of the Act (attachments 35 and 36).

14. On or about February 13, 2001, the trustees deposited in their account No. 0301637, "HENRY SZTERN & ASSOCIES REG'D", 42 GST refunds (input credits) issued in the name of the debtor, Meco Limited, and totalling \$52,145.03, rather than depositing them in the estate trust account, thereby contravening subsections 25(1) and 25(3) of the Act (attachment 37, p. 5 and attachments 44 and 49).
 15. Between the months of January 1999 and March 2001, the trustees made unauthorized withdrawals totalling \$492,957.82 (including taxes) of which \$440,812.79 came from the trust account of the estate of Meco Limited and \$52,145.03 from monies deposited to an account No. 0301637 opened under the name "H. SZTERN & ASSOCIES REG'D", thereby contravening subsection 25(1.3) of the Act (attachment 37, p. 4-5 and 14, and attachments 44 and 49).
 16. The trustees signed false minutes from a meeting of inspectors dated January 1999 and associated themselves with two other false minutes from meetings of inspectors dated February 16, 1999 and April 1, 1999, by using them to withdraw fees totalling \$212,658.51 (including taxes) from the trust account of the estate of Meco Limited, thereby contravening section 13.5 of the Act and sections 36 and 45 of the Rules (attachment 37, p. 5 and attachment 44).
- K. Bankruptcy of Eric Lacroix
17. Between the months of June 2000 and October 2001, the trustees made unauthorized withdrawals totalling \$18,133.73 (including taxes) from the trust account of the estate of Eric Lacroix, thereby contravening subsection 25(1.3) of the Act (attachment 37, p. 6-7, and attachments 45 and 49).
- L. Bankruptcy of 9084-8144 Quebec Inc.
18. On or about December 12, 2002, the trustees made an unauthorized transfer of \$20,000 from the trust account of the estate of 9084-8144 Quebec Inc. to their account No. 0301637, "H. SZTERN & ASSOCIES REG'D", thereby contravening subsection 25(1.3) of the Act (attachment 37, p. 8 and attachments 46 and 49).
- M. Bankruptcy of Service de Mini-Remorque H.C.H. Inc.
19. Between the months of February 2001 and February 2002, the trustees made unauthorized withdrawals totalling \$46,107.40 (including taxes) from the trust account of the estate of Service de Mini-Remorque H.C.H. Inc., thereby contravening subsection 25(1.3) of the Act (attachment 37, p. 9-10, and attachments 47 and 49).

- N. Bankruptcy of Kenneth Roy Sinclair
20. Between the months of July 2000 and March 2001, the trustees made unauthorized withdrawals totalling \$77,423.67 (including taxes) from the trust account of the estate of Kenneth Roy Sinclair, thereby contravening subsection 25(1.3) of the Act (attachment 37, p. 10-11, and attachments 48 and 49).
- O. Submitting falsified bank statements to the Official Receiver
22. The trustee Henry Sztern, in the following consumer proposal files:
- Richard Archambault & Andrée Jean (41-235334/35),
Michel Jobin & Diane Bouchard Jobin (41-240676/77),
Denis Dufour & Linda Bouchard (41-241615/16),
Marcel Lavoie (41-270213),
- falsified bank statements for the period from Nov. 29/01 to Dec. 31/02, copies of which were submitted on February 19, 2003 to representatives of the Office of the Superintendent of Bankruptcy, thereby contravening section 13.5 of the Act and sections 36, 39 and 45 of the Rules (attachment 38).
23. The trustee faxed falsified bank statements on or about March 5, 2003 to representatives of the Office of the Superintendent of Bankruptcy in the following consumer proposal files:
- Rachel Chartrand (41-240055), (attachments 39 and 40)
Michel Jobin & Diane Bouchard Jobin (41-240676/77), (attachments 38 and 39)
Marcel Lavoie (41-270213), (attachments 38 and 39)
Bernard Séguin (41-230928), (attachments 39 and 40)
Richard Archambault & Andrée Jean (41-235334/35), (attachments 38 and 39)
Rémi Dumais & France Beauregard (41-239883/84), (attachments 39 and 42)
- thereby contravening section 13.5 of the Act and sections 36, 39 and 45 of the Rules.
24. The trustee faxed falsified bank statements for the consumer proposal file of Denis Dufour and Linda Bouchard on or about March 21, 2003 to representatives of the Office of the Superintendent of Bankruptcy, thereby contravening section 13.5 of the Act and sections 36, 39 and 45 of the Rules. (attachment 43)

[12] In summary, the written notice of the Senior Analyst alleged that the applicants, while holding a trustee licence: maintained a false and misleading accounting system; made unauthorized withdrawals; made cash withdrawals in contravention with subsection 25(2) of the Act; failed to deposit moneys in trust accounts; made several unauthorized withdrawals from the trust account of several estates and falsified bank statements; and Henry Sztern exercised his powers as trustee while his licence was suspended.

[13] The Senior Analyst recommended that the applicants' licences be cancelled and that they make restitution in 14 estate files, representing a total of \$1 899 173.86. These recommendations were amended in November 2005 and five restitution sanctions were removed because of a civil action filed by the Guardian Trustee against the applicants in the Superior Court in Montreal, having the same cause of action ("action en récupération de deniers").

[14] On November 1, 2005, the OSB decided that a disciplinary hearing would be held and the powers, duties and functions were delegated to the Hon. Lawrence A. Poitras. The Hon. Poitras asked to be excused and resigned from this delegation in February 2006. The OSB then delegated the powers and duties to the Hon. André Deslongchamps (the Delegate).

[15] The parties held a first pre-hearing conference on April 19, 2006. The applicant requested to examine for discovery but this request was denied by the Delegate.

[16] On May 15, 2006, the applicant filed a motion for particulars. Within a month, additional documents were provided to him by the Senior Analyst.

[17] In July 2006, the applicant filed a motion to strike allegations which was dismissed by the Delegate on February 26, 2008.

[18] In April 2007, the applicant filed a motion to obtain the services of an interpreter but this motion was dismissed by the Delegate on October 2, 2007.

[19] In April 2007, the applicant filed a motion holding that he had reason to believe that the Delegate was in conflict of interest and there were reasonable grounds to apprehend bias on his part. The motion was dismissed by the Delegate on June 5, 2007. The applicant filed for judicial review of this decision, but leave was dismissed by this Court on February 7, 2008.

[20] The actual disciplinary hearing began on February 12, 2008. There were 18 days of hearing and 16 witnesses were heard. Henry Sztern was self-represented and Henry Sztern & Associés Inc. was not represented. Henry Sztern testified but the applicant did not present any other witnesses. The hearing ended on June 3, 2008 and the parties were invited to submit their submissions in writing.

[21] On December 15, 2008, the Delegate rendered his decision, which was translated by the OSB on February 3, 2009. On January 10, 2009, the applicants filed an application for judicial review requesting the decision of the Delegate be quashed.

Impugned Decision

[22] The Delegate noted that the proceeding is disciplinary in nature and that the alleged offences have been treated by the courts in the past as similar to a quasi-penal offence. The recognition of the quasi-penal nature of the proof and the hearing before the Delegate does not make subsection 14.02(2) of the Act inoperative. The application of subsection 14.02(2) of the Act is subject to the rules of natural justice (*Perrier v. Canada (Superintendent of Bankruptcy)*, (1995), 93 F.T.R. 127, 55 A.C.W.S. (3d) 902). The Delegate noted that the burden of rebutting the allegations or offences alleged by the Senior Analyst's report rests on the applicants.

[23] Moreover, on the applicants' motion to dismiss the allegations, the Delegate on February 26, 2008, found that the disciplinary and/or quasi-penal nature of the allegations entailed a duty of disclosure or information by the Senior Analyst and that this duty had been performed.

[24] Henry Sztern raised a specific objection, referring to subsection 5(2) of the *Canada Evidence Act*, R.S., 1985, c. C.-5 (the *CEA*) and section 13 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Charter*) on the ground of possible self-incrimination to answering a specific question in the case of a specific offence (K.17).

[25] In *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 at paragraph 22, discussing the application of the *Charter*, the Supreme Court stated that section 13, which was adopted to expand the scope of the protection conferred by section 5 of the *CEA*, is designed “to protect individuals from being indirectly compelled to incriminate themselves”. On the other hand, the Supreme Court had previously found that a distinction is made between impeachment of credibility and incrimination in ways which have become unduly and unnecessarily complex and technical (*R. v. Mannion*, [1986] 2 S.C.R. 272, 69 N.R. 189). Henry Sztern’s objection was dismissed as the Delegate noted two voluntary testimonies before him in cross-examination and in the Superior Court. He concluded that the only purpose of the cross-examination in the present proceedings was to impeach Henry Sztern’s credibility.

[26] The Delegate analyzed the applicants’ operational method and noted that only Henry Sztern signed cheques. Certain banking transactions were made by “debit memos” sent to the Toronto-Dominion Bank (TD Bank). These cheques and these “debit memos” were used to make transfers of fees from “in trust accounts” opened for each of the debtors. These transfers were made either to the bank account of Henry Sztern & Associés Inc. (No. 301637) or to Henry Sztern’s personal account (No. 860407).

[27] The Delegate then proceeded with a thorough analysis of each of the 35 alleged offences. The Delegate was persuaded from the evidence submitted as a whole that Henry Sztern & Associés Inc. and Henry Sztern personally disregarded the provisions of the Act and the Rules. By giving questionable and illegal accounting directions to their employees, the applicants knowingly

converted large sums of money to their own use, without regard to those to whom they were accountable. By their actions, the Delegate found that they disregarded the required high standards of ethics, which are central to the maintenance of public trust in the administration of the Act (section 34 of the Rules). They used subterfuges and falsified documents, knowing they were false, in order to conceal the true state of files controlled or administered by them pursuant to the Act and Rules.

[28] The Delegate found that, based on the overwhelming evidence submitted, there is no question that the applicants knew of the irregularities of the relevant transfers of funds. In the Delegate's opinion, the applicants had systematically anticipated the fees to be earned, without the necessary authorizations under the Act and Rules by inspectors or by the Court.

[29] The Delegate also noted there was no application to renew the trustee licences of Henry Sztern and Henry Sztern & Associés Inc.

[30] The Delegate did not give much weight to Henry Sztern's testimony, as he found that his testimony and his explanations were full of inaccuracies. His hesitation before admitting documentary evidence and his frequent lapses of memory in relation to specific operations undermined his credibility. The Delegate also found that the applicant sought to place responsibility on his employees.

[31] The Delegate concluded that there should be reimbursement to the estates of the files discussed at the date the Guardian Trustee took possession of the files on April 14, 2003, and in accordance with the proceedings filed in the Superior Court of Montreal and their outcome. The Delegate cancelled the corporate trustee licence of Henry Sztern & Associés Inc., he cancelled the trustee licence of Henry Sztern and he reserved his decision on the other penalties sought by the Senior Analyst.

Issues

[32] The applicants raise numerous issues which can be summarized as follows:

1. What is the applicable standard of review of the Delegate's decision?
2. Did the Delegate err in failing to disclose relevant evidence and in displaying partiality and/or committing a breach of natural justice?
3. Was the Delegate's decision to cancel the applicants' licences reasonable?

Relevant Legislation

[33] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 :

Decision affecting licence

14.01 (1) If, after making or causing to be made an inquiry or investigation into the conduct of a trustee, it appears to the Superintendent that

Décision relative à la licence

14.01 (1) Après avoir tenu ou fait tenir une investigation ou une enquête sur la conduite du syndic, le surintendant peut prendre l'une ou plusieurs des mesures énumérées ci-après, soit lorsque le syndic ne remplit pas adéquatement ses fonctions ou a été reconnu coupable de mauvaise administration de l'actif, soit lorsqu'il n'a pas

observé la présente loi, les Règles générales, les instructions du surintendant ou toute autre règle de droit relative à la bonne administration de l'actif, soit lorsqu'il est dans l'intérêt public de le faire :

(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;

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

(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;

(f) require the trustee to make restitution to the estate of such amount of money as the estate has been deprived of as a result

of the trustee's conduct; and

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

Application to former trustees

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

Delegation

(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.

Notification to trustees

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

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

(b) whether or not paragraph (a) applies, give written notice of the delegation of a power to any trustee who may be affected by the exercise of that power,

Application aux anciens syndics

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

Délégation

(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.

Notification

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

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

b) en tout état de cause, aviser par écrit, avant l'exercice du pouvoir qui fait l'objet de la délégation ou lors de son exercice, tout syndic qui

either before the power is exercised or at the time the power is exercised.

pourrait être touché par l'exercice de ce pouvoir.

Notice to trustee

14.02 (1) Before deciding whether 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 may exercise and the reasons why they may be exercised and afford the trustee a reasonable opportunity for a hearing.

Avis au syndic

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

Summons

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

Convocation de témoins

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

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

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

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

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

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

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

Effect throughout Canada

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

Effet

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

Fees and allowances

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

Frais et indemnité

(1.3) Toute personne assignée reçoit les frais et indemnités accordés aux témoins assignés devant la Cour fédérale.

Procedure at hearing

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

Procédure de l'audition

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

(a) has the power to administer oaths;

a) peut faire prêter serment;

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

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

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

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

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

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

Record

(3) The notice referred to in subsection (1) and, where applicable, the summary of oral evidence referred to in paragraph (2)(d), together with

Dossier et audition

(3) L'audition et le dossier de l'audition sont publics à moins que le surintendant ne juge que la nature des révélations possibles sur des questions

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

Decision

(4) The decision of the Superintendent after a hearing referred to in subsection (1), together with the reasons therefor, shall be given in writing to the trustee not later than three months after the conclusion of the hearing, and is public.

Review by Federal Court

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

Conservatory measures

14.03 (1) Subject to subsection (2), the Superintendent may, for the protection of an estate, the rights of the creditors or the

personnelles ou autres est telle que, en l'espèce, l'intérêt d'un tiers ou l'intérêt public l'emporte sur le droit du public à l'information. Le dossier de l'audition comprend l'avis prévu au paragraphe (1), le résumé de la preuve orale visé à l'alinéa (2)d) et la preuve documentaire reçue par le surintendant.

Décision

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

Examen de la Cour fédérale

(5) La décision du surintendant, rendue et remise conformément au paragraphe (4), est assimilée à celle d'un office fédéral et comme telle est soumise au pouvoir d'examen et d'annulation prévu à la Loi sur les Cours fédérales.

Mesures conservatoires

14.03 (1) Pour assurer la sauvegarde d'un actif ou des droits des créanciers ou du débiteur, le surintendant peut,

debtor, sous réserve du paragraphe (2) :

(a) direct a person to deal with property of the estate described in the direction in such manner as may be indicated in the direction, including the continuation of the administration of the estate; a) donner instruction à quiconque de s'occuper des biens de l'actif visé dans les instructions conformément aux modalités qui y sont indiquées, notamment d'en continuer l'administration;

(b) direct any person to take such steps as the Superintendent considers necessary to preserve the books, records, data, including data in electronic form, and documents of the estate; b) donner instruction à quiconque de prendre les mesures qu'il estime nécessaires à la sauvegarde des livres, registres, données sur support électronique ou autre, et documents de l'actif;

(c) direct a bank or other depository not to pay out funds held to the credit of the estate except in accordance with the direction; and c) donner instruction à une banque ou autre dépositaire de ne faire aucun paiement sur les fonds détenus au crédit de cet actif, si ce n'est conformément à l'instruction;

(d) direct the official receiver not to appoint the trustee in respect of any new estates until a decision is made under subsection 13.2(5) or 14.01(1). d) donner instruction au séquestre officiel de ne plus nommer le syndic en cause pour administrer de nouveaux actifs tant qu'une décision n'est pas rendue au titre des paragraphes 13.2(5) ou 14.01(1).

Circumstances

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

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

(b) the Superintendent makes or

Circonstances

(2) Le surintendant peut exercer les pouvoirs visés au paragraphe (1) dans les circonstances suivantes :

a) le décès, la destitution ou l'empêchement du syndic responsable de l'actif;

b) la tenue des investigations ou

causes to be made any inquiry or investigation under paragraph 5(3)(e);

des enquêtes prévues à l'alinéa 5(3)e);

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

c) l'exercice par lui des pouvoirs visés à l'article 14.01;

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

d) le défaut de paiement de droits prévus au paragraphe 13.2(2) à l'égard de la licence du syndic;

(e) a trustee becomes insolvent;

e) l'insolvabilité du syndic;

(f) a trustee has been found guilty of an indictable offence that, in the Superintendent's opinion, is of a character that would impair the trustee's capacity to perform the trustee's fiduciary duties, or has failed to comply with any of the conditions or limitations to which the trustee's licence is subject; or

f) le syndic a été reconnu coupable d'un acte criminel dont la nature, selon lui, le rend inapte à agir comme fiduciaire ou il n'a pas observé l'une des conditions ou restrictions de sa licence;

(g) a circumstance referred to in paragraph 13.2(5)(c) or (d) exists and the Superintendent is considering cancelling the licence under subsection 13.2(5).

g) le fait qu'il envisage d'annuler la licence du syndic au titre des alinéas 13.2(5)c) ou d).

Contents and effect of direction

Teneur et effet des instructions

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

(3) Les instructions énoncent la disposition législative conformément à laquelle elles sont données, lient leur destinataire et font pleinement foi de leur contenu en faveur de leur destinataire.

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

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

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

Liability ceases on compliance

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

Suppression de la responsabilité

(4) Quiconque obtempère aux instructions données en application du paragraphe (1) échappe à toute responsabilité pour les actes posés dans le seul but de s'y conformer.

[34] *Canada Evidence Act, R.S., 1985, c. C.-5:*

Incriminating questions

5. (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

Questions incriminantes

5. (1) Nul témoin n'est exempté de répondre à une question pour le motif que la réponse à cette question pourrait tendre à l'incriminer, ou pourrait tendre à établir sa responsabilité dans une procédure civile à l'instance de la Couronne ou de qui que ce soit.

Answer not admissible against witness

(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act

Réponse non admissible contre le témoin

(2) Lorsque, relativement à une question, un témoin s'oppose à répondre pour le motif que sa réponse pourrait tendre à l'incriminer ou tendre à établir sa responsabilité dans une procédure civile à l'instance de la Couronne ou de qui que ce soit, et si, sans la présente loi ou toute loi provinciale, ce témoin eût été dispensé de répondre à cette question, alors, bien que ce témoin soit en vertu de la présente loi ou d'une loi

<p>or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.</p>	<p>provinciale forcé de répondre, sa réponse ne peut être invoquée et n'est pas admissible en preuve contre lui dans une instruction ou procédure pénale exercée contre lui par la suite, sauf dans le cas de poursuite pour parjure en rendant ce témoignage ou pour témoignage contradictoire.</p>
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[35] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11:

<p><u>Proceedings in criminal and penal matters</u></p> <p>11. Any person charged with an offence has the right</p> <p>...</p> <p>(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;</p> <p>(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;</p> <p>...</p> <p><u>Self-crimination</u></p> <p>13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any</p>	<p><u>Affaires criminelles et pénales</u></p> <p>11. Tout inculpé a le droit :</p> <p>(...)</p> <p>c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;</p> <p>d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;</p> <p>(...)</p> <p><u>Témoignage incriminant</u></p> <p>13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de</p>
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other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence. poursuites pour parjure ou pour témoignages contradictoires.

Preliminary Issues

[36] Prior to hearing the submissions of both parties, the Court addressed a number of preliminary issues raised by the respondent in his factum:

- 1- The respondent brought to the attention of the Court the fact that the applicants named Sylvie Laperrière, *es qualité* Senior Analyst for the Office of the Superintendent of Bankruptcy, as respondent. The respondent alleged that the proper respondent should be the Attorney General of Canada and the style of cause should be amended in consequence. The Court agreed that the Attorney General of Canada be named as the respondent - instead of Sylvie Laperrière, *es qualité* Senior Analyst for the Office of the Superintendent of Bankruptcy - by virtue of Rule 303(2) of the *Federal Courts Rules*, SOR/98-106, as amended.
- 2- The respondent also noted the memorandum of fact and law filed by the applicants exceeds the 30 pages authorized by Rule 70 of the *Federal Court Rules*, SOR/98-106. However, the Court noted that an Order dated May 5, 2009 by Prothonotary Morneau allowed the filing of the applicants' memorandum of fact and law on an exceptional basis.
- 3- The respondent finally alleged that Exhibits E-1 to E-8 provided by the applicants are inadmissible and should be struck from the record as they are not part of the

tribunal record and they should have been submitted in a motion to file supplementary evidence. The Court indicated it was not prepared at this preliminary juncture to strike the above-mentioned exhibits from the record. The issue is therefore addressed in the Court's decision at paragraphs 45-49.

1. *What is the applicable standard of review of the Delegate's decision?*

[37] The Court agrees with the respondent that, prior to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the standard of review applicable to a disciplinary report and to a decision concerning the sanction of the Superintendent of Bankruptcy (and its delegate) was reasonableness *simpliciter* (*Roy c. Poitras*, 2006 FC 1386, 306 F.T.R. 83 at par. 19-21; see also *Sheriff v. Canada (Superintendent of Bankruptcy)*, 2005 FC 305, 137 A.C.W.S. (3d) 1102 (*Sheriff* (FC))).

[38] Considering the applicants' main point of issue is the alleged lack of appreciation of the facts in evidence and the Delegate's failure to consider the evidence and testimony in reaching his decision, the Court finds the applicable standard of review is reasonableness.

[39] However, the Federal Court of Appeal noted in *Sheriff v. Canada (Attorney General)*, 2006 FCA 139, [2007] 1 F.C.R. 3 (*Sheriff* (FCA)) at paragraph 24 that a common law duty of fairness is owed in proceedings under sections 14.01 and 14.02 of the Act. Accordingly, the standard of review on the disclosure issue is correctness (see *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221 at par. 65).

[40] The standard of review on questions of law such as the scope of procedural fairness including procedural safeguards, impartiality of the investigation process and bias are reviewable on the standard of correctness (*Sam Lévy & Associés Inc. v. Mayrand*, 2005 FC 702, [2006] 2 F.C.R. 543 (*Lévy* (FC)), *aff'd Sam Lévy & Associés Inc. v. Canada (Superintendent of Bankruptcy)*, 2006 FCA 205, 359 N.R. 145 (*Lévy* (FCA))).

2. *Did the Delegate err in failing to disclose relevant and material evidence and in displaying partiality and/or committing a breach of natural justice?*

[41] After filing their Notice of Application in this proceeding, the applicants discovered new evidence (filed as Exhibits E-1 to E-8 to the applicants' memorandum of fact and law), which was found in February 2009 upon review of the volumes of evidence discovered by the RCMP in the criminal proceedings. The applicants submit that this new evidence confirms the Senior Analyst and her key witness, Lynda Lalande, the representative of the Guardian Trustee, knowingly withheld critical evidence which contradicts numerous unfounded allegations of the Senior Analyst.

[42] According to the applicants, the Delegate erred in failing to consider *Sheriff* (FCA), where the Federal Court of Appeal held that the trial level Court erred in deciding that the *Stinchcombe* principles (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 130 N.R. 277) do not apply as it pertains to requirements of full disclosure in proceedings under the Act.

[43] The applicants also asserts that the alleged intentional non-disclosure of this evidence also confirms that both Lynda Lalande and Sylvie Laperrière, as officers of the Court, provided false testimony, obstructed justice and breached all rules of ethics by which they are bound.

[44] The applicants further submit that the Delegate also erred when he summarily rejected his motion to strike allegations premised on the lack of particulars and full disclosure by the Senior Analyst. In so doing, the Delegate deprived Henry Sztern's right to full answer and defence. The applicant argues numerous documents and improperly admitted evidence were only introduced during the proceedings before the Delegate. The applicant submits that he was not provided with the opportunity to examine all documents.

[45] At the hearing before this Court, the applicants stressed that the non-disclosure of relevant material demonstrates a clear and cogent bias on the part of the Senior Analyst and the Guardian Trustee, who are duty bound as officers of the Court to truthfully and impartially communicate all information which is relevant and to submit their testimony in an impartial and unabusive manner.

[46] As mentioned above at paragraph 36(3), the respondent replied that the new evidence (Exhibits E-1 to E-8) provided by the applicants is inadmissible and should be struck from the record as these exhibits are not part of the tribunal record. The respondent submitted that new evidence should have been the object of a motion to file supplementary evidence.

[47] The Court acknowledges that the applicants must have access to all relevant material which may assist them. The Senior Analyst had a duty to disclose all documents unless they were clearly irrelevant. If it is established that relevant materials were not disclosed, it must be determined whether that failure to disclose impaired the applicants' right to explore possible avenues of investigation and to have the opportunity to answer and defend themselves (*Sheriff* (FCA)). The

procedural requirements for disciplinary proceedings under the Act give rise to a clear duty to afford the trustees fulsome disclosure, similar to the *Stinchcombe* principles.

[48] After reviewing the record, the Court notes that the two pages of the “Trustee’s Final Statement of Receipts and Disbursements” dated May 15 1998, found at Exhibits E-7 and E-8 in the applicants’ Record, is also contained at Tab 100 under “Attachment 32” of Sylvie Laperrière’s affidavit on behalf of the respondent sworn March 23, 2009. Furthermore, in his decision, the Delegate mentions this same “Attachment 32” submitted by Senior Analyst Sylvie Laperrière at paragraph 162 of his decision. Thus, these two Exhibits (E-7 and E-8) do not constitute new evidence as contended by the applicants.

[49] This leaves Exhibit E-1 to E-6. After reviewing Exhibits E-1 to E-6, the Court does not agree that the Senior Analyst withheld relevant information during the investigation as alleged by the applicants. As per the decision in *Sheriff* (FCA) and assuming without deciding that (i) Exhibits E-1 to E-6 were relevant but were not disclosed and (ii) a motion to file supplementary evidence was not required, the Court is nonetheless of the view that the signed authorizations from each individual inspector contained at Exhibits E-1 to E-6 do not open new lines of inquiry or change the result of the proceeding. The Delegate did not err or display personal bias and the Court finds there has been no failure by the respondent to disclose relevant evidence in the case at bar.

3. *Is the Delegate's decision to cancel the Applicants' licences reasonable?*

[50] The applicants argue that there was insufficient evidence upon which the Delegate could reasonably have extrapolated and rendered judgment on each offence alleged by the Senior Analyst against the applicants, as there was a lack of consideration and appreciation of key and relevant testimony, facts and evidence submitted. The applicants also argue that the Delegate erred in admitting evidence in contravention of the *CEA* and in violation of the principles of natural justice.

[51] The applicants mention various examples where they contend the Delegate erred in his appreciation of the evidence and testimony before him. For example, the applicants argue that the Delegate erred in law when he allowed the introduction of all evidence, including copies of alleged banking printouts and copies of banking statements introduced by the Senior Analyst. These elements of illegal evidence breach section 29 of the *CEA* and the rules of natural justice. The applicants assert the Delegate improperly and incorrectly extrapolated the information on a limited number of estate bank accounts into all estates suggested by the Senior Analyst in her allegations of offences and, as a result, the Delegate's decision is based on erroneous extrapolation and this is unreasonable.

[52] The Court disagrees with the applicants. The Delegate's decision, rendered on December 15, 2008, addresses all relevant arguments and provides a thorough analysis with respect to each of the alleged offences. Indeed, the Delegate evaluated the credibility of the witnesses, considered the evidence and arguments from both parties and applied the applicable legal principles before concluding that the offences should all be upheld.

[53] Further, the Delegate analyzed the evidence following the rule that the burden of rebutting the allegations or alleged offences is on the applicants and he must be satisfied that the Senior Analyst's report is credible, trustworthy and accurate (*Perrier*). The Delegate recognized the rules of natural justice applied to the disciplinary hearing, but also recognized that he had to consider subsection 14.02(2) of the Act.

[54] Upon reviewing the record, the Court is of the view that the Delegate's decision is not unreasonable or unsupported by evidence. The central issue of the Delegate's decision rests on the credibility of the witnesses and the appreciation of the evidence. More particularly, the Delegate found at paragraphs 41 and 42 of his reasons that the applicant, Henry Sztern, lacked credibility:

Henry Sztern a bien tenté, de par son témoignage et par le contre-interrogatoire de témoins appelés par l'analyste sénior, Sylvie Laperrière, de faire porter la responsabilité de l'ensemble des opérations, telles qu'elles nous ont été décrites, sur ses employés, y compris la possibilité que ses employés aient détourné, à leur propre profit, certaines des sommes d'argent.

Il n'a pas réussi. Ses nombreuses hésitations à admettre l'évidence, même de la preuve documentaire, et son manque de mémoire flagrant et fréquent concernant certaines opérations précises, tel qu'il appert de son contre-interrogatoire (transcription du 3 juin 2008, pages 66 et suivantes), font en sorte que sa crédibilité est grandement entachée.

[55] At the hearing, the applicants repeatedly argued for a reassessment of the evidence by the Court. Suffice it to say that in a judicial review proceeding, the role of the Court is not to reassess the credibility of witnesses or the appreciation of the documentary evidence filed before the Delegate (*Dunsmuir*; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, 373 N.R. 339 at par. 41; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12). As noted in *Dunsmuir*,

the function of judicial review is to ensure the legality, reasonableness and fairness of the administrative process and its outcome.

[56] The Superintendent of Bankruptcy is appointed by the Governor in Council and is responsible for supervising the administration of all estates and matters to which the Act applies. The Act provides the Superintendent with powers related to the licensing and supervision of trustees in bankruptcy and allows the Superintendent to investigate complaints from the public concerning trustees. If deficiencies are found in their conduct, the Superintendent has the ability to impose disciplinary sanctions on a trustee (sections 14.01 and 14.02 of the Act).

[57] In the present circumstances, the Superintendent, who by statute has the discretion to determine what is evidence and how it shall be weighed, did not err in law and his decision was entirely reasonable. In my opinion, the specific errors in law alleged by the applicants are not established, and those submissions provide no basis for the Court to intervene to quash the decision. The Court thus finds the Delegate's conclusions were supported by ample facts and overwhelming evidence. It was open to him to exercise his discretion to cancel the licences of the applicants. His decision in that regard was not capricious, biased or unreasonable as to constitute a reviewable error.

Application of sections 11 and 13 of the *Charter*

[58] During the hearing before the Delegate, the applicants objected to answering a question on the ground of possible self-incrimination because the Senior Analyst referred to his testimony in the

Superior Court on the same file. The applicants submit that section 13 of the *Charter* reflects a long-standing form of statutory protection against compulsory self-incrimination in Canadian law and is best understood by reference to section 5 of the *CEA*. When a witness who is compelled to give evidence in a court proceeding is exposed to the risk of self-incrimination, the state offers statutory and constitutional protection against the subsequent use of that evidence against the witness in exchange for their full and frank testimony. If the evidence proffered is less than full and frank, the witness is subject to prosecution for perjury or for the related offence of giving contradictory testimony.

[59] According to the applicants, the Delegate confirmed in his own judgment and was fully aware that the present proceeding is quasi-judicial and *Charter* protection does exist. They also argue that the Delegate erred when he concluded that subsection 5(2) of the *CEA* and section 13 together with section 11c) of the *Charter* have not been breached and that the Delegate incorrectly relies on *Henry* to support his decision. The applicant, Henry Sztern, argues he never stated during the previous Superior Court proceedings that unauthorized fees were withdrawn. According to him, the foundation of the Delegate's understanding is false.

[60] In order to decide whether sections 11 and 13 of the *Charter* apply to this case, the Court must first address the role and function of the Superintendent of Bankruptcy and determine whether they are criminal or disciplinary in nature. If the role and function are criminal, the *Charter* would apply. On the other hand, if the role and function are disciplinary, the next step is to identify whether the measures taken against the applicants are criminal or disciplinary in nature. In other

words, the Court must determine whether the sanction amounts to a true penal consequence. The answer to this question will determine whether sections 11 and 13 of the *Charter* apply to the case at bar.

[61] In *Lévy* (FC), my colleague Justice Martineau of this Court, in a well elaborated decision, wrote on the role and function of the Superintendent of Bankruptcy. The Superintendent exercises a general supervisory power over the administration of estates and affairs governed by the Act and thus regulates a professional and economic activity. The Superintendent is responsible for issuing licences to trustees and may suspend or cancel the licence of a trustee who does not comply with the appropriate legal requirements. The intention of Parliament was to guarantee a high degree of protection for creditors and public confidence in the bankruptcy system and the assignment of property by an insolvent debtor.

[62] At paragraph 128, Justice Martineau turned to the role of the trustee and summarized its role. He noted that a trustee is a participant in the administration of property and estates and has legal obligations imposed on trustees such as competence, honesty, impartiality, integrity, due care. These obligations “are positive, rather than prohibitory, in nature (as is generally the case in criminal law)”. He further explained the need for the Superintendent to suspend or cancel the licence of a trustee who does not comply with the legal requirements of the Act and ruled that it would be “presumptuous to seek to compare the disciplinary proceedings in question to proceedings of a penal or criminal nature”.

[63] Finally, Justice Martineau also observed in *Lévy* (FC) that the purpose of subsections 14.01(1) and 14.01(2) is different from a provision of a penal or criminal nature and stated the following at paragraph 154:

If we look at the organic nature of the tribunal, the institution of the Office of the Superintendent of Bankruptcy cannot be compared to a court of law, as for example is true of the Bankruptcy Court, a division of the Quebec Superior Court. Further, remember that, originally, trustees were appointed by the Governor in Council: the power to issue or cancel a trustee licence has never belonged to ordinary courts of law, even to the Bankruptcy Court. The purpose of the provisions in question [subsections 14.01(1) and 14.01(2)] is different from provisions of a penal or criminal nature.”

[Emphasis added]

[64] I agree with my colleague Justice Martineau that the scheme of the act in general and the nature of the provisions in particular are not of a penal or criminal nature. Having decided that the purpose of subsections 14.01(1) and 14.01(2) of the Act is not penal or criminal in nature, the Court must now decide whether the measure taken against the applicants – the cancellation of their trustee licences – amounts to a true penal consequence. In order to address this issue, I now turn to the sections of the *Charter* relied upon by the applicants in their submissions.

[65] Section 13 of the *Charter* provides for the right against the use of incriminating evidence given by someone in one proceeding to incriminate that same person in subsequent proceedings and it is closely related to the rights protected by sections 11(c) and 11(d) of the *Charter*. As noted by the Supreme Court of Canada in *R. v. Dubois*, [1985] 2 S.C.R. 350, 62 N.R. 50 at par. 9:

A plain reading of s. 13 indicates that the guarantee it provides is directed against self-incrimination through the use of one’s previous testimony. It is a very specific form of protection against self-

incrimination and must therefore be viewed in the light of two closely related rights, the right of non-compellability and the presumption of innocence, set forth in ss. 11(c) and 11(d) of the Charter.

[66] In terms of the nature of the proceedings to which these rights apply, the respective scopes of sections 11 and 13 of the *Charter* should generally be the same. In *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, 81 N.R. 161 at par. 23, the Supreme Court of Canada discussed the characteristics which would bring an offence within the scope of section 11 of the *Charter*:

In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited sphere of activity [...]. There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of “offence” proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of “offence” proceedings to which s. 11 is applicable.

[Emphasis added]

[67] Furthermore, section 13 of the *Charter* is only invoked regarding hearings where the penalty for the alleged offence or conduct involves true penal consequences (*McDonald v. Law Society of Alberta*, (1993), 44 A.C.W.S. (3d) 681, [1994] 3 W.W.R. 697 (Alta. Q.B.) at par. 13). The meaning of true penal consequences was assessed in *Wigglesworth* at par. 24:

“... a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.”

[68] In *Knutson v. S.R.N.A.*, (1990), 24 A.C.W.S. (3d) 706, [1991] 2 W.W.R. 327 (Sask. C.A.), the Saskatchewan Court of Appeal found the loss of a job as a result of disciplinary proceedings did not amount to a true penal consequence. The disqualification was an internal and private disciplinary matter imposed as part of a scheme for regulating an activity in order to protect the public. Similarly, following the application of the test in *Wigglesworth* to the case at bar, the Court is of the view that the disciplinary hearing undertaken by the Delegate resulting in the cancellation of the applicants' licences does not amount to a true penal consequence. Consequently, sections 11 and 13 of the *Charter* do not apply to this case. The applicants' argument on this point cannot be accepted.

Interpretation / Translation

[69] The applicants also argue that the Delegate contravened and offended the Act, the *Charter* and the *Official Languages Act*, 1985, c. 31 (4th Supp.), by not immediately providing an English translated version of his decision dated December 15, 2008. The English translated version of the Delegate's decision was e-mailed to the applicant, Henry Sztern, on February 3, 2009. Mr. Sztern submits that the English version of the decision is not properly translated as many statements appear to be literally translated, resulting in nonsensical statements in English. The applicant submits the English translation was delivered too late for the appeal process to be initiated and it is of little value

as a legible and understandable document. The applicant also argues that there was no interpreter available during his English testimony and during the English examinations and cross-examinations.

[70] It is worth noting that on April 3, 2007, Henry Sztern filed a motion requesting the services of an interpreter and the Delegate rejected this request on October 2, 2007. The Delegate found that section 14 of the *Charter* did not apply to the case at bar and that Henry Sztern had not established he did not have knowledge of French.

[71] Furthermore, this very same issue had been previously decided by the Superior Court of Quebec and the Quebec Court of Appeal on April 16, 2007 (see Affidavit of Sylvie Laperrière sworn March 13, 2009 at Exhibit SL-11, pp. 2494-2498 of the respondent's Record).

[72] On the basis of this evidence, the Court finds that Henry Sztern had sufficient knowledge of French to file his application for judicial review pursuant to subsection 18.1(2) of the *Federal Courts Act*, R.S., 1985, c. F-7 and there has not been a breach of procedural fairness. There is no evidence on file that Henry Sztern made a specific request to the Delegate prior or during the disciplinary hearing for the decision to be rendered or translated in English. To the contrary, the evidence demonstrates that the Delegate issued his decision in French on December 15, 2008 and a request for a translation was sent to the Delegate on December 21, 2008, six days after the decision was rendered. The Delegate followed-up on the request and a translation of the decision was obtained by the applicants on February 3, 2009. In the present circumstances, the Court finds this was an acceptable delay. The applicants filed this application for judicial review on January 10,

2009, within the prescribed time limit, and they have not convinced the Court that they suffered any prejudice on this point.

[73] The Court also notes that in spite of a ruling from the Delegate rejecting the request for translation, the respondent nonetheless made arrangements upon its own initiative during the disciplinary hearing before the Delegate to provide an interpreter to translate the testimonies rendered in French for Henry Sztern (see Sylvie Laperrière's affidavit at paragraph 41). Most of the disciplinary hearing was conducted in English and the testimonies rendered in French were translated by an interpreter provided by the respondent for Henry Sztern. The Court is of the view that the applicants' claims on this point are unfounded.

[74] At the hearing before this Court, the applicants further alleged prejudice because the Delegate reserved his decision on the other penalties sought by the Senior Analyst. Firstly, the Court notes that this second decision of the Delegate is not before the Court. Arguments raised by the applicants with regard to the second decision of the Delegate are therefore not the subject of this application for judicial review. The applicants were not barred from requesting a stay of the Delegate's first decision or from filing an application for judicial review of his second decision. They failed to do so.

[75] The Court finds the Delegate's decision reasonable. The Delegate conducted a full and thorough assessment of all the evidence and testimonies before him. His decision was not biased or

unreasonable and it was made in accordance with the rules of procedural fairness. The Court's intervention is not justified.

[76] For these reasons, the application for judicial review is dismissed with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed with costs.

“Richard Boivin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-49-09

STYLE OF CAUSE: HENRY SZTERN et al
v. THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Montréal, Québec

DATE OF HEARING: January 26, 2010

REASONS FOR JUDGMENT: BOIVIN J.

DATED: February 22, 2010

APPEARANCES:

Henry Sztern	ON HIS OWN BEHALF
Vincent Veilleux	FOR THE RESPONDENT

SOLICITORS OF RECORD:

None	ON HIS OWN BEHALF
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT