Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20110113

Docket: A-66-10

Citation: 2011 FCA 4

CORAM: **BLAIS C.J.**
NOËL J.A.
NADON J.A.

BETWEEN:

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

Appellant

and

ALLEN W. MACLEOD

and

D. & A. MACLEOD COMPANY LTD.

Respondents

Heard at Ottawa, Ontario, on November 23, 2010.

Judgment delivered at Ottawa, Ontario, on January 13, 2011.

REASONS FOR JUDGMENT BY:	BLAIS C.J.
CONCURRED IN BY:	NADON J.A.
CONCURRING REASONS BY:	NOËL J.A.

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REASONS FOR JUDGMENT

BLAIS C.J.

[1] This is an appeal from the decision of Justice Mainville (Judge), as he then was, of the Federal Court, dated January 28, 2010 (Decision), which allowed, in part only, the appellant's

application for judicial review of related decisions made by the Honourable James B. Chadwick in his capacity as Delegate of the Superintendent of Bankruptcy (Delegate). More specifically, this appeal is concerned with the Delegate's finding that the respondents had established a defence of due diligence with respect to certain violations of professional conduct provisions set out in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA), the *Bankruptcy and Insolvency General Rules*, C.R.C. 1978, c. 368 (Rules) and the Directives of the Superintendent (Directives).

I. Background

[2] The respondents carry on activities as trustees in bankruptcy under licences issued by the Superintendent of Bankruptcy (Superintendent) pursuant to the BIA.

[3] In 2005, the appellant, in her capacity as a Senior Analyst (Professional Conduct) with the Office of the Superintendent of Bankruptcy (OSB), was mandated to conduct an investigation of the respondents' professional conduct in the administration of bankruptcy estates. This investigation culminated in a report dated February 27, 2007 (Report), which identified over forty breaches of professional conduct provisions set out in the BIA, the Rules and the Directives.

[4] Following the receipt of the appellant's report, the Superintendent appointed the Delegate to conduct a hearing in order to determine whether the respondents had committed the alleged contraventions and whether any disciplinary measures set out in subsection 14.01(1) of the BIA were warranted.

[5] The Delegate described the alleged contraventions under the following 12 headings:

A. Bank balances of estate and insolvency files deposited in an "Interest Account".
B. Applications for trustee discharge while having a bank balance in the estate account.
C. Surplus from the consolidated trust account for summary administrations deposited in an "Interest Account".
D. Monies withdrawn for various uses from an "Interest Account".
E. Statements of Receipts and Disbursements.
F. Unauthorized fee withdrawal in a consumer proposal.
G. "Clearing Account" used to post estate transactions.
H. Co-mingling of funds in consolidated trust accounts.
I. Disbursement claimed for services performed by a related person.
J. "Third Party Account" used to post estate transactions.
K. Monies not deposited forthwith.
L. Delay in the administration of estates.

[6] In his decision dated December 1, 2008, the Delegate first dismissed a motion for a stay of proceedings filed by the respondents on grounds of delay, bias and other improprieties with respect to the conduct of the appellant's investigation. Concerning the nature of the allegations, the Delegate found that the alleged contraventions were strict liability offences which, as per the Supreme Court of Canada's decision in *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, allowed for a defence of due diligence.

[7] The Delegate rejected the allegations falling under headings A and D on the basis that the "Interest Account" operated by the respondents had been authorized by the OSB and had subsequently been closed when the OSB requested such a closure. The allegations under headings C, F, G and I were rejected on the basis that no contraventions of the BIA, the Rules or the Directives had occurred.

[8] With respect to headings B, E, H, J and K, the Delegate found that the respondents had failed to fully comply with the relevant statutory and regulatory provisions. However, having accepted the respondents' submissions that the estates at issue represented only a small fraction of their overall business and that the infractions were the result of administrative errors which had caused no prejudice to the estates or the creditors, the Delegate found that a defence of due diligence had been established. The Delegate ultimately found that the respondents were liable only with respect to the contraventions falling under heading L, in respect of which he concluded in a separate decision dated February 5, 2009, that the appropriate disciplinary measure was a reprimand.

[9] The appellant brought an application for judicial review challenging the Delegate's decision with respect to headings A, B, D, E, H, J and K, as well as the sanctions decision.

II. Decision of the Federal Court

[10] The Judge carried out the standard of review analysis established in *Dunsmuir v. New Brunswick*, 2008 SCC 9, and characterized the issues before the Delegate as principally involving questions of fact or mixed fact and law for which the appropriate standard of review was reasonableness. (Decision, at paragraphs 52-59) However, the Judge identified two questions of law arising from the Delegate's decision, namely whether the allegations under headings B, E, H, J and K could be characterized as strict liability offences and whether a reprimand was an available form of sanction under subsection 14.01(1) of the BIA, to which he applied the correctness standard. (Decision, at paragraph 60)

[11] The Judge identified the first issue in the application as whether the Delegate had committed a reviewable error in finding, as a matter of fact, that the operations of the Interest Account under Headings A and D had been authorized by the OSB. The Judge stated that the record contained ample evidence to support the Delegate's finding on this issue, which was largely based on an assessment of the credibility of various witnesses. (Decision, at paragraphs 70-82)

[12] The Judge identified the second issue in the application as whether the Delegate had erred in law in finding that the allegations under headings B, E, H, J and K were subject to a defence of due diligence. Relying on *Gordon Capital Corp. v. Ontario (Securities Commission)*, [1991] O.J. No. 934, 50 O.A.C. 258 (Div. Ct.), *Carruthers v. College of Nurses of Ontario* (1996), 31 O.R. (3d) 377 (Div. Ct.) and *Canada (Attorney General) v. Roy*, 2007 FCA 410, the Judge indicated that a contextual or *sui generis* approach was appropriate to determine whether allegations of professional misconduct were subject to a defence of due diligence: "If the legislative or regulatory provision at issue shows that an element of reasonable care is involved, then the defence of due diligence will generally be available (…)." (Decision, at paragraph 91) The Judge found that the provisions of the BIA and the Rules surrounding the allegations under headings B, E, H, J and K, when read together, disclose wording such as "due care" or "reasonably ought to know" and concluded that the Delegate was correct in finding that a defence of due diligence was available to the respondents. (Decision, at paragraphs 83-106)

[13] The Judge identified the third issue as whether the Delegate had erred in finding that the respondents had established a defence of due diligence to counter the allegations under headings B, E, H, J and K, which he described as a question of mixed fact and law reviewable on a standard of reasonableness. (Decision, at paragraph 107)

[14] Of particular importance for this appeal are the Judge's findings with respect to headings B, E and H. The Judge noted that the Delegate had accepted the respondents' evidence that the irregularities (i) represented a small segment of their overall business, (ii) had been unintentional, (iii) were the result of minor administrative errors on the part of their staff, (iv) had caused no prejudice to the estates or the creditors and (v) had not resulted in any benefits to the respondents. The Judge indicated that the Delegate must have inferred from these findings that the respondents had successfully established a defence of due diligence. (Decision, at paragraphs 111, 114 and 117) The Judge refused to interfere with the Delegate's conclusions, stating that they fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law." (Decision, at paragraph 113) However, the Judge reached a different conclusion with respect to allegations J and K, remarking on "the absence of any evidence tendered by the respondents in regard to a due diligence defence to these allegations, and the absence of explanations by the Delegate (…) as to why a due diligence defence was held to have been made out (…)." (Decision, at paragraph 121)

[15] The Judge identified the fourth issue in the application as whether the Delegate had erred in law at the disciplinary stage of the proceedings in imposing a reprimand on the respondents with

respect to the infractions under heading L. The Judge stated that while the Delegate's determination of the appropriate remedy fell within his expertise and was therefore reviewable on the reasonableness standard, the determination of the spectrum of available remedies was a question of law subject to the correctness standard. (Decision, at paragraph 129) The Judge noted that while a "reprimand" was not an available form of sanction under subsection 14.01(1) of the BIA, the decision to impose or not to impose a sanction fell within the Delegate's discretion (*Jacques Roy v. Sylvie Lapperière*, 2006 FC 1386 at paragraphs 75-80). The Judge interpreted the Delegate's decision to impose a reprimand on the respondents as a decision that no specific measure or sanction contemplated by subsection 14.01(1) was warranted and held that this decision was reasonable in the circumstances. (Decision, at paragraphs 122-131)

[16] The Judge allowed the application in part and remitted the matter to the Delegate in order for him to determine the appropriate disciplinary measure, if any, to be imposed on the respondents with respect to headings J, K and L.

III. <u>Issues and Analysis</u>

[17] This appeal raises only one issue, namely whether the Judge erred in upholding the Delegate's finding that the respondents had established a defence of due diligence with respect to headings B, E and H.

A. *Positions of the Parties*

[18] The appellant argues that, in the context of a strict liability regime, due diligence is established by showing on a balance of probabilities that the accused took all reasonable care to avoid committing the illegal act or that he reasonably believed in a mistaken set of facts which, if true, would render the act innocent. (*Sault Ste. Marie*, above at pages 1325-1326; *Corp. de l'École Polytechnique v. Canada*, 2004 FCA 127 at paragraph 28) The appellant submits that the Federal Court has set a high threshold for proving the defence of due diligence (*Cata International Inc. v. Canada (M.N.R.)*, 2004 FC 663 at paragraph 22; *Samson v. Canada (M.N.R.)*, 2007 FC 975 at paragraph 35) and that the following principles have been established in the relevant case law: (i) errors made in good faith are not tantamount to due diligence as this defence requires affirmative proof that all reasonable care was exercised to ensure that errors were not made; (ii) proof of reasonable care must be established in relation to the particular contravention at issue and general compliance with a statutory regime is not sufficient; (iii) an employer must show that a system was in place to prevent the prohibited act from occurring and that reasonable steps had been taken to ensure the effective operation of that system; and, (iv) the fact that the contraventions did not cause prejudice to third parties is not relevant in assessing whether due diligence was exercised.

[19] The appellant submits that the Delegate erred in law in finding that the respondents had successfully established a defence of due diligence with respect to the allegations contained in headings B, E and H by showing, *inter alia*, that the infractions were the result of administrative errors, had caused no prejudice to the estates or the creditors and represented a small fraction of the overall volume of their business. Further, the appellant argues that the Judge erred in law in

upholding a decision reached on the basis of an unacceptably low standard for the defence of due diligence.

[20] The respondents argue that this appeal should be rejected on the basis that the appellant is asking this Court to reweigh evidence pertaining to their defence of due diligence. The respondents submit that the issue of whether a defence of due diligence had been established was properly characterized by the Judge as a question of mixed law and fact which should be reviewed on the reasonableness standard. Alternatively, the respondents submit that, as per *Dunsmuir*, above at paragraph 70, even if an extricable question of law could be identified, the Delegate's decision should nevertheless be reviewed on the reasonableness standard on the basis that it has no significance to the legal system in general and was within the Delegate's expertise in matters of professional discipline.

[21] The respondents reiterate their position that the infractions set out in the Report did not result in any benefit to them or in any prejudice to the concerned estates or creditors, and evidence that the concerned estates and transactions represented a very small fraction of their overall business demonstrates that an adequate system of oversight was applied and, therefore, that "all reasonable care" had been exercised to prevent these infractions. In the alternative, the respondents argue that, as per *Sault Ste. Marie*, above, a defence of due diligence has also been established on the basis that the infractions resulted from a reasonable belief on a mistaken set of facts.

B. *Standard of Review*

[22] The role of this Court is to determine whether the Judge selected and correctly applied the appropriate standard of review to the Delegate's decision: *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23 at paragraph 18; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paragraph 35; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paragraph 43. The Judge's selection of the appropriate standard of review is a question of law subject to review on the standard of correctness: *Shneidman v. Canada (Customs and Revenue Agency)*, 2007 FCA 192 at paragraph 17; *Davies v. Canada (Attorney General)*, 2005 FCA 41 at paragraph 8; *Housen v. Nikolaisen*, 2002 SCC 33 at paragraph 8. If the correct standard of review was selected, the Judge's application of that standard constitutes a question of mixed fact and law reviewable on a "palpable and overriding error" standard, unless an extricable error of law can be identified in his reasons: *Housen*, above at paragraphs 26, 37.

C. *Analysis*

[23] As stated above, this Court must determine whether the Judge erred in finding that it was reasonable for the Delegate to conclude that the respondents had met their burden of proving a defence of due diligence with regard to the infractions listed under headings B, E and H. The answer to this question requires this Court to first determine whether the Judge selected the appropriate standard of review: *Telfer*, above at paragraph 18; *Mugesera*, above at paragraph 35; *Dr. Q*, above at paragraph 43. The Judge stated his position on this issue as follows:

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

[24] The Judge correctly characterized the issue as to whether the respondents had established the defence of due diligence as a question of mixed fact and law, as it required the Delegate to apply a legal standard to a set of facts: *Democracy Watch v. Campbell*, 2009 FCA 79 at paragraph 21; *Housen*, above at paragraph 26; *Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748 at paragraph 35. Further, the Judge correctly concluded that such questions, in an application for judicial review, are generally subject to the reasonableness standard: *Dunsmuir*, above at paragraph 53; *Housen*, above at paragraph 37.

[25] However, the judicial review of questions of mixed fact and law presents an additional challenge for reviewing judges. If an extricable question of law can be identified in the question of mixed fact and law put before the decision-maker, this question must be reviewed on the appropriate basis. If the extricable question of law is of "central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", it must be reviewed on the standard of correctness: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paragraph 62; *Dunsmuir*, above at paragraph 55. Conversely, if the extricable question of law involves the decision-maker's interpretation of a statute "with which [he] will have particular familiarity", it will generally attract the application of the reasonableness standard: *Dunsmuir*, above at paragraph 54.

[26] The question as to whether the respondents have successfully established a defence of due diligence with respect to headings B, E and H clearly presents an extricable question of law, namely the legal standard upon which such a defence must be established. Further, I disagree with the

respondents' submission that the Delegate's interpretation of this standard should be reviewed on the standard of reasonableness because, in what I interpret to be a reference to the Supreme Court's above-cited comments in *CUPE* and *Dunsmuir*, "it has no significance to the legal system in general". (Respondents' Memorandum, at paragraph 77) The Supreme Court of Canada's affirmation in *Sault Ste. Marie* that the defence of due diligence was available in the context of "strict liability" infractions has impacted our legal system across many fronts, from quasi-criminal proceedings involving breaches of work safety or environmental regulations (*R. v. Rio Algom Ltd.* (1988), 66 O.R. (2d) 674 (C.A.); *R. v. Imperial Oil Ltd.*, 200 BCCA 553) to the context of professional discipline (*Re Ghilzon and Royal College of Dental Surgeons of Ontario* (1979), 22 O.R. (2d) 756 (H.C.J.); *Stuart v. British Columbia College of Teachers*, 2005 BCSC 645). In addition, a plain reading of the case law shows that developments in the interpretation of "due diligence" in one context will influence the application of this standard in another. The Delegate's interpretation of the criteria required to establish a defence of due diligence and, by extension, the Federal Court's treatment of this issue in an application for judicial review, transcends the interests of the parties and holds significance to the Canadian legal system as a whole. Further, while courts have considered the relative expertise of the Superintendent and his delegates in the supervision of trustees to justify the application of the reasonableness standard to liability and sanctions decisions under section 14.01 of the BIA (*Roy v. Poitras*, 2006 FC 1386 at paragraphs 19-21; *Sheriff v. Canada (Attorney General)*, 2005 FC 305 at paragraphs 30-31), the Delegate does not possess any comparative expertise on the standards required to establish a defence of due diligence. The Judge was therefore required to apply the standard of correctness to this aspect of the Delegate's decision: *CUPE*, above at paragraph 62; *Dunsmuir*, above at paragraph 55.

[27] Although the Judge's standard of review analysis identified two questions of law raised in the Delegate's decision for which he applied the correctness standard (Decision, at paragraph 60), his review of the Delegate's decision with respect to headings B, E and H failed to distinguish between the merits of the Delegate's findings and the legal standard against which these findings were made. The Judge simply qualified the issue of whether a defence of due diligence had been established by the respondents as a question of mixed fact and law and felt it appropriate to generally show deference to the Delegate's findings on this point. (Decision, at paragraphs 107, 112) The Judge's failure to separately examine the Delegate's interpretation of the standard required to establish a defence of due diligence under the correctness standard was an error of law: *Democracy Watch*, above at paragraph 26.

[28] Further, a review of the Delegate's decision pertaining to headings B, E and H shows that he misunderstood the burden falling upon the respondents with respect to the establishment of a due diligence defence.

[29] With regard to allegation B, the Delegate noted that the respondents admitted to having failed to comply with section 154 of the BIA and section 64(2) of the Rules [now section 61(2)] by applying for a discharge before forwarding all unclaimed dividends and undistributed funds to the Superintendent. Section 154 provides, *inter alia*, that before proceeding to a discharge, a trustee shall forward to the Superintendent, for deposit with the Receiver General for Canada, unclaimed dividends and undistributed funds. Completing section 154, section 64(2) states, *inter alia*, that at

the time of discharge a trustee shall certify to the Court that he has forwarded all undistributed funds to the Superintendent. The Delegate accepted the respondents' submissions that the infractions (i) were the result of administrative errors, (ii) had not resulted in any prejudice to the creditors or benefit to them and (iii) that the amounts in issue represented a small fraction of their overall business. The Delegate concluded his analysis with the following statement: "Technically, there may be a breach of [the Act] and Rules. However, it was certainly unintentional." (Appeal Book, Vol. I, Tab 4, "Liability Decision", pages 103-104). For his part, the Judge indicated that "[t]he Delegate obviously inferred from this evidence that the Respondents has thus established a successful due diligence defence (…)." (Decision, at paragraph 111)

[30] The Delegate's findings with regard to headings E and H reflect a similar decision-making process. The respondents admitted to having submitted inaccurate Statements of Receipts and Disbursements (SRD) in contravention of sections 151 and 152 of the BIA. Section 151 of the BIA imposes a duty on trustees to prepare a SRD once all the property of a bankrupt has been realized while section 152 indicates the mandatory information contained in a SRD. The Delegate accepted the respondents' submission that these infractions were the result of administrative errors and had not resulted in any benefit to them or prejudice to the creditors. The Delegate adopted the same approach with respect to allegation H, which concerned the respondents' failure to maintain separate trust accounts for estates converted from a summary to an ordinary administration in contravention of section 13 of Directive No. 5. Again, the Delegate accepted the respondents' submissions that the amounts at issue represented a small fraction of their overall business and that the infractions were the result of administrative errors which did not prejudice the creditors. (Appeal

Book, Vol. I, Tab 4, "Liability Decision", pages 110-111) The Judge's comments on the Delegate's findings also reflect the general deference he showed to this aspect of the Delegate's decision: "[T]he findings of fact and the inferences drawn by the Delegate from the evidence (…) are reasonable since they fall within an acceptable range of possible outcomes." (Decision, at paragraph 117)

[31] A plain reading of the Delegate's decision reveals that the following factors were considered as supporting the respondents' defence of due diligence: (i) the lack of intentional wrongdoing on the part of the respondents; (ii) the lack of any resulting prejudice to the creditors of benefit to the respondents; and (iii) the fact that the infractions related to a small portion of the respondents' overall business. In my opinion, these were not relevant considerations to the establishment of a defence of due diligence as articulated in *Sault Ste. Marie* and subsequently developed in the jurisprudence.

[32] The defence of due diligence was articulated in *Sault Ste. Marie,* at pages 1325-26 as follows:

> The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

[33] While the Delegate regarded the respondents' diligence in the overall conduct of their business as a relevant factor in assessing whether due diligence had been established with respect to headings B, E and H, the jurisprudence is well-settled that, as per *Sault Ste. Marie,* evidence

presented to support this defence must relate to the specific offence at issue. This principle has notably been adopted by the Ontario Court of Appeal (*R. v. Raham*, 2010 ONCA 206 at paragraph 48; *R. v. Kurtzman* (1991), 4 O.R. (3d) 417 at paragraph 37; *Rio Algom Ltd*., above at paragraph 31), the British Columbia Court of Appeal (*R. v. Emil K. Fishing Corp*., 2008 BCCA 490 at paragraphs 13, 19; *Imperial Oil*, above at paragraphs 23, 28) and the Newfoundland and Labrador Court of Appeal (*R. v. Alexander* (1999), 171 Nfld. & P.E.I.R. 74 at paragraph 18 (C.A.)). The Ontario Court of Appeal recently made the following comments on this particular aspect of the due diligence defence in *Raham*, above at paragraph 48:

> The due diligence defence relates to the doing of the prohibited act with which the defendant is charged and not to the defendant's conduct in a larger sense. The defendant must show he took reasonable steps to avoid committing the offence charged, not that he or she was acting lawfully in a broader sense.

[34] Similarly, with respect to heading B, the Delegate accepted the respondents' submission that the breach of the BIA and the Rules was "unintentional". (Appeal Book, Vol. I, Tab 4, "Liability Decision", page 104). However, the lack of intentional wrong-doing will not support a defence of due diligence in the context of strict liability offences which, as stated in *Sault Ste. Marie*, have as their defining characteristic the absence of any need for the prosecution to prove the existence of a *mens rea*. In *Pillar Oilfield Projects Ltd. v. Canada*, [1993] T.C.J. No. 764 at paragraph 27, the Tax Court indicated that "innocent good faith in the making of unintentional errors is not tantamount to due diligence." More recently in *Samson*, above at paragraph 35, the Federal Court stated that "[i]t is not sufficient to plead forgetfulness or an error made in good faith."

[35] The fact that the infractions may have resulted from “administrative errors” on the part of the respondents’ staff was also taken into consideration by the Delegate. However, with respect to headings B and E, subsection 7(f) of Directive No. 4R (Delegation of Tasks) specifically barred the respondents from delegating their responsibility to ensure both the accuracy of SRDs (Heading E) and that an application for discharge was not filed prior to forwarding all unclaimed dividends and undistributed funds to the Superintendent (Heading B). Further, as stated in *Sault Ste. Marie* at page 1331, en employer will not escape “strict liability” on the sole basis that the alleged infraction was committed by a staff member:

> Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused’s direction or approval, thus negating willful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

[36] Finally, while the Delegate accepted the respondents’ submissions that the infractions had not resulted in any prejudice to the concerned creditors, there is no reference in the case law pointing to the relevance of such considerations in a due diligence analysis. The appellant refers this Court to the comments of the Court of Quebec (Civil Division) in *Millette c. Le Comité de surveillance de l'Association des courtiers*, [2004] J.Q. no 8844 at paragraph 44 (Civ. Div.), aff’d 2006 QCCA 711, to the effect that liability under a regime of professional conduct does not depend on whether a prejudice was caused to third parties. On this issue, the Court was referred to S. Poirier, *La discipline professionnelle au Québec* (Cowansville: Yvon Blais, 1998) at 39:

> Contrairement à la faute civile, la faute disciplinaire est sans égard aux conséquences de l'acte posé. La conclusion recherchée en matière disciplinaire sera la sanction de l'infraction et non la réparation du préjudice causé.

[37] In light of these observations, it is clear that the Delegate determined that a defence of due diligence had successfully been established by the respondents on the basis of irrelevant criteria. The Delegate failed to hold the respondents to the correct burden of proof, namely to demonstrate on a balance of probabilities that they took all reasonable steps to avoid committing the specific infractions listed under headings B, E and H. Further, even if the Delegate had applied the appropriate criteria for assessing the respondents' due diligence, there is no evidence in the record which can support the finding that all reasonable care was exercised to prevent these specific infractions from occurring. Admittedly, the interpretation of the defence of due diligence in the jurisprudence sets a heavy burden on the respondents: *Samson*, above at paragraph 35; *Cata International*, *above* at paragraph 22. The Ontario Court of Appeal has notably commented on the "nebulous" nature of the notion of due diligence: *R. v. Wholesale Travel Group Inc*., [1989] O.J. No. 1971 at paragraph 70 (C.A.).

[38] The respondents rightfully submit that, as per *Sault Ste. Marie*, a defence of due diligence will also be established if the accused "reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent." However, while the respondents invoke this alternative mode of defence, they have failed to identify a precise "set of facts" which was reasonably relied on to believe that their actions were lawful. Rather, the respondents' argument on this point seems to relate to a reasonable belief that existing control measures were adequate to prevent the infractions from occurring. In my opinion, on the evidence before us, that argument cannot form the basis of a due diligence defence.

IV. Disposition

[39] I would allow the appeal, set aside the Judge's decision pertaining to the contraventions listed under headings B, E and H and allow the application for judicial review with respect to these contraventions. The Delegate's decisions pertaining to headings B, E and H, in addition to his decision pertaining to the remedial measure under heading L, are thereby set aside. Given this disposition, the matter is remitted to the Delegate in order to determine the appropriate disciplinary measure, if any, under subsection 14.01(1) of the BIA with regard to the contravention under heading L in addition to the contraventions identified by the Judge (J and K) and on appeal (headings B, E and H) as a whole. However, in light of the appellant's failure to obtain a stay of the Judge's decision, and in the event the Delegate has already rendered a new decision with respect to disciplinary measures under headings J, K and L, I would remit the matter to the Delegate only with respect to headings B, E and H.

[40] The Federal Court awarded no costs and I would not disturb that finding. I would award the appellant its costs in this appeal.

"Pierre Blais"

Chief Justice

"I agree.
M. Nadon J.A."

NOËL J.A. (Concurring Reasons)

[41] I have had the benefit of reading the reasons of the Chief Justice. Like him I would allow the appeal. However, I reach that conclusion through a different route.

[42] The role of this Court sitting on an appeal from a decision rendered by the Federal Court further to an application for judicial review is to identify the correct standard of review and determine whether the Judge applied this standard correctly (*Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56 at paragraph 84). In this case, the Delegate's decision gave rise to an extricable question of law which, by its nature, stood to be reviewed on a standard of correctness, *i.e.* what are the legal parameters of the defence of due diligence?

[43] Had the Judge assessed this question against the appropriate standard, he would have been bound to allow the application for judicial review with respect to the contraventions described under headings B, E and H because none of the grounds identified by the Delegate in exculpating the respondents from these contraventions come within the ambit of the defence of due diligence.

[44] Specifically, with respect to the contravention under heading B, the Delegate wrote at paragraph 68 of his reasons:

> I accept Mr. MacLeod's evidence that the irregularities as set fourth in these allegations were as a result of administrative errors, and that there was no prejudice to the estates or the creditors, nor any benefit to trustees. Technically, there may be a breach of the *Bankruptcy Act* and *Rules*, it was certainly unintentional.

[45] As for the contravention under heading E, the Delegate wrote at paragraph 75 of his reasons:

> The explanation given by Mr. MacLeod was that allegation 46 and 47 was an error made by his staff, for which he takes responsibility… At the time of signing the SRD he thought they were correct and accurate. The trustees did not benefit from any of these administrative errors…As has been pointed out, the trustees have not financially benefited from any of these mistakes. They may have used some creative accounting techniques to adjust the estates, but it would also appear that no creditor or debtor has suffered.

[46] With respect to the allegation under heading H, the Delegate noted at paragraph 84 that:

> Mr. MacLeod's response to this allegation was that it represented a very small portion of the estates, which were administered by [the respondents].

[47] Finally, the Delegate at paragraph 87 added that:

> [Mr. McLeod] points out that the effect of opening these estates in the consolidated bank account was an administrative error but did no prejudice or compromise the administration [of] the estate nor did it prejudice the consolidated bank account for consumer proposals.

[48] In short, the Delegate found that the defence of due diligence had been made out because the contraventions were the result of administrative errors, the creditors were not prejudiced, the respondents did not benefit and the amounts involved represented a very small fraction of the total value of the estates under the respondents' administration.

[49] However, the case law establishes that errors made in good faith are not tantamount to due diligence (*Cata International Inc. v. Canada (Minister of National Revenue, Customs, Excise and Taxation – M.N.R.)*, 2004 FC 663 at paragraph 22; *Jean-Pierre Samson and the Minister of National Revenue*, 2007 FC 975; *Pillar Oilfield Projects Ltd. v. Canada*, [1993] T.C.J. no 764 at paragraphs 24 and 27); that proof of reasonable care in the general conduct of one's affairs is not sufficient to escape liability (*R. v. Alexander*, (1999) 171 Nfld & P.E.I.R. 74 (C.A.); *R. v. Imperial Oil Ltd.*, (2000) 144 B.C.A.C. 118; *R. v. Kurtzman*, (1991) 4 O.R. (3d) 417, 429 (C.A.); *R. v. Emonts*, [2007] O.J. no 1206; *R. v. Pilen Construction of Canada Ltd.*, [1999] O.J. No 5650; *R. v. Cooke*, (1989) 78 Sask. R. 141); that it is incumbent upon the person claiming due diligence to show that a system was in place to prevent the prohibited act (*R. v. Sault-Ste-Marie*, [1978] 2 S.C.R. 1299 at page 1331; *Chauvin c. Beaucage*, 2008 QCCA 922 at paragraphs 88-91) and that the fact that the contraventions did not cause prejudice to third parties is irrelevant (*Millette c. Assoc. des Courtiers d'Assurances de la Province de Québec*, 2004 CanLII 7074 (CQ) at paragraphs 42-46; conf. at 2006 QCCA 711 (CanLII) at paragraph 59; *Chauvin c. Sheehan*, 2010 QCCQ, 1512 (CanLII); *Latulippe c. Médecins*, 1998 QCTP 1687 (CanLII); Poirier, S., *La Discipline Professionnelle au Québec*, Cowansville, Les Éditions Yvon Blais inc., 1998 at pages 38-39).

[50] Giving effect to the defence of due diligence as defined by the case law, it is apparent that none of the factors relied upon by the Delegate were capable of establishing such a defence.

[51] In response to questions from the Court during the hearing, counsel for the respondents (Mr. Christian) did not challenge the state of the law as I have described it. However, he took the position that this line of cases does not apply in assessing a due diligence defence in the context of this case.

[52] In particular, counsel noted that there are two branches to the due diligence defence as it was articulated in *Sault Ste Marie* (at pages 1325 and 1326):

> … The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular act. …

[53] Insisting on the first branch of this test counsel argued that the strict due diligence standard which has been developed by the case law is appropriate with respect to infractions under certain statutes which are based on self-compliance such as the *Income Tax Act*. However, it is inappropriate in the case of the BIA.

[54] I can see no merit in this submission. First, although broken down into two elements, the Supreme Court in the above quote from *Sault Ste Marie* provides for a single test inasmuch as an accused who fails to take all reasonable steps to avoid the commission of an infraction will not be able to invoke the first element (i.e. reliance on others) in order to escape liability (*Sault Ste Marie* at p. 1331).

[55] Second, there is no basis for the suggestion that the BIA calls for a more relaxed approach. Trustees are expected to act in conformity with their statutory obligations. Investigations are

undertaken under the BIA from time to time in order to ensure compliance just as they are under the *Income Tax Act*. This does not detract from the fact that trustees are expected to comply on their own volition as most do. The system could not function otherwise.

[56] I can see no basis for altering the standard of due diligence as it has been established by the case law when dealing with contraventions under the BIA. Applying this standard, it was not open to the Delegate to hold, on the record before him, that the due diligence defence had been made out. It follows that the Judge was bound to intervene and that he erred in failing to do so.

[57] I would allow the appeal on the terms proposed by the Chief Justice.

"Marc Noël"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-66-10

Appeal from a decision of Justice Mainville, as he then was, of the Federal Court, dated January 28, 2010.

STYLE OF CAUSE:	SYLVIE LAPERRIÈRE, in her capacity as Senior Analyst – Professional Conduct – of the Office of the Superintendent of Bankruptcy and ALLEN W. MACLEOD and D. & A. MACLEOD COMPANY LTD.
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 23, 2010
REASONS FOR JUDGMENT BY:	BLAIS C.J.
CONCURRED IN BY:	NADON J.A.
CONCURRING REASONS BY:	NOËL J.A.
DATED:	January 13, 2011

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