CAIRP
Rebuilding Success • Rétablir le succès

Canadian Association of Insolvency and Restructuring Professionals

CHAIR'S Newsletter

November 2016
Special Annual Conference Edition

INDEX

Chair's Message

By Larry Prentice, FCPA FCA, FCIRP, FIIC

For those members who joined us in Montreal for our Annual Conference, you know that our organizing committee did a terrific job in presenting an interesting educational program in a wonderful city. Nathalie Brault and Josée Pomerleau led a great team in bringing a wide variety of information and innovation to a program that had something for everyone.

You will read in this Newsletter articles that describe the various sessions presented throughout the Conference days. The technical sessions were presented separately in both French and English, and Mylène Paquette as the keynote speaker charmed the audience with her description of her journey to become the first person from the Americas to row across the Atlantic from Nova Scotia to France. Hers is truly an inspirational story.

CAIRP Chair Larry Prentice

Our Annual Conference presents a unique opportunity for members from across the country to congregate and discuss the issues that we care about and the challenges we must meet together to maintain and enhance our special position in the Canadian financial landscape. And, yes, we do have challenges. In Montreal we heard about the sharp drop in revenues, particularly in the student education programs, that lead to reporting a sizable shortfall in our fiscal 2016 operating results. That is not a result that we have experienced in our history, and one that we cannot allow to continue.

Like many of the businesses that we look at professionally, we have to look closely at what we do and how we do it in order to ensure that CAIRP continues to serve its members and fulfill its mandates in the best way possible. We are an organization that is approaching its 40th anniversary, and the leaders of the enterprise need to be out in front of opportunities for innovation and creativity in serving the needs of our members.

Your Board of Directors recognized the need for an assessment of CAIRP's needs and resources at the beginning of this year and launched a very extensive consultation process that has yielded a wealth of information from members across the country and the leaders of firms large and small. The Strategic Planning Task Force is nearing the end of its deliberation process and you can expect to hear about its recommendations arising from this review in the coming months.

CAIRP is in a very strong financial position as a result of decades of prudent fiscal management and we have a wide variety of options available to us as we plan for our future.

It is my honour and pleasure to serve as your Chair for the coming year. Your Board of Directors is a strong and involved group of practitioners from all regions of the country and all practice profiles. I am very much looking forward to working with them as we define and address the challenges in front of us and I am fully confident that we will do so very successfully.

Tales from the Frontline - Retail Pharma in Flux

Review by David Lewis, CPA, CA, CIRP, LIT
Speaker: Philippe Jordan, CPA, CMA, CIRP, PwC

In this session, Philippe Jordan, of Pricewaterhouse Coopers LLP, discussed the retail pharmacy business, its current challenges, method of valuation and items for insolvency professionals to be aware of in cases of bankruptcy or receivership.

Mr. Jordan described the retail market as a range of business sizes from a single pharmacist running a 600 square-foot location to chains like Shoppers Drug Mart with a large retail sections and a pharmacy occupying only part of the floor space.

Some of the areas that are creating challenges currently in the retail pharmacy business:

» Governments are pushing the healthcare frontline further into pharmacies by allowing pharmacists to provide direct patient care;
» Pharmacist remuneration is under heightened scrutiny as governments try to curb public spending; and
» Key players are consolidating the market and integrating vertically to maintain profitability.

The most common way to value a pharmacy is by earnings before income tax, depreciation and amortization (EBITDA). According to Mr. Jordan, "Over the last five years, retail drug companies have average EBITDA multiples of 9.5"

The key drivers of merger and acquisition activity are: the growing expansion of large banners, rising competition from supercentres (e.g. Costco, Wal-Mart, Loblaw) and mail-order pharmacies, and retiring owners.

From the presentation, I believe there are five key restructuring issues of which a receiver or trustee should be aware:

1. **Key Stakeholder support – Banner/chain/franchisor**
   The Banner is often a key stakeholder as they may finance operations; provide financial reporting, purchase allocation, merchandising support, and logistics. They often own the lease to the premises or have a right of first refusal and may have insight into issues affecting operations and can help facilitate the restructuring.
2. **Wholesaler**
   Wholesalers may provide financial supports and may also have a buyback agreement with the lending institution for the inventory.
3. **Regulatory intervention/support or notification**
   The College of Pharmacists must be notified if there is outside intervention and informed of the receiver or trustee's plan of action. Its principal concern is with protecting patient records and inventory management. If the operations are to be shut down, the College must be advised before the commencement of the shutdown.
4. **Patient records**
   A trustee or receiver requires the co-operation of a pharmacist or a laboratory technician, as they are the only parties that may access patient records. Also, there is a standard notification period to be observed and rules regarding transferring patient records.
5. **Inventory**
   Unlike most standard bankruptcies, keeping detailed and ongoing accurate inventory records of all pharmaceuticals is key, as they may be subject to review or audit. The receiver or trustee cannot take possession of over-the-counter, prescription or narcotic drugs without the participation of a wholesaler or authorized dealer.

As with most insolvency engagements, good planning is key to a successful result. Retail pharmacy has a unique array of key stakeholders who require significant consideration. Ideally, the receiver or trustee will have notification ahead of time to plan effectively and get the necessary items in order, such as ensuring there is a pharmacist in place.

The Art of Managing Fiscal Claims

Review by Deborah Conroy CPA, CA, CIRP, LIT
Presenters:
Jean-Daniel Breton, CPA, CA, FCIRP, LIT, Ernst & Young Inc.
Dana Nowak, MacPherson Leslie & Tyerman LLP

When governments want to recover debts owed to them, what avenues and recourse do they have available? And what avenues and recourses are they actually attempting to use?

Jean-Daniel Breton and Dana Nowak spoke to us on this subject, exploring some of the more significant problems that arise in the course of the administration of a file as relates to the Crown's claims, with a particular emphasis on recent jurisprudence trends.

What should have been a simple general rule, as expressed in s. 86(1) Bankruptcy and Insolvency Act (BIA): "*In relation to a bankruptcy or proposal, all provable claims (…) of Her Majesty (…) rank as unsecured claims*.", has become a maze of exceptions and has led to a seemingly never-ending series of debates and disputes, according to Mr. Breton and Ms. Nowak.

Their presentation outlined the options available to the Crown, new developments in jurisprudence related to garnishment rights and statutory deemed trusts, and complications that arise with its attempts to apply rights of set-off to pre- and post-bankruptcy debts.

The issue of the valuation and validity of certain Crown claims has also become of particular concern when the Crown's claim rests upon a disputed or very recently issued notice of assessment, Mr. Breton and Ms. Nowak noted.

They explained that recent jurisprudence challenges the previously accepted view that an assessment is necessarily valid as soon as it is issued, and that the only way to dispute a claim of the Crown is by applying the notice of objection process dictated by the tax laws.

In cases where the Crown is a significant creditor that may control the fate of a restructuring attempt, the proper characterization of the claim becomes particularly important, as the claim could be contingent or unliquidated if the notice of assessment is legitimately disputed, and thus the trustee could in certain circumstances properly disallow the claim for voting purposes at a meeting of creditors.

Similarly, the fact that a tax claim is not definitively resolved could facilitate the discharge of a debtor who may be thought to be a high-tax debtor under s. 172.1 BIA if the claim was disputed.

However, recent jurisprudence has also demonstrated the need for trustees to be careful and even-handed in their approach to assessing claims.

Mr. Breton and Ms. Nowak concluded that there exist many areas of contention regarding the Crown's position in insolvency proceedings; the challenge or "art" is to find a harmonious interpretation between the Income Tax Act and the BIA.

Solange de Billy Tremblay and Jean-Daniel Breton peruse the annual conference agenda

The Art of Negotiation

Review by François Noël, MBA, CIRP, LIT
Presenters:
Julie-Martine Loranger, McCarthy Tetrault LLP
Jocelyn T. Perrault, McCarthy Tetrault LLP

Julie-Martine Loranger and Jocelyn T. Perrault, partners at McCarthy Tetrault LLP, spoke to attendees at the Annual Conference about the subtle art of negotiation.

As trustees in insolvency, more often than not negotiation is part of our daily routine.

Just scan the *Bankruptcy and Insolvency Act* (BIA) or the *Companies' Creditors Arrangement Act* (CCAA) and you can see what's involved in our role as insolvency professionals, whether as trustees, receivers, monitors or financial advisors.

Negotiation should be the undertaking of discussions among two or more parties to find common ground and reach an agreement to settle a matter of common interest or to resolve a conflict.

François Noël at the Art of Negotiation session

The Canadian insolvency system aims to maintain a balance among the rights of the different parties involved, including taxation authorities, secured creditors, employees, landlords, ordinary creditors and so on.

The BIA and, to a certain extent, the CCAA delineate the rights and obligations of the parties, and insolvency professionals, as officers of the court, must often intervene to ensure that the process operates in an environment of equity and justice.

Different contexts require negotiation on the part of a Licensed Insolvency Trustee (LIT): handling of claims, sale of assets, preferences and transfers at undervalue, proposals or plans of arrangements, trust claims, etc.

Negotiations can begin with a face-to-face meeting or a meeting involving many parties in which the interests of many stakeholders must be taken into account.

LITs must never forget their role as officers of the court and must maintain absolute independence (and the perception of their independence).

Negotiations are a three step process — before, during and after — which seems to go without saying. However, each step requires its own kind of preparation.

As the saying goes, "If I had eight hours to chop down a tree, I'd spend six sharpening my axe."

Before any negotiation, you must have a complete grasp of the facts, an understanding of the strengths and weaknesses of the case and . . . research, research, research. You need to adopt a positive attitude, show creativity, control the timing of the negotiations and set a deadline, establish a good rapport, and gather as much information as possible.

Above all, identify the alternatives to a negotiated agreement and the potential consequences of failure.

During the negotiation, set your emotions aside and keep a cool head. Clarify the issue and avoid straying off topic. If there's an impasse, take a break. Finally, keep calm and keep to your strategy.

After the negotiation is completed, prepare an agreement in principle, ensuring that all parties understand the content and use the same language.

If negotiations do not result in an agreement, find a way to maintain the momentum and set up another meeting.

WEPPA

Review by Jean-Daniel Breton CPA, CA, FCIRP, LIT
Presenters: Danijela Hong, Employment and Social Development Canada
Bernadette Syverin, Employment and Social Development Canada

What is new and exciting about the Wage Earner Protection Program Act (WEPPA)?

In Spring 2015, the Ministry of Labour tabled it's five-year statutory review of the Wage Earner Protection Program Act.

Danijela Hong and Bernadette Syverin are senior representatives of Employment and Social Development Canada (ESDC) and were on hand to explain the five-year review, as well as the process put in place since the report was filed to engage stakeholders, including CAIRP, in discussing ways to improve the WEPP and its administration.

We learned that while some problems were identified with the program, it appears to meet its stated objective to help employees who lose their employment as a result of the bankruptcy or receivership of their employer.

Since the inception of the program in 2008, it has provided relief to some 94,000 employees, or approximately 90% of the employees that applied for relief under the program, and 46% of the employees received full payment of the amount they were due by the employer. We also learned that service standards are also being met and, in recent years, significantly exceeded.

ESDC has put in place committees to analyze some of the problems identified with the program, with a view to resolving them. All of the problems identified cannot be dealt with immediately, as some of the issues can only be resolved by legislative changes, which requires research to determine the likely cost of the proposed changes, a long analysis by the officials that are in charge of policy development, and an opportunity to introduce changes in Parliament's legislative agenda. This would be the case, for example, of changes seeking to expand the program to cover employees who lose their employment due to a restructuring process, which does not lead to a bankruptcy.

However, other issues are more administrative in nature and ESDC has prioritized these in its attempts to improve the program. These include, for example, the administration of the most beneficial payment (where there is a concurrent bankruptcy and receivership), the concerns of professionals over their liability in cases where information is inadequate, and addressing the payment scheme for trustees and receivers.

We learned from Ms. Hong and Ms. Syverin that ESDC considers CAIRP a very important stakeholder and values the association's input in the development of the program, and that ESDC has put in place a joint committee, which includes representatives from CAIRP, to address policy and operational issues relating to the administration of the WEPP.

FCA Insurance Brokers President Andrew Osbourne and FCA Treasurer Don Anderson enjoy a quiet moment before the crowds arrive

All About That Attitude — Keynote Speaker Mylène Paquette

Review by Daniel Budd, CIRP, LIT

CAIRP President and Chief Operating Officer, Mark Yakabuski and Mylène Paquette

If someone told you their plan for the foreseeable future was to row alone across the Atlantic Ocean, you would probably think they were completely out of their mind.

After listening to Mylène Paquette, keynote speaker at this year's Annual Conference, speak about her decision, training and transatlantic rowing experience, it almost seems crazy not to want to embark on such a life-altering journey. Ms. Paquette's presentation - and I say presentation because she is so much more than a speaker - moved at least this attendee to tears.

Ms. Paquette is truly an inspiration and a role model. She began working with sick children before finishing her education. After a particularly difficult and moving interaction with a patient, Ms. Paquette became determined to face her own fears head on.

In this case, what would usually be a relatively minor fear of water, coupled with a newfound interesting in sailing drove her to try something new for both her and the world; being the first North American to row across an ocean.

After five years of training and preparation, Ms. Paquette set off on her adventure. After an extremely rough and choppy beginning (please pardon my puns) she was almost ready to call it quits. Not only were the weather and ocean currents not going her way, but the shock to her system both mental and emotional of rowing for weeks without leaving Canadian waters was almost too much to bear.

While she had amazing support from her ground team, she was in all truth completely alone in a small boat on a vast ocean. On top of that was the pressure that she would lose all the money she had raised from friends and family if she did not succeed. It was then that Ms. Paquette determined she could only change things within her control - in this case her attitude - knowing she could only succeed as long as she stayed positive and in control.

This winning attitude is what makes Ms. Paquette such a compelling and inspirational figure. Even after being hit by hurricane Umberto (who was not the sexy Spaniard she had envisioned) and losing the vast majority of her communication equipment, Ms. Paquette was able to turn the most frightening moment of her life into, as she described it, the best moment of her life.

Reflecting on the idea of being frightened, Ms. Paquette taught us that even in the middle of the ocean, the scariest beast there is is the beast inside. Toward the conclusion of her adventure, once her confidence had grown and she could taste the end, Ms. Paquette admits she let her ego get the best of her. The result: A final 11 days without electricity in her boat. While to most this would have been catastrophic, Ms. Paquette doubled down, figured out how to finish and made it all the way to the French coast.

While the feat of rowing from Canada to France is an amazing accomplishment in its own right, what is truly awe-inspiring about Ms. Paquette is what she has been able to take away from her experience. She teaches us to understand, but maybe not accept, our limitations and to always envision success. With the right attitude, mindset, support and dedication, you can not only accomplish anything but use that experience to grow and succeed in everything else life throws at you.

Keynote speaker Mylène Paquette gave an inspirational address that was well-received by attendees

Consumer Insolvency Issues

Review by Marla Adams, CPA, CA, CIRP, LIT
Presenters:
Pierre Fortin, Jean Fortin & Assoc
Lisa Peeling, Gowling WLG

Pierre Fortin and Lisa Peeling presented the consumer insolvency technical update by way of a series of 16 questions and answers (with references to recent court decisions). The result was a lively and fast-paced run through of important recent precedents. For the sake of brevity I have included only some of the questions and tried to focus on those that appeared to generate the most discussion.

Question: Does publication by the trustee of a caveat against a real estate asset protect rights of the creditors even after the trustee is discharged?

Answer: NO- Murdock (Syndic de), 2014, QCCS 3426

It appears that this is the decision that prompted the OSB to issue a position paper in May 2016. The Murdock decision refers to a 1987 Saskatchewan case (Zemlak). Essentially, if a trustee wants to retain an interest post discharge the trustee must:

- Quantify the equity and make disclosure in the Section 170 report;
- Inform the debtor of its intention to register and the quantum of the non-exempt equity;
- Inform the creditors of the intended course of action;
- Recommend that the debtor seek independent legal counsel.

Otherwise, the trustee must make a return of the property to the debtor under Section 40 of the *Bankruptcy and Insolvency Act* (BIA).

Q: Is the increase in equity acquired between the date of bankruptcy and the date of discharge devolved to the creditors?

A: YES- In re Raymond Stephen Paul Lepage, 2015 ONSC 4525

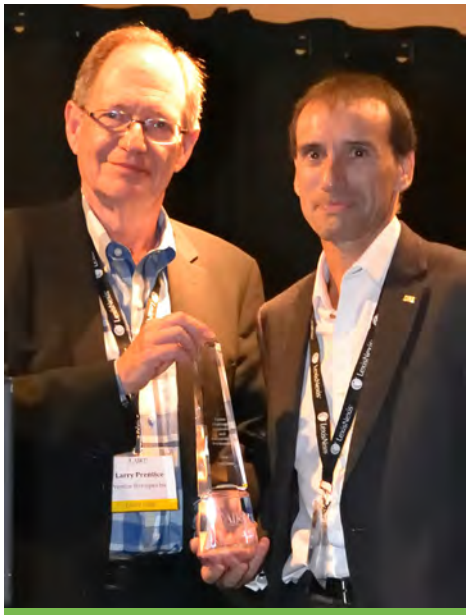
In this case a second-time bankrupt with surplus income had previously admitted to tax fraud. While the trustee initially indicated that it would disclaim its interest in real property, as there was no equity, it did not do so.

Over the course of the 36-month administration, the property appreciated in value and the bankrupt continued to make payments under the terms of the mortgage. These payments, and the increases in market value generally, resulted in equity of approximately $150,000 accruing. The concept of "promissory estoppel" was discussed, ie., 1. a promise is made (by the Trustee) and 2. the person acts on the promise to his detriment (the bankrupt).

The Court, demonstrating an inability to apply Directive 11R2, said that the payments made by the bankrupt were a reduction to monthly income thereby reducing surplus resulting in the equity.

While the result allowing the creditors access to the equity in the property was surprising, the circumstances of this particular case must be kept in mind when considering its implications for general practice. The bankrupt's history with Canada Revenue Agency (CRA), and the duration of this administration, contributed to the approach taken by CRA as creditor and the increase in market value of the property. This case does highlight the importance of dealing with and documenting the trustee's position with respect to real estate, which is simply good practice.
(Ed. See CAIRP Bulletin on Lepage)

Q: Is a notice of assessment that the debtor opposed before the bankruptcy a provable claim that the trustee must recognize for determining whether the bankruptcy is an income tax-driven bankruptcy?



Paul Casey (right) receives the honour of Fellow Chartered Insolvency and Restructuring Professional (FCIRP), the highest honour the Association can bestow upon a member.

Answer: NO- Schnier v. Canada (Attorney General) 2016 ONCA 5

In this Court of Appeal decision, the taxpayer participated in certain tax shelters, which CRA determined to be a sham, resulting in Notices of Assessment totaling approximately $4.2 million which were under appeal by the taxpayer at the time of the bankruptcy filing. The only CRA claim not subject to appeal amounted to $71,000. This became important with respect to making a determination as to the applicability of Section 172.1 at the time of discharge. The court found that CRA needs to consider a change in enforcement once a Notice of Objection is filed. CRA must follow the rules to avail itself of the process. Only the $71,000 was a provable claim and the debtor got an automatic discharge.

International Cyberfraud

Review by Ian Penney, CPA, CA, CIRP, LIT
Panelists:
André Lepage, EY
Danielle Ferron, Langlois Lawyers
Dina Raphael, BMO Financial Group

André Lepage, Dina Raphael and Danielle Ferron

Did you know that cybercrime (also referred to as computer crime) is any crime in which a computer is the object of the crime or is used as a tool to commit an offence and that cyberfraud is a cybercrime in which the Internet is used to illegally obtain money, goods, etc., from people or an organization through deception?

The CAIRP panel provided Annual Conference attendees a host of interesting facts and statistics about cybercrime of which all professionals should be aware, inducing:

» Cyberattacks cost businesses more than $400 billion a year.
» The average total cost of a data breach is estimated at $3.79 million–$4 million.
» 13% of users who receive a "phishing" email will click on it!
» Studies have also shown that 80% of workers are unable to detect the most common and frequently used phishing scams.

Phishing is a common type of cybercrime and can take the form of a phone call or email from someone claiming to be in a position of authority and asking for confidential information, such as a password.

Other types of cybercrime include "spear phishing," where email is used to fool employees into believing that the information request came from a credible internal source, such as IT or HR. "Pharming" sees the user fooled into entering sensitive and confidential information in a website that is a replicate of an actual one, such as a bank website. And "smishing" (or "tishing"), which uses the same process as phishing but through text messages systems.

Social engineering is also a critical component of cyberfraud, in which fraudsters gain unauthorized access to systems by manipulating people to obtain confidential information. Online profiles such as Facebook, LinkedIn, and other publically available sources of personal information are used to build credibility and trust with the target.

While varied and constantly evolving, the most frequent types of cyberfraud include:

1) Wire transfer fraud: A business is requested to wire funds for invoice payment to a fraudulent account.

2) Cyber extortion: "Ransomware" is a form of malware that attacks an organization's or individual's systems in an effort to deny the availability of critical data and/or systems and access is only regained upon payment of a fee.

3) Impersonation/pretexting: An attacker impersonates a person in authority, a colleague, IT representative, or vendor to gather confidential or sensitive information.

4) CEO fraud: Information is gathered from publicly available sources or from social engineering. The fraudster impersonates the CEO (or a consultant or lawyer from a reputable firm) and the targeted employee is a senior/trusted person who is authorized to handle wire transfers. Typically, a time is chosen when the CEO is out of the office or is not available and the request carries a sense of urgency and includes a confidentiality request.

While cyberfraud is often difficult to detect, common red flags include :

» Email uses generic terms like "Dear account holder" or "Dear ian.penney@janesnoseworthy.com".
» Email is threatening and/or states that urgent action is required.
» Email contains an unrecognizable link.
» Email contains spelling errors.
» Email address is different from trusted company's website.
» Unexpected emails from a company you have no business with.
» No padlock sign on website and no https:// in the URL bar.
» Email asks you to respond to another email address.
» Time difference appearing on emails: country of fraudster versus country of the person being impersonated.

Unfortunately, no cyberfraud defence strategy is foolproof and all strategies rely on the diligence of all system users. In addition, a general awareness of frequently used scams, knowing your customer (KYC) and a healthy skepticism are often the best defences.

Strategies may also involve installing encryption software, the use of anti-malware software and strong internal controls (with next-level approval thresholds). Finally, emails should always be handled with care, passwords and security codes should not be shared and links should not be clicked without verification.

Technical Update – Court decisions in the twelve months

Review by Paul Casey, CPA, CA, FCIRP, LIT
Presenter: Denis Ferland, Davies Ward Phillips & Vineberg LLP

Denis Ferland of Davies Ward Philips & Vineberg

CAIRP is indebted to the professional generosity of Denis Ferland and his firm, Davies Ward Phillips & Vineberg LLP, for his preparation and delivery of our technical update. Among his many other qualifications, Denis was named Montreal Insolvency and Financial Restructuring Lawyer of the Year 2015 by The Best Lawyers in Canada.

Denis' presentation delivered a full menu of 24 recent cases which he separated into five categories: a) plans of arrangement and proposals; b) bankruptcy; c) interactions between provincial laws and the BIA; d) sale of assets; and e) miscellaneous. Denis has generously made his extensive presentation available to Conference attendees, so this discussion represents a small sampling of the recent cases highlighted.

Plans of arrangement and proposals – The Montreal, Maine & Atlantic case focused on the CCAA professionals' unusual request for approval of additional fees of $10 million on top of their billed fees of $9.4 million. Readers will undoubtedly be aware of this administration which was the result of the horrific Lac Megantic train derailment. After extensive efforts by the parties to resolve claims, a settlement fund of $300 million was accumulated.

In considering this request, the Court referenced the Tepper factors in evaluating the reasonableness of fees. The Court also considered the exceptional nature of the case, the exceptional risk that the professionals took on in managing the case without certainty of being paid their fees and costs, and the analogy between fees awarded in class action cases. The Quebec Court concluded that the additional fees were appropriate in the circumstances.

Other notable cases included Target Canada, US Steel Canada, Nortel (twice), and Magasin Laura.

Bankruptcy – The array of cases included contested discharge proceedings for high-tax debtors, applications for bankruptcy orders, the increase in the value of a home during the bankruptcy period, and the Redwater Energy Corp case.

Redwater was a public O&G company that was declared bankrupt. The company held 127 properties licensed by the Alberta Energy Regulator. Upon its appointment, the trustee took possession of only 20 of the properties and disclaimed its interest in the remaining properties pursuant to S. 14.06 of the BIA. The AER did not accept this result and issued orders against the trustee for the abandonment, remediation and reclamation obligations pursuant to the provincial Oil and Gas Conservation Act. The Alberta court applied the principle of federal paramountcy found that the provincial legislation was inoperative to the extent that it was incompatible with and frustrated the purpose of S.14.06.

Other cases – Denis' presentation covered key decisions from the Supreme Court of Canada in the past year including the Moloney / 407 ETR (motor vehicle licensing) and Lamare Lake Logging (conflicting notice periods from the Saskatchewan Farm Security Act versus a BIA S.243 Receivership).

INSOL Vice-President Adam Harris and Past CAIRP Chair Uwe Manski of BDO Canada

Perspectives From The Bench

Review By Mathieu Roy, LL.B., LL.M., CIRP, LIT
Panellists:
Honourable Suzanne Côté, Supreme Court of Canada
Honourable Mark Schrager, Quebec Court of Appeal
Honourable Michel Mongeon, Quebec Superior Court
Éric Vallières, McMillan LLP

Are you biased in favour of debtors?

That was the first question moderator Éric Vallières (McMillan LLP) asked the impressive panel of judges seated to his right. All levels of the court with expertise in bankruptcy and insolvency were there: the Honourable Suzanne Côté of the Supreme Court of Canada, the Honourable Mark Schrager of the Quebec Court of Appeal and the Honourable Robert Mongeon of the Quebec Superior Court.

Robert Mongeon (RM): "I think yes. The bankruptcy and insolvency laws are remedial laws that have been established for helping debtors. The framework is more flexible for debtors than for creditors."

Mark Schrager (MS): "The BIA has two goals — to rehabilitate debtors and to distribute assets. Almost all sections of the Act deal with at least one of these goals."

In going around the table again, all agreed that the system established by the Commercial Division of Montréal in 2001 after the Air Canada case has been efficient and access to the courts has been virtually in real time, on a daily basis.

Hon. Justice Mongeon and Honourable Justice Mark Schrager of the Quebec Court of Appeal

Suzanne Côté (SC): "When we look at the BCE case, we see significant efficiencies in that the case went through all three court levels (Superior, Appeal and Supreme) in only six months. This shows that when there is a need to act quickly, it is possible and we put in the place the resources to make it happen. When I was still practising, foreign clients were extremely satisfied with the work accomplished by the Division."

Hon. Justice Suzanne Côté of the Supreme Court of Canada and Hon. Justice Robert Mongeon of the Superior Court of Québec

For his part, Justice Mongeon noted the essential support of the practitioners (lawyers and trustees) in the evolution of the mindset of the judiciary:

RM: "In 2000, the position of the Superior Court was that there was no need for a division that specialized in bankruptcy. After the Air Canada case, which was handled in Toronto, it was the practitioners who pushed for the establishment of the Commercial Division. Without them, it never would have been created!"

In closing with a question on the harmonization of provincial legislation and the application of judicial precedents from common law provinces, Justice Schrager said that he believed that the requirements of Canada's two judicial regimes need to be respected, but only if the provincial law is clear about the issue. He believes part of the problem is that not all judicial decisions in Canada are translated: "In the Quebec Court of Appeal, we have worked on this (translation of decisions) and in the next 12 months, we should have the results."

As he usually does, Justice Mongeon pushed the point further:

RM: "We must have a system in place that makes the decisions of the Superior Court available in English. "

Keynote Speaker Léon Sergent: Taking Charge of Your Personal Brand

Review By Virginie Comtois, CPA, CA, CIRP, LIT

That's the title of the lecture presented by Léon Sergent, who describes himself as a "motivated, passionate and engaged trainer. Someone able to laugh at himself to explain his ideas and examples."

First of all, what is a personal brand?

A personal brand is what differentiates you from others. To be able to express your personal brand is to be able to describe yourself from a professional perspective in a way that distinguishes you from the competition. Essentially, it's what others say about you when you're not around! Clearly defining your personal brand allows you to establish your credibility, build recognition and work with clients who pay better. Finally, with a well-defined personal brand, you can increase your market value in the eyes of others.

For Mr. Sergent, a recognized personal brand is a matter of showing leadership. It's a promise of quality.

How do you develop a personal brand?

First, you need to understand that developing a personal brand takes time. It's very hard to do at the start of your career. Your brand image should be consistent with who you are. To develop your brand image, you need to determine what you are passionate about, what interests you and, most of all, what you do as an insolvency professional that makes you different from all the others.

Why should you make your personal brand known?

Once you have developed your brand image, it is essential that you pay attention to it, because you need to protect it and manage what others say about you. You need to demonstrate your value to the competition, however unfair it may be.

During his lecture, Mr. Sergent reminded the audience of some truths about business development that emphasize the importance of identifying your personal brand.

"People do business with people, not companies. People are more memorable than companies. And people become experts, but companies rarely do."

That's why it's important to differentiate yourself. We Licensed Insolvency Trustees (LIT) all offer the same product. It's how we do so that differentiates us. Who has the most empathy? Who manages the most complex files? Who is better at dealing with female clients? Who is the most passionate, available, devoted?

It is through the promotion of personal brands that clients can choose the professional that gives them confidence. Even if you wish it weren't true, you work better with certain clients. Those who see themselves in your personal brand. Those who see you reflected in what your brand says about you. For these people, you make a real difference. Your brand image must go beyond what is expected of any Licensed Insolvency Trustee. It must identify what makes you different, what makes you stand out from the crowd.

How do you test your brand?

Mr. Sergent talked about the "elevator pitch," essentially describing yourself to a stranger in the seven seconds an elevator ride takes. Are you an individual focused on helping families recover financially? Or are you a professional who wants to deal frankly and openly with clients as they overcome their financial difficulties? Or perhaps you are a top-notch business advisor who helps find effective solutions in business restructurings?

If you can do that, you have defined your personal brand. Once that's done, the challenge is to promote it to build awareness and recognition.

Welcome reception on the Terrasse des festivals at the Hyatt Regency

How do you make your brand known?

Obviously your business card, your email signature and your publications are simple and accessible tools. Social media platforms (Facebook, LinkedIn, etc.) are essential in spreading the word about your brand image. But use them wisely.

Your brand image is important. Promote it. Protect it. In short, work on it.

Strategic Agreements Between Creditors

Review by Steve Borsellino, CIRP, LIT
Presenters:
Christian Lazarre, Borden Ladner Gervais
Ouassim Tadlaoui, Borden Ladner Gervais

Christian Lazarre and Ouasim Tadlaoui of Borden Ladner Gervais

The presentation on Strategic Agreements Bewteen Creditors discussed pre-insolvency arrangements negotiated between two or more secured creditors to alter their rights, relative to each other.

Christian Lazarre and Ouassim Tadlaoui gave the early morning conference crowd an overview of the types of inter-creditor agreements, discussed important legal- and business-related considerations involved, and reviewed court decisions both inside and outside of an insolvency context.

Generally, an inter-creditor agreement seeks to override provincial statutes relating to the rank or priority of secured creditors. The agreement will be negotiated in advance to determine how proceeds of realization will be apportioned among the signatories, and may also set out rules regarding when and which assets will be realized.

The most common type of agreement is a cession of rank, in which an existing secured creditor agrees to subordinate its claim to a new lender. Although the first security interest registered is normally entitled to full satisfaction before any other creditors receive payment, the parties involved can negotiate to give a later secured creditor first right to an asset. Other common examples are *pari passu* agreements, which give equal ranking to creditors, notwithstanding the time of their registrations, and subordination agreements, in which a senior creditor is allowed to limit a junior creditor's ability to enforce its security interest until the debt owing to the senior creditor has been paid in full.

These agreements are negotiated between the debtor and its lenders when times are good and new financing is coming in to the business. There is sometimes a great difference of sophistication and leverage held by the parties. Where a major financial institution may only be willing to use set terms contained in standard contracts, a private lender may be prepared to tailor each agreement to fit the circumstances at hand.

When it comes time to enforce against a debtor, the courts will defer to written agreements between secured creditors, but will be careful to assure that it protects the rights of creditors who did not enter into the agreement. It is important that the intention of the agreement is clearly explained within the written document so that a court can interpret the participating creditors' rights.

The seminar concluded by reviewing some relevant case law, but it was pointed out that there is not an abundance of Canadian decisions to rely on, with case law in the U.S. being contradictory.