Date: 20080304

Docket: T-1184-07

Citation: 2008 FC 285

Ottawa, Ontario, March 4, 2008

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

HENRY SZTERN

Applicant

and

ME ANDRÉ DESLONGCHAMPS,
ES QUALITÉ DELEGATE OF THE
SUPERINTENDENT OF BANKRUPTCY

and

SYLVIE LAPERIERRE, ES QUALITÉ SENIOR ANALYST
FOR THE OFFICE OF THE
SUPERINTENDENT OF BANKRUPTCY

Respondents

REASONS FOR ORDER AND ORDER

[1] The applicant seeks to judicially review an interlocutory decision (the Decision) rendered pursuant to subsection 14.02 of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3 (the Act), by

Me André Deslongchamps, (the Delegate), a delegate of the Superintendent of Bankruptcy (the Superintendent), which rejected on June 5, 2007, the applicant's motion for the Delegate's recusal.

[2] The applicant, Henry Sztern, held a trustee licence issued under the Act by the Superintendent. Henry Sztern & Associés Inc (Sztern Inc.) held a corporate trustee licence. The applicant and Sztern Inc. (together, the trustees) administered bankruptcy files, including the Estate of Meco Ltd. (Meco).

[3] Creditors of Meco, represented by Me Marc Duchesne (who eventually joined the same law firm as the Delegate) instituted legal proceedings in the Quebec Superior Court against Sztern Inc. pursuant to subsection 81(4) of the Act with respect to the validity and rank of the creditors' proofs of claim in the Meco bankruptcy matter. The Court rendered a judgment in favor of Sztern Inc. on November 23, 2000. On May 6, 2004, the Court of Appeal rendered its decision accepting, in part, the creditors' proofs of claim and determining their rank.

[4] In 2003, the Office of the Superintendent uncovered various allegations of professional misconduct against the trustees. All the trustees' estate files were removed from their administration and remitted to H.H. Davis & Associés Inc. (H.H. Davis). H.H. Davis subsequently filed a claim against the trustees in the Quebec Superior Court for the purpose of recuperating missing funds from a number of bankruptcy estates which had been under the trustees' administration, including the Estate of Meco.

[5] In 2005, Sylvie Laperrière, Senior Analyst acting on behalf of the Superintendent and one of the respondents in the case at bar, issued a report concluding that the trustees had committed numerous disciplinary infractions. As a result of Ms. Laperrière's report, the applicant became the subject of disciplinary proceedings initiated pursuant to subsections 14.01 and 14.02 of the Act (the Disciplinary Proceedings). Ms. Laperrière recommend the trustees' licences be cancelled and the restitution of missing funds in ten bankruptcy estates (including the Meco bankruptcy matter), 399 summary administration estates and 201 consumer proposal files. To avoid any potential for *lis pendens* between the Disciplinary Proceedings and the civil proceedings, Ms. Laperrière removed the proposed restitution sanctions in the five bankruptcy estate matters (including Meco) that were before the Superior Court.

[6] In October 2005, the Superintendent delegated his power to preside over the Disciplinary Proceedings to the Honourable Lawrence A. Poitras, formerly Chief Justice of the Quebec Superior Court and then a member of the law firm Borden Ladner Gervais (BLG). In February 2006, Lawrence A. Poitras became unable to fulfill his duties and was accordingly discharged of them. The Delegate, formerly Assistant Chief Justice of the Quebec Superior Court and also a member of BLG, was appointed to replace Mr. Poitras in presiding over the Disciplinary Proceedings.
On April 19, 2006, the Delegate convened a pre-trial conference and rendered an interlocutory decision denying the applicant's request to examine the opposing party prior to filing a contestation. The Disciplinary Proceedings were scheduled for September 2006; however, due to the Delegate's illness, the hearing date was postponed.

[7] On April 3, 2007, the applicant informed the Delegate that he was believed to be in a situation of conflict of interest and that there were reasonable grounds to apprehend a bias on his part. The basis of these allegations is as follows: Me Marc Duchesne is a member of BLG; upon being appointed as a delegate, Me Poitras of BLG conducted a verification of office files to determine whether a potential conflict of interest existed; the verification revealed that BLG through Me Duchesne represented Natsumi Management in the Meco bankruptcy matter from August 2001 to March 2007. As a result of this verification, BLG's legal involvement in the Meco matter (a matter the applicant alleges is at the heart of the Disciplinary Proceedings), was known or ought to have been known at the commencement of the Disciplinary Proceedings. The applicant therefore argues that Me Poitras and the Delegate should have recused themselves instead of continuing their paid mandate acting as a quasi-adjudicator with no mention of this conflict.

[8] On May 7, 2007, the Delegate requested that the parties to the Disciplinary Proceedings submit their respective arguments regarding the Delegate's alleged conflict of interest and reasonable apprehension of bias. The Delegate considered the submissions made by the parties and concluded that he was not in a conflict of interest by virtue of his affiliation with BLG, nor was there a reasonable apprehension of bias on his part. The motion for recusal was dismissed on June 5, 2007. The Decision was communicated to the applicant a day later.

[9] In the Decision, the Delegate summarizes the applicant's conflict of interest and reasonable apprehension of bias arguments as follows:

> Par sa lettre du 3 avril 2007, Henry Sztern reproche au soussigné et à l'honorable Lawrence A. Poitras de ne pas avoir dénoncé que Me Marc Duchesne, également de la firme [BLG] à Montréal, avait entrepris des procédures contre [Sztern Inc.] à titre de syndic dans l'affaire Meco Limitée, affaire qui fait l'objet d'une des 24 plaintes ou offenses reprochées à Henry Sztern et à [Sztern Inc.] et qu'en conséquence, il y a conflit d'intérêt et crainte raisonnable de partialité.

[10] The Delegate emphasized that when the Meco file was opened at BLG on February 22, 2001 (the date Me Duchesne joined the firm), the name Meco appeared in the file opening system and there was no reference to the applicant or to Sztern Inc. Further, the Delegate noted that the entire time BLG worked on the Meco bankruptcy file, namely from February 22, 2001 to May 6, 2004, the applicant knew or ought to have known that Me Duchesne was acting on behalf of certain creditors. Indeed, by April 2, 2003, the applicant must have been aware of Me Duchesne's involvement on the Meco file as he was in attendance at the hearing. Similarly, the Delegate stated that between October 2005 (the date the Superintendent delegated his power to preside over the Disciplinary Proceedings to Me Poitras of BLG), until April 2007, the applicant actively participated in the case management of the Disciplinary Proceedings and did not once raise the question of a potential conflict of interest. The Delegate was of the view that "la demande de Henry Sztern du 3 avril 2007 nous parait pour le moins surprenante et de nature purement obstructive et dilatoire."

[11] The Delegate concluded as follows :

> Non seulement le dossier de Me Duchesne invoqué par Henry Sztern est fermé, mais
>
> – considérant la nature de la demande pilotée par Me Duchesne qui consistait en une requête en

> revendication d'une partie des remboursements de la taxe de vente fédérale;
> - considérant que le dossier de Me Duchesne, Henry Sztern & Associées Inc. agissait en sa qualité de syndic et que Henry Sztern et Henry Sztern & Associées Inc. n'y étaient pas impliqués personnellement;
> - considérant que la question de protèger la confidentialité client/procureur n'est pas pertinente dans la présente affaire;
> - considérant que le rapport à être fait au Surintendant des faillites et ses conclusions relèvent de l'application des principes disciplinaires et déontologiques découlant de la *Loi sur la faillite* et non des principes découlant de l'exercice des droits des créanciers d'une faillite;
> - considérant qu'aucun privilège avocat/client n'existe entre le soussigné et Henry Sztern et Henry Sztern & Associées Inc.;
> - considérant que le soussigné n'a aucun intérêt personnel dans le dossier relevant de Me Duchesne; le conflit d'intérêt allégué est mal fondée [*sic*] en droit.

[12] Turning to the issue of reasonable apprehension of bias, the Delegate noted that in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 (*Wewaykum*), the Supreme Court of Canada reasoned that "the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified." Likewise, the Delegate relied on the following criteria (expressed by de Grandpré J. in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 (*Committee for Justice*) and cited in *Wewaykum)*, to establish reasonable apprehension of bias:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having

> thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[13] In conclusion, the Delegate did not believe that an informed person, viewing the matter realistically and practically and having thought the matter through would conclude that the Delegate would not decide the Disciplinary Proceedings fairly. The motion for the Delegate's recusal was dismissed.

[14] The applicant now contests the legality of the Decision on essentially two grounds. First, the applicant submits the Delegate erred in concluding that he did not have a real or perceived conflict of interest as a result of the fact that BLG represented creditors in a matter which is essentially at the heart of the Disciplinary Proceedings over which the Delegate currently presides. The applicant suggests clients of BLG are substantial unsecured creditors (totalling almost $1,300,000) in the Estate of Meco and thus, these clients stand to gain financially from the Disciplinary Proceedings. The applicant states it was incumbent on the Delegate to immediately inform both parties to the Disciplinary Proceedings of this conflict and to recuse himself forthwith. In making this argument, the applicant relies on the *Judicial code of ethics*, R.R.Q. 1981, c. T-16, r.4.1; the *Code of ethics of advocates*, R.R.Q. 1981, c. B-1, r.1; and the Canadian Judicial Council's publication entitled "Ethical Principles for Judges." Secondly, the applicant states the Delegate erred in concluding there was no reasonable apprehension of bias on his part. A reasonable-minded person upon analyzing all the facts would conclude that there is indeed a reasonable apprehension of bias.

[15] Neither party made submissions regarding the standard of review. Nevertheless, in *Sam Lévy & Associés Inc. v. Mayrand*, 2005 FC 702, [2006] 2 F.C.R. 543, (*Sam Lévy*); affirmed by the Federal Court of Appeal in *Sam Lévy & Associés Inc. v. Canada (Superintendent of Bankruptcy)*, 2006 FCA 205, [2006] F.C.J. No. 867 (QL), leave to appeal to the Supreme Court of Canada refused, I concluded that questions of law (such as the scope of procedural safeguards, impartiality and the independence of the system for investigating the conduct of trustees in bankruptcy) are reviewable by this Court applying the standard of the correct decision. Given that this judicial review involves issues of procedural fairness, I am of therefore of opinion that the appropriate standard of review of the Board's Decision regarding conflict of interest and reasonable apprehension of bias is that of correctness.

[16] At the hearing, the respondents (who are represented by the Attorney General of Canada which should have been named as respondent by virtue of Rule 303(2) of the *Federal Courts Rules*, SOR/98-106, as amended), noted for the first time that the application for judicial review was premature and ought to be dismissed on that sole ground. By direction of the Court, the parties filed supplemental written representations addressing this issue.

[17] The respondents rely on the seminal case of *Szczecka v. Canada (Minister of Employment and Immigration)* (1993), 116 D.L.R. (4th) 333, [1993] F.C.J. No. 934 (QL) (*Szczecka*) for the proposition that there exists a long standing rule before the Federal Courts barring applications of interlocutory decisions absent exceptional circumstances. The respondents are of the view that this rule applies to an interlocutory decision pertaining to the recusal of an adjudicator. The respondents

note in *Ipsco Inc. v. Sollac, Aciers d'Usinor* (1999), 246 N.R. 197, [1999] F.C.J. No. 910 (QL) (*Ipsco*), the Federal Court of Appeal refused to judicially review a decision by the Canadian International Trade Tribunal (CITT) disqualifying the applicant's counsel from participating in the hearing as his appearance was found to create a reasonable apprehension of bias. The Federal Court of Appeal in *Ipsco* concluded that the matter was interlocutory in nature (since its determination does not go to the merits of the issue in dispute before the CITT), and, therefore, there were no special circumstances warranting the Court's intervention at that juncture. Moreover, in *Lorenz v. Air Canada,* [2000] 1 F.C. 494, [1999] F.C.J. No. 1383 (QL) (*Air Canada*), Justice Evans states: "I find no authority for the proposition that an allegation of bias *ipso facto* constitutes "exceptional circumstances" justifying judicial review before the tribunal has rendered its final decision." According to the respondents, there are no exceptional circumstances in this case warranting judicial review of the interlocutory decision. Indeed, were the Court to judicially review the Delegate's interlocutory decision, it would lead to a fragmentation of issues; a waste of court resources; undue proliferation of litigation; unnecessary delay of the Disciplinary Proceedings and would set a negative precedent.

[18] The applicant, for his part, attempts to distinguish the cases relied on by the respondents. He argues that since the sanctions that a Delegate may order pursuant to the Act can be of a penal nature, cases like *Air Canada* (which was decided in the context of labour law), are of little relevance. Further, in many of the cases cited by the respondents, the principal hearing was stayed pending the disposition of the judicial review. In this instance, the Delegate has continued the Disciplinary Proceedings. Finally, the applicant states that in *Zündel v. Canada (Human Rights*

Commission), [2000] 4 F.C. 255, [2000] F.C.J. No. 678 (QL), leave to appeal to the Supreme Court of Canada refused [2000] S.C.C.A. No. 323, the Federal Court of Appeal ruled that matters like bias have been held to go to the very jurisdiction of a tribunal and therefore constitute special circumstances that warrant immediate judicial review of a tribunal's interlocutory decision.

[19] Despite the arguments raised ably by the applicant who represents himself in this proceeding, I am of the opinion that are no special circumstances in the case at bar which warrant the immediate judicial review of the Delegate's interlocutory decision. The starting point of my analysis, per *Szczecka*, is that unless there are special circumstances there should not be an immediate judicial review of an interlocutory judgement. As I found in *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, 2007 FC 955, [2007] F.C.J. No. 1249 (QL) at para. 148:

> The rationale for this is that applications for judicial review of an interlocutory ruling may ultimately be totally unnecessary: a complaining party may be successful in the end result, making the applications for judicial review of no value. Also, the unnecessary delays and expenses associated with such applications can bring the administration of justice into disrepute.

[20] The applicant has failed to convince the Court that in this instance, there are such "special circumstances." To the contrary, I am of the view that a determination of bias at the interlocutory stage runs the risk of proliferating litigation unduly. For example, if the allegations of bias made by the applicant as a ground for recusal were to be dismissed by the Court at this point, there is nothing to prevent the applicant from raising them again in another decision attacking the final decision of the Disciplinary Proceedings. Likewise, if the Delegate's future interlocutory rulings and final

decision alleviate any apprehension the applicant may have with regards to the Delegate's bias, the judicial review of the interlocutory recusal decision would have been of no value and would have wasted precious Court resources.

[21] I am persuaded by the respondents' careful examination of the jurisprudence in this area. In particular, I find the facts in *Air Canada* are very similar to the fact raised in this instance. In *Air Canada*, the Court was tasked with determining: "Is an adjudicator appointed under the Canada Labour Code to determine an unjust dismissal complaint disqualified by bias because as a practising lawyer he was at that time representing a client in an unjust dismissal claim under provincial employment standards legislation against another employer?" In *Air Canada*, as in this case, Justice Evans had the benefit of hearing the case in its entirety before rendering his decision on prematurity. This provides a valuable context within which to consider the exercise of the Court's discretion over the grant of relief. Having considered factors such as hardship to the applicant, waste, delay, fragmentation, strength of the case, the statutory context and relevant jurisprudence, Justice Evans concluded: "A non-frivolous allegation of bias that falls short of a cast-iron case does not *per se* constitute "exceptional circumstances", even when the hearing before the tribunal is still some way from completion, and there is no broad right of appeal from the tribunal. Nor is it to be equated with a constitutional attack on the "very existence of a tribunal" considered in *Pfeiffer v. Canada (Superintendent of Bankruptcy), supra*." I agree with Justice Evans and for these reasons, this application for judicial review is dismissed.

[22] A trial judge who is dealing with an unrepresented litigant has the right and the obligation to ensure that the litigant understands the nature of the proceedings: *Wagg v. Canada*, 2003 FCA 303, [2003] F.C.J. No. 1115 (QL) at para. 33. Accordingly, I have specifically considered the fact that the applicant is self-represented and is not as familiar as lawyers are with concepts such as "conflicts of interest" and "reasonable apprehension of bias". In spite of my findings that this judicial review is premature, I would have concluded that the Delegate's decision with respect to the absence of a conflict of interest was correct.

[23] In essence, the applicant is arguing that the Delegate is in a conflict of interest by virtue of the fact that his colleague, Me Duchesne, instituted legal proceedings on behalf of creditors of Meco contesting Sztern Inc.'s decision to disallow their proofs of claim in the Meco matter. The applicant characterizes this as a conflict of a "professional nature" that arises between one of the parties to a dispute and one of the members of a tribunal deciding a case. I disagree. The Delegate is not in a position of representing conflicting interests. The term "conflict of interest" typically means an interest that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or that a lawyer might be prompted to prefer to the interests of a client or prospective client.

[24] A client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest. In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at para. 45, the Supreme Court of Canada stated that cases involving potential conflicts of interest require two questions to be answered: (1) Did the lawyer receive

confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client? Taking this test (which is generally designed to ensure that lawyers do not represent more than one side of a dispute) and applying it to the case at bar, I see nothing in the evidentiary record which would lead me to conclude that the Delegate (or Me Duchesne or BLG itself) received confidential information attributable to a solicitor and client relationship with the creditors of the Meco Estate that would be relevant to the matter at hand.

[25] Indeed, I see nothing in the facts to support the applicant's assertion that Me Duchesne's former clients (in their capacity as creditors) would stand to gain financially or psychologically from the Disciplinary Proceedings. At issue in the Disciplinary Proceedings is whether or not the applicant committed a range of disciplinary infractions which involve numerous bankruptcy estates, administration estates and consumer proposals. The validity and rank of creditors' proofs of claim in the Meco matter is not even remotely at issue in the Disciplinary Proceedings. Further, even if the applicant is found to have committed these alleged infractions, the sanctions that are being sought involve the cancelling of the trustees' licenses and do not include restitution for missing fund in the Meco matter. To summarize, the Disciplinary Proceedings are a very different matter than the bankruptcy proceedings (which involved Me Duchesne between 2000 and 2004). I also emphasize that it is not improper for a lawyer to act against a client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where previously obtained confidential information is irrelevant to that matter. As such, I am of the opinion that the Delegate is not in a conflict of interest.

[26] With respect to the applicant's second argument, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*), the Court iterated that procedural fairness requires that decisions be made by an impartial decision-maker and free from any reasonable apprehension of bias. The classic test for reasonable apprehension of bias was set out by Justice de Grandpré writing in dissent, in *Committee for Justice*, above and was accurately quoted by the Delegate in his Decision.

[27] First, the mere fact that the Delegate made an interlocutory ruling denying the applicant's request to examine the opposing party prior to filing a contestation, is insufficient evidence, in my opinion, to raise a reasonable apprehension of bias, or to conclude the judge is biased. I emphasize that the interlocutory contestation decision is not the subject of the judicial review at bar. As such, I am hesitant to comment on the Delegate's findings in this area. Suffice it to state, the Delegate's interlocutory decision was within his jurisdiction, it did not run contrary to any case law and it did not violate any of the applicant's procedural guarantees.

[28] Secondly, I hold the opinion that the mere fact that the Delegate is now associated with a lawyer who previously advocated on behalf of creditors in a matter which involved Sztern Inc. is insufficient to constitute a reasonable apprehension of bias in the particular circumstances of this case.

[29] Finally, I am of the opinion that the applicant's argument the Delegate is wearing multiple hats is without merit. The applicant explains this argument as follows: "One hat as Delegate/Agent of the [Superintendent]. Another hat as quasi-adjudicator in the undeniably awkward position of having to decide on a matter where another member/employee/agent of the [Superintendent] is also one of the parties in the litigation as against [the applicant]. The last hat is that es qualité attorney representing the interests of the [Superintendent]." As for the contention that the Delegate would be institutionally biased because the process involves a delegation to the Superintendent of (i) his investigation/prosecutorial function to a Senior Disciplinary Analyst of the Office of the Superintendent of Bankruptcy and (ii) his adjudicative function to a retired judge, this does not amount to institutional bias as was decided in various decisions (*Métivier c. Mayrand*, [2003] R.J.Q. 3035, [2003] J.Q. no 15389 (C.A.)(QL); *Sam Lévy & Associés c. Marc Mayrand*, 2006 CAF 205, [2006] 2 F.C.R. 543; *Sheriff v. Attorney General of Canada*, 2006 FCA 139, [2006] F.C.J. No. 580 (QL); *Canada (Procureur général) c. Raymond Chabot et al*, 2006 QCCA 1074, [2006] J.Q. no 9051 (QL)). Moreover, the Delegate does not in any way act as an "attorney representing the interests of the [Superintendent]" (my emphasis) but as a tribunal invested with the powers mentioned in sections 14.01 and 14.02 of the Act.

[30] As a final note, I have also considered the other arguments made by the applicant, including the arguments based on delay or negative publicity. These arguments are either premature or irrelevant considering the particular nature of this proceeding, the interlocutory character of the complained actions or decisions, and the limited jurisdiction of the Court in a judicial review application. No doubt the applicant is under considerable psychological stress, and the financial and

economic impact of this on-going process before the Delegate is immense to him. Nonetheless, this, alone, does not entitle the Court to make the requested orders given the absence of any reviewable error by the Delegate in dismissing the applicant's motion for recusal. I do note that in the course of his oral submissions, the applicant alleged facts that are not part of the record or which are subsequent to the impugned decision made by the Delegate. Rightly so, respondents' counsel objected to the admissibility of such evidence.

[31] In conclusion, the present application must fail. The respondents are entitled to costs.

ORDER

THIS COURT ORDERS that this application for judicial review be dismissed with costs.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OR RECORD

DOCKET :	T-1184-07
STYLE OF CAUSE :	**HENRY SZTERN v. ME ANDRÉ DESLONGCHAMPS, ES QUALITÉ DELEGATE OF THE SUPERINTENDENT OF BANKRUPTCY and SYLVIE LAPERIERRE, ES QUALITÉ SENIOR ANALYST FOR THE OFFICE OF THE SUPERINTENDENT OF BANKRUPTCY**
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DATE OF HEARING :	February 7, 2008
REASONS FOR ORDER AND ORDER :	MARTINEAU J.
DATED :	March 4, 2008

APPEARANCES :

Henry Sztern (Self-represented)	FOR THE APPLICANT
Vincent Veilleux	FOR THE RESPONDENTS

SOLICITORS OF RECORD :

Not applicable	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General	FOR THE RESPONDENTS