Federal Court of Appeal		Cour d'appel fédérale

Date: 20100324

Docket: A-66-10

Citation: 2010 FCA 84

Present: **STRATAS 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

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 24, 2010.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

A. Introduction

[1] The appellant moves for a stay or suspension of an administrative adjudicator's hearing while an appeal is pending in this Court. For the reasons set out below, I shall dismiss the motion.

B. The facts giving rise to the motion

The parties

[2] The appellant is a senior analyst / professional conduct official in the Office of the Superintendent of Bankruptcy. The respondents are trustees who have administered various estates.

The legislative regime

[3] The Office of the Superintendent of Bankruptcy licenses trustees in bankruptcy. Under section 14.01 of the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3, the Office can inquire into the conduct of a trustee. Sanctions can be imposed where, among other things, the trustee has contravened the Act, the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, or directives of the Superintendent of Bankruptcy made under section 5 of the Act.

The allegations

[4] After an investigation, the Office alleged that the respondents, while administering various estates, had committed a number of contraventions. It identified 12 categories of contraventions. The Office instituted disciplinary proceedings under section 14.01 of the Act against the respondents.

The disciplinary proceeding

[5] A delegate of the Superintendent of Bankruptcy tried the allegations. He found the respondents not guilty of misconduct under six of the twelve categories.

[6] In one category, the delegate found a contravention arising from the respondents' delays in administering two estates. The respondents had no defence to this and were guilty of misconduct. The delegate held a sanction hearing on this and imposed a reprimand.

[7] In the remaining five categories, the delegate found contraventions, but ruled that the respondents had established the defence of due diligence. Therefore, in these five categories, the delegate decided that the respondents were not guilty of misconduct. The appellant applied for judicial review to the Federal Court from that decision.

The Federal Court's decision: the case becomes bifurcated

[8] The Federal Court granted the application for judicial review in part: 2010 FC 97. The Federal Court's decision led to bifurcation: of the five categories of contraventions placed before the Federal Court, a group of three are now in this Court and a group of two are now before the delegate for determination of sanction. Here is how that happened:

- *The group of three now in this Court.* On judicial review, the Federal Court agreed with the delegate that the due diligence defence was established in three categories of contraventions. The appellant appealed this portion of the Federal Court's decision to this Court.

- *The group of two now before the delegate.* On judicial review, the Federal Court found, contrary to the delegate, that the due diligence defence was not established in

two categories of contraventions and so the respondents were guilty of misconduct. The Federal Court remitted these back to the delegate for determination of sanction. The respondents did not appeal.

[9] The delegate now intends to begin a hearing concerning the sanction that should be applied for the findings of misconduct in the group of two. The delegate's sanction hearing will likely take place and conclude before this Court deals with the appeal concerning the group of three. The appellant asks this Court to stay this sanction hearing until it determines the appeal concerning the group of three.

C. Analysis

[10] The test for a stay is set out in the well-known Supreme Court of Canada cases of *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339 and *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764, 2000 SCC 57.

[11] On the first branch of the threefold test for a stay, the appellant must establish a serious question to be tried on appeal. The threshold for seriousness is "a low one" and "liberal": *RJR-Macdonald*, *supra* at page 337; *143471 Canada Inc.*, *supra* at page 358, *per* La Forest J. (dissenting, with apparent concurrence on this point from the majority). An applicant need only show that the

matter is not destined to fail or that it is "neither vexatious nor frivolous": *RJR-Macdonald*, *supra* at page 337. Based on the record in this case, I cannot say now that this matter is destined to fail.

[12] The appellant's request for a stay turns on the outcome of the remaining two parts of the test. The appellant must show that irreparable harm will be caused if the stay is not granted and the balance of convenience lies in favour of granting a stay. Where the stay seeks to stop persons acting under a statute from carrying out their duties, a "very important" public interest "weigh[s] heavily" in favour of allowing those acting under statutes to carry out their mandates: *143471 Canada Inc.*, *supra* at page 383, Cory J. (for the majority); *Harper*, *supra* at paragraph 9.

[13] Before applying for a stay from this Court, the appellant asked the delegate to adjourn until the appeal to this Court was determined. The delegate declined. If this Court grants the stay requested by the appellant in this motion, this Court essentially would be quashing an interlocutory, fact-based, discretionary scheduling decision made by the delegate, an administrative actor who is statutorily empowered to conduct his own proceedings. Seen in that light, the appellant's stay would be just like a successful interlocutory judicial review of the delegate's decision. But interlocutory judicial reviews are not available, absent exceptional circumstances: *President of the Canada Border Services Agency v. C.B. Powell Limited*, 2010 FCA 61. This underscores the exceptional nature of the relief sought by the appellant in the circumstances of this case. For this sort of exceptional relief, the appellant must file evidence that is credible, detailed and strong.

[14] The evidence offered by the appellant on the issue of irreparable harm falls short of the mark.

[15] The appellant submitted that if this Court grants her appeal and remits instances of misconduct from the group of three back to the delegate for determination of sanction, the delegate would have to hold a second separate hearing on sanction. Consequences giving rise to irreparable harm follow from this, says the appellant. The first hearing on sanction would become moot because the delegate would have to conduct a new, compendious assessment of sanction: the delegate would have to consider all of the instances of misconduct from the original category of five. Thus, "[a]ll of the time, energy and money spent" on the first sanction hearing would be wasted. The appellant also points to a savings of costs arising from holding one compendious sanction hearing, rather than two.

[16] This scenario of irreparable harm offered by the appellant suffers from at least four flaws. The appellant has fallen well short of proving the sort of irreparable harm necessary to obtain a stay.

[17] First, the appellant's scenario presupposes that her appeal will succeed. It may not succeed, with the effect that a second sanction hearing will not be held and the harms alleged by the appellant will not arise. The harms alleged by the appellant are speculative, hypothetical, or only arguable at best and do not qualify as irreparable harm: *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12.

[18] Second, the appellant has asserted, without evidence, that the first sanction hearing will be rendered moot by the second sanction hearing. In considering the issue of irreparable harm, the Court cannot accept bare assertions without evidence: *Bathurst Machine Shop Ltd. v. Canada*, 2006 FCA 59, [2006] 2 C.T.C. 276 at paragraph 24 (F.C.A.). It may be possible for the delegate to hold two sanction hearings dealing with the two groups of contraventions without reference to each other. It all depends on the circumstances.

[19] In this regard, the appellant offered no evidence to show an interconnection among the various matters such that there would have to be one compendious sanction hearing. Had the appellant filed that evidence, she might have been able to raise a tenable issue regarding whether irreparable harm would arise if the sanction hearing were held now. The available evidence, however, suggests no such interconnection. The delegate, in declining to adjourn the sanction hearing, obviously concluded that he could proceed with the sanction hearing and, if necessary, hold a second sanction hearing later. Further, the delegate has already proceeded in this way: he held a hearing and imposed the sanction of reprimand for one of the instances of misconduct even though several other matters were before the Federal Court and might come back to him later for a determination of sanction (see paragraph 6, above).

[20] Third, even if "time, energy and money" would be wasted, the appellant has failed to particularize adequately the nature and amount of waste. Indeed, as best as can be determined from the affidavit offered in support of the stay – and the affidavit is unclear on this point – perhaps only a few days of work might be wasted. This smacks of mere administrative inconvenience and is too

trifling to justify the unusual remedy of a stay against a public decision-maker who wants to exercise his jurisdiction. Mere administrative inconvenience, without more, does not qualify as irreparable harm: *Falkiner v. Director, Income Maintenance Branch* (2000), 189 D.L.R. (4th) 377 at paragraph 9 (Ont. C.A.).

[21] Finally, the sort of bifurcation caused by the Federal Court's decision in this case often happens. Bifurcation and its unwelcome effects – greater inconvenience, increased complexity and mounting costs – are part of the normal vicissitudes of litigation. If the Court granted a stay on the basis of the evidentiary record in this motion, it would have to grant a stay in every case where bifurcation has happened. The appellant did not offer evidence that the bifurcation in this case caused abnormal, harsh consequences beyond the norm. Bifurcation, without more, is not a golden ticket to a stay.

[22] Therefore, the appellant has failed to show irreparable harm. This conclusion is sufficient to dismiss the appellant's motion for a stay of the delegate's sanction hearing. However, for completeness, I would add that the balance of convenience is strongly against the granting of this relief.

[23] The respondents filed an affidavit attesting to the impact that the allegations have had against them, their family and their business, including legal fees, enormous expenditures of management time, loss of staff and significant reputational, financial and emotional harm. Understandably, the respondents want the sanction hearing to finish as soon as possible. Depending

on the outcome of the appeal in this Court, it may be the last hearing before the delegate in this matter and the end of what the respondents feel is an intolerable ordeal.

[24] Some of the respondents' evidence lacks sufficient particularity to be given full weight. However, it easily outweighs the appellant's evidence, summarized earlier in these reasons.

[25] This conclusion is buttressed by the public interest considerations that the Court must factor into the balancing: see paragraph 12, above. The delegate is discharging responsibilities under a statutory regime that protects the public by identifying and sanctioning instances of professional misconduct. Parliament has instructed the delegate to act as expeditiously as the circumstances and fairness permit: Act, subsection 14.02(2). The delegate now intends, with the respondents' support, to act expeditiously and determine the sanction that the respondents deserve for their misconduct in what I have called the group of two. Public interest considerations weigh against the granting of a stay.

[26] I conclude that the delegate may proceed with the sanction hearing without interference from this Court at this time. I decline to grant the stay requested by the appellant.

D. Conclusion

[27] Therefore, I shall dismiss the appellant's motion for a stay, with costs to the respondents.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-66-09
STYLE OF CAUSE:	**Sylvie Laperrière, in her capacity as Senior Analyst – Professional Conduct - of the Office of the Superintendent of Bankruptcy v. Allen W. MacLeod and D. & A. MacLeod Company Ltd.**

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Stratas J.A.
DATED:	March 24, 2010

WRITTEN REPRESENTATIONS BY:

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