Federal Court  Cour fédérale

Date: 20100128

Docket: T-327-09

Citation: 2010 FC 96

Ottawa, Ontario, January 28, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

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

Applicant

and

ALLEN W. MACLEOD and D&A MACLEOD COMPANY LTD.

Respondents

REASONS FOR ORDER AND ORDER

[1] This judgment concerns a motion submitted by the Respondents pursuant to Rules 58 and 59 of the *Federal Courts Rules* (the "Rules") seeking to set aside the Application for Judicial Review in this file (the "Application") on two grounds: a) the Application was brought outside the period set out in subsection 18.1(2) of the *Federal Courts Act*, and b) the Application seeks the review of two separate decisions contrary to Rule 302.

[2] This motion is rejected for the reasons which follow.

Background

[3] The judgment on this motion is issued contemporaneously with the decision of this Court on the merits of the Application. The full background to this motion is set out in the reasons for judgment on the merits of the Application, and need therefore only be briefly set out herein for the purpose of this motion.

[4] The Application underlying this motion seeks the review of two decisions rendered by the Honourable James B. Chadwick, acting in his capacity as a Delegate of the Superintendent of Bankruptcy, concerning allegations of misconduct by the Respondents as bankruptcy trustees following professional misconduct hearings held pursuant to sections 14.01 and 14.02 of the *Bankruptcy and Insolvency Act* (the "Act").

[5] As is common in hearings of this type, the Honourable Chadwick rendered a first decision dated December 1, 2008 on the merits of the allegations (the "Liability Decision") and then sought additional representations on the appropriate sanctions to be imposed following his findings on the merits of the case. Following these representations, the Honourable Chadwick issued a second decision dated February 5, 2009 imposing a reprimand on the Respondents (the "Sanctions Decision").

[6] Shortly after the Liability Decision had been rendered, on December 17, 2008, an attorney representing the Applicant wrote to the attorneys representing the Respondents to inform them that

he had been instructed to challenge the Liability Decision before the Federal Court, and also noting the following in his letter:

> Since we are of the view that a reviewable decision under the *Federal Courts [R]ules* will only be rendered when a measure (sanction) is issued by delegate Chadwick under section 14.01 of the [*Bankruptcy and Insolvency Act*], I have advised Mrs Laperrière that it would be premature and a waste of Court resources to file a judicial review before the Court at this stage of the disciplinary process. Consequently, we will only file a notice of application in this matter after delegate Chadwick fully exercises the power conferred to him by virtue of section 14.01, i.e. once he issues his decision on your clients' potential disciplinary sanction.

[7] On March 4, 2009, within 30 days after the Sanctions Decision was finally issued, the Applicant formally submitted the Application seeking the review of that Decision and of the related earlier Liability Decision.

[8] The Respondents never challenged the tardiness or the appropriateness of the Application, and the parties proceeded to submit their respective records and arguments on the merits of the Application. On October 5, 2009, the Chief Justice set the dates of December 14 and 15, 2009 for the hearing on the merits of the Application, and the undersigned judge was assigned to hear the case.

[9] On December 9, 2009, only two clear work days prior to that hearing, the Respondents submitted a motion seeking rejection of the Application on the basis of tardiness and on the basis that two separate decisions were being challenged simultaneously in the Application. The

arguments on the motion were heard at the same time as the arguments on the merits of the Application, and the decision on the motion was reserved.

Pertinent legislative provisions

[10] Subsection 18.1(2) of the *Federal Courts Act* reads as follows:

18.1 (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	18.1 (2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[11] Rule 302 of the *Federal Courts Rules* provides for the following:

302. Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.	302. Sauf ordonnance contraire de la cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une réparation est demandée.

[12] The remedial powers of this Court, where non-compliance with the Rules is raised, are to be found in Rules 56 to 60 which provide as follows:

56. Non-compliance with any of these Rules does not render a	56. L'inobservation d'une disposition des présentes règles

proceeding, a step in a proceeding or an order void, but instead constitutes an irregularity, which may be addressed under rules 58 to 60.

n’entache pas de nullité l’instance, une mesure prise dans l’instance ou l’ordonnance en cause. Elle constitue une irrégularité régie par les règles 58 à 60.

57. An originating document shall not be set aside only on the ground that a different originating document should have been used.

57. La Cour n’annule pas un acte introductif d’instance au seul motif que l’instance aurait dû être introduite par un autre acte introductif d’instance.

58. (1) A party may by motion challenge any step taken by another party for non-compliance with these Rules.

58. (1) Une partie peut, par requête, contester toute mesure prise par une autre partie en invoquant l’inobservation d’une disposition des présentes règles.

(2) A motion under subsection (1) shall be brought as soon as practicable after the moving party obtains knowledge of the irregularity.

(2) La partie doit présenter sa requête aux termes du paragraphe (1) le plus tôt possible après avoir pris connaissance de l’irrégularité.

59. Subject to rule 57, where, on a motion brought under rule 58, the Court finds that a party has not complied with these Rules, the Court may, by order,

59. Sous réserve de la règle 57, si la Cour, sur requête présentée en vertu de la règle 58, conclut à l’inobservation des présentes règles par une partie, elle peut, par ordonnance :

(*a*) dismiss the motion, where the motion was not brought within a sufficient time after the moving party became aware of the irregularity to avoid prejudice to the respondent in the motion;

a) rejeter la requête dans le cas où le requérant ne l’a pas présentée dans un délai suffisant — après avoir pris connaissance de l’irrégularité — pour éviter tout préjudice à l’intimé;

(*b*) grant any amendments required to address the irregularity; or

b) autoriser les modifications nécessaires pour corriger l’irrégularité;

(*c*) set aside the proceeding, in whole or in part.

c) annuler l’instance en tout ou en partie.

60. At any time before judgment is given in a proceeding, the Court may draw the attention of a party to any gap in the proof of its case or to any non-compliance with these Rules and permit the party to remedy it on such conditions as the Court considers just.	60. La Cour peut, à tout moment avant de rendre jugement dans une instance, signaler à une partie les lacunes que comporte sa preuve ou les règles qui n'ont pas été observées, le cas échéant, et lui permettre d'y remédier selon les modalités qu'elle juge équitables.

Analysis

[13] The explanation the Respondents give for submitting their motion only two clear days before the hearing on the merits of the Application is set out in the affidavit of one of their counsel stating that counsels for the Respondents only became aware of the issues raised in the motion a few days prior to submitting the motion. Presumably, counsels for the Respondents argue that they were not familiar with the Rules, and that this justifies the presentation of the motion two clear days before the hearing on the merits. I do not find this explanation adequate or acceptable. I would therefore reject the motion on the basis of subsection 58(2) and paragraph 59 a) of the Rules. However, since (as we shall see below) the procedure used by the Applicant is deficient and requires an order from this Court to correct, and since this issue was argued extensively before me, I deem it nevertheless appropriate to address the merits of the motion.

[14] The two decisions at issue here are part of one single continuous proceeding. It has indeed become common in cases involving professional misconduct of bankruptcy trustees to divide the proceedings into two phases, one concerning the merits of the allegations of professional misconduct, and the other concerning the appropriate sanctions required in the circumstances of the case.

[15] A decision on the merits of professional misconduct allegations pursuant to sections 14.01 and 14.02 of the Act may be subject to a judicial review application prior to the decision on the appropriate sanctions being rendered. Likewise, even if the decision on the merits of the allegations is not challenged in judicial review, the decision concerning the resulting sanctions could also be the subject of a separate judicial review application. Obviously, a single decision addressing both the merits of the case and the appropriate sanctions could also be the subject of a judicial review application.

[16] The issue here however concerns circumstances where the decision on the merits and the decision on the sanctions are rendered separately. In such circumstances, may both decisions be challenged together in one single application, and if so, is the authorization of this Court required for such purposes? For the reasons set out below, I find that the decisions related to the merits and the sanctions involving a same proceeding may be challenged together in a single application for judicial review insofar as the authorization of the Court has been given to proceed in this fashion.

[17] Indeed, combining together in a single judicial review application a challenge to separate decisions on the merits and on the sanctions could result in extending, without the consent of the Court, the 30-day delay set out in subsection 18.1(2) of the *Federal Courts Act* to challenge the decision on the merits. I find that there is no authority to allow an extension of this 30-day delay without leave from the Court: see *Corbett v. Canada (Attorney General)*, 2007 FCA 292, [2007] F.C.J. No. 1220 (QL) at para. 6.

[18] I note however that, barring exceptional circumstances, such an extension would normally be granted insofar as an applicant, as is the case here, has clearly informed the other parties within a 30-day delay following the decision on the merits that it intends to challenge that decision once the sanctions have been determined. To proceed otherwise would render difficult, if not impossible, the segmentation of professional conduct litigation between a merits and a sanctions phase, a result which should not be encouraged by this Court.

[19] I note that leave under Rule 302 would also be required in such circumstances. In *Canadian World Wide Film Festival v. Équipe Spectra Inc.*, 2005 FC 1730, Justice de Montigny noted the following at paragraphs 33 to 35 [emphasis added]:

> 33 Now, our case law clearly establishes that two or more decisions which have been taken by the same body in the same case may (with leave) be the subject of a single judicial review proceeding, in order to simplify the proceedings. After having reviewed the relevant case law on the point (*Mahmood v. Canada* (1998), 154 F.T.R. 102 (F.C.); [1998] F.C.J. No. 1345 (QL); *Puccini v. Canada* (1993), 65 F.T.R. 127; [1993] 3 F.C. 557 (F.C.); *047424 NB Inc. v. Canada (M.N.R.)* (1998), 157 F.T.R. 44 (F.C.); [1998] F.C.J. No. 1292 (QL); *Lavoie v. Canada (Correctional Service)* (2000), 196 F.T.R. 96 (F.C.); [2000] F.C.J. No. 1564), my colleague Mr. Justice Campbell said the following in *Truehope Nutritional Support Ltd. v. Canada (Attorney General)* (2004), 251 F.T.R. 155; [2004] F.C.J. No. 806; 2004 FC 658 (QL) (at paragraph 6):
>
> - Continuing acts or decisions may be reviewed under s.18.1 of the *Federal Court Act* without offending Rule 1602(4) [now Rule 302], however the acts in question must not involve two different factual situations, two different types of relief sought, and two different decision-making bodies ...
>
> 34 There seems to be no doubt that the issues to be decided are closely inter-related: in fact, the two disputed decisions are connected, each being the outcome of the other. We are dealing

> here with a series of events and an ongoing process, involving a single decision-making body. Contrary to what the respondent argued, indeed, I hardly see how the evidence and legal arguments could be completely separate and distinct.
>
> 35 Accordingly, I am prepared to grant this motion by the applicant and allow the two disputed decisions to be addressed in the same application for judicial review and to be tried at the same time. The application to set aside the bidding process is directly related to the application to set aside the decision on that bidding process, so that judicial review of these two "decisions" as part of a single proceeding will simplify matters and make possible a complete resolution of the dispute between the parties, while avoiding the risk of conflicting decisions.

[20] The matter was moreover specifically addressed in proceedings involving professional misconduct allegations relating to bankruptcy trustees in *Sheriff v. Canada (Attorney General)*, 2005 FC 305, where Justice MacKay was seized of a judicial review application concerning three interrelated decisions of the Superintendent of Bankruptcy within the context of professional misconduct proceedings concerning bankruptcy trustees. In that case, the first decision concerned the merits of the allegations, the second decision concerned a rejection of a request for a stay of the proceedings or a rehearing, and the third decision concerned penalties imposed for the failure of the trustees to meet the professional standards expected of them. Justice MacKay noted the following at paragraph 3 of the decision:

> Under Rule 302 of the Federal Court Rules, 1998, SOR/98-106, unless the Court orders otherwise, an application for judicial review concerns a single decision of a federal board, tribunal or agency in respect of which relief is sought. The circumstances of this case warrant an Order, as the terms of the Order now issued confirm, that this proceeding relates to three interrelated and interdependent decisions made concerning the merits, a stay application and applicable penalties in the course of proceedings arising from investigation and hearings about alleged failure of the

> trustees to meet professional standards in the management of certain estates in bankruptcy.

[21] However, in *Roy v. Poitras*, 2006 FC 1386, a judicial review application was decided both with regard to a decision on the merits of the professional misconduct of a bankruptcy trustee and also with regard to a separate subsequent decision determining the appropriate sanctions. In that case, no party raised the provisions of Rule 302. Consequently, I find the decision in *Roy v. Poitras* is an example of how judicial review proceedings should proceed in such circumstances, but that it is of limited usefulness in determining the procedural vehicles which must be used in order to achieve such a result since the procedural issues were not raised in that case.

[22] In conclusion, I find that separate decisions concerning the merits and the sanctions in the same bankruptcy trustee professional conduct proceedings may be challenged together in a single application for judicial review insofar as the authorization of the Court has been given to proceed in this fashion pursuant to Rule 302 and, where applicable, an extension of the 30-day delay provided by subsection 18.1(2) of the *Federal Courts Act* has been granted. I note that, barring exceptional circumstances, such authorization and extension are normally to be granted as a matter of course insofar as an applicant has notified the other parties of the intent to pursue the judicial review of the decision of the merits within 30 days of that decision.

[23] Neither an authorization under Rule 302 nor any extension of the 30-day delay under subsection 18.1(2) of the *Federal Courts Act* was requested by the Applicant in this case. The Applicant explains this by the fact that she relied on the case of *Roy v. Poitras*, *supra*, where both

the decision on the merits and on the sanctions were dealt with in a single application for judicial review without Rule 302 being raised. I find this explanation satisfactory. Moreover, in this case, it is abundantly clear that the Respondents have suffered no prejudice from the situation. It is also clear that the Applicant has continuously pursued the judicial review of the Liability Decision and notified the Respondents accordingly shortly after that decision was released.

[24] In such circumstances, I have decided to exercise my discretion under subsection 18.1(2) of the *Federal Courts Act*, and I extend accordingly the time to file the judicial review application regarding the Liability Decision to 30 days after the Sanctions Decisions was communicated to the Applicant. I have also decided to exercise my powers under Rule 302 in conjunction with my remedial powers under Rules 59 and 60, and I therefore order that the application for judicial review in this case may address together both the Liability Decision and the Sanctions Decision. Consequently, the Application as submitted by the Applicant stands as presently submitted.

ORDER

THIS COURT ORDERS that:

1. The time to file the judicial review application concerning the decision rendered by the Honourable James B. Chadwick on the merits of the allegations against the Respondents and dated December 1, 2008 (the "Liability Decision") is extended until 30 days after the decision rendered by the Honourable Chadwick imposing a reprimand on the Respondents (the "Sanctions Decision") dated February 5, 2009 was communicated to the Applicant.

2. The Application for Judicial Review in this case may address together both the Liability Decision and the Sanctions Decision;

3. The Application for Judicial Review as submitted by the Applicant and dated March 4, 2009 consequently stands as submitted;

4. The motion is rejected and costs on this motion shall be in the cause.

"Robert M. Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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