



**Date: 20160823**

**Docket: T-1405-16**

**Citation: 2016 FC 954**

**BETWEEN:**

**DR. V.I. FABRIKANT**

**Applicant**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF  
CANADA, CORRECTIONAL SERVICE  
CANADA**

**Respondent**

**ORDER AND REASONS**

**AYLEN P.**

[1] On August 11, 2016, the Applicant moved pursuant to Rule 369 of the *Federal Courts Rules* for an order waiving the filing fee for the filing of a proposed application for judicial review.

[2] In support of his motion, the Applicant relies upon a Notice of Motion, the affidavit of Dr. Valery I. Fabrikant sworn July 4, 2016, and his written representations.

[3] The motion appears to have been brought on an *ex parte* basis, as no proof of service of the Respondent was filed with the Court and no materials were received from the Respondent.

[4] The Applicant was declared a vexatious litigant pursuant to section 40(1) of the *Federal Courts Act* and requires leave of the Court pursuant to section 40(3) to institute any proceeding before this Court. As a result, the Applicant has brought an additional motion, which is not being determined herein, seeking leave pursuant to section 40(3) of the *Federal Courts Act* to commence the proposed application for judicial review [Leave Motion].

[5] While the Applicant has styled the relief sought on this motion as an order waiving the filing fee for the proposed application for judicial review, the Court notes that the Applicant has not paid the \$30 filing fee for the Leave Motion as required by Tariff A 1(2)(b). In the absence of payment of the filing fee for the Leave Motion, the Leave Motion cannot be determined. Accordingly, the Court has considered the within motion as seeking a waiver of the filing fee for the Leave Motion.

[6] The proposed application for judicial review relates to a decision of the Deputy Commissioner of Correctional Services Canada in relation to the Applicant's grievance that inmates at Archambault Jail are unable to purchase fresh grapes.

[7] Rule 55 of the *Federal Courts Rules* provides that only in "special circumstances" can the Court dispense with compliance with a rule. In determining whether special circumstances exist warranting a dispensation from the requirement in the Rules to pay a filing fee, the Court

requires that a party demonstrate his or her impecuniosity with sufficient particularity and demonstrate that the requirement to pay a filing fee would prevent that party from pursuing a reasonably good claim before the Court (see *Spatling v Canada (Solicitor General)*, 2003 FCT 443 [*Spatling*]). The Court has acknowledged that the requirement to demonstrate a reasonably good claim ought not to be a strict test so as to result in an artificial barrier against equal access to the Court (see *Spatling* at para 11 and *Pearson v Canada* (2000), 195 F.T.R. 31 at para 13 (T.D.) [*Pearson*]).

[8] A decision to waive filing fees is a discretionary one that takes into account the facts of each case. The fact that another judge may have chosen to exercise his or her discretion to waive filing fees for the Applicant based on a potentially similar record in other proceedings initiated by the Applicant does not bind the exercise of the Court's discretion herein (see *Fabrikant v Canada*, 2015 FCA 53 at para 12).

[9] It must also be noted that the conduct of those requesting dispensation under Rule 55 will of necessity be scrutinized (see *Pearson* at para 5).

[10] Based on the evidence filed by the Applicant, the Court is not satisfied that the Applicant has provided particularized, credible evidence of impecuniosity. This alone is a sufficient basis on which to dismiss the Applicant's motion.

[11] The Applicant's evidence is that he receives \$26.19 every two weeks, after deductions, which he is permitted to spend and which he chooses to spend on telephone calls, rather than

funding the Leave Motion. The Applicant has not filed any financial records to support his claim of impecuniosity, which records the Applicant confirms in his affidavit exist. While the Applicant asserts that such records could be made available to the Court, the reality is that they were not made available to the Court in determining this motion. The Applicant bears the burden of proof on this motion and it is not the role of the Court to advise the Applicant of the additional evidence that he should file and then wait for it to be filed before determining the motion. Moreover, there is no evidence before the Court that the Applicant unsuccessfully attempted to obtain the funds necessary to pay the \$30 filing fee from his family, friends or other inmates. The Applicant's bald assertion that it would be "inappropriate" to ask his family for funds is insufficient.

[12] In his written representations in support of his request to waive the filing fee, the Applicant asserts that:

It is important to notice in the past, all legal fees were waived without filing any motions on this subject in the cases A-10-13, A-26-13 and A-274-13, If it was possible and justified to waive all legal fees in these cases, it is certainly possible to do the same in the present case. Applicant was initially able to borrow money to pay filing fees for exactly the same case back in 2011. Applicant can no longer borrow money and it would be unfair to require Applicant to pay twice for the same case which should have been adjudicated on merit, rather than dismissed on formal grounds back in 2012.

[13] While the Applicant appears to be asserting that the proposed application for judicial review relates to "exactly the same case" that he commenced in 2011, that is simply impossible. The decision at issue in the proposed application for judicial review relates to a grievance filed with Correctional Services Canada in 2014, which was determined by Correctional Services

Canada in 2016. The other proceedings therefore pre-date the decision at issue in the proposed application for judicial review. Moreover, a review of the pleadings in those earlier proceedings reveals that they have nothing to do with the Applicant's ability to buy fresh grapes while incarcerated.

[14] Keeping in mind that an assessment of the reasonableness or merit of the underlying claim should not act as artificial barrier preventing the Applicant access to the Court, I do have concerns regarding the merit of the proposed application for judicial review based on my review of the very limited materials filed by the Applicant to support his claim. As noted above, the decision at issue is a decision of the Deputy Commissioner of Correctional Service Canada dated June 30, 2016. However, the Leave Motion was only filed with the Court on August 11, 2016, which appears on its face to be more than 30 days after the time the decision was first communicated by Correctional Service Canada to the Applicant. Accordingly, on its face, it would appear that the Applicant is out of time to commence the proposed application should leave be granted.

[15] Moreover, while the Applicant has made the bald assertion that the proposed application for judicial review "is very important to me", no explanation is provided to the Court as to why that is the case. It would appear that Correctional Service Canada's decision to refuse inmates access to fresh grapes impacts all inmates equally and on the materials filed by the Applicant, the Applicant has filed no submissions regarding the significance of the decision to him personally and the impact upon him should this issue not ultimately be determined by the Courts.

[16] In assessing whether to exercise my discretion for dispensation under Rule 55, I am also mindful of the fact that the Applicant has been declared a vexatious litigant. His previous conduct before this Court is therefore a relevant consideration which militates against the exercise of my discretion.

[17] I also note that while the Applicant has asserted that a proposed notice of application for judicial review was included in his motion materials, no such proposed notice of application for judicial review was provided to the Court.

[18] The Court is therefore not satisfied that sufficient special circumstances exist to warrant a waiver of the \$30 filing fee for the filing of the Leave Motion.

**ORDER**

**THIS COURT ORDERS that:**

1. The Applicant's motion is dismissed.

"Mandy Ayles"

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Prothonotary

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1405-16

**STYLE OF CAUSE:** DR. V.I. FABRIKANT v HER MAJESTY THE  
QUEEN IN RIGHT OF CANADA, CORRECTIONAL  
SERVICE CANADA

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO  
RULE 369**

**ORDER AND REASONS:** AYLEN P.

**DATED:** AUGUST 23, 2016

**WRITTEN REPRESENTATIONS BY:**

Dr. Valery Fabrikant  
Archambault Jail  
St-Anne des Plaines, Quebec

THE APPLICANT  
ON HIS OWN BEHALF

M<sup>c</sup> Morgan  
Department of Justice  
Montreal, Quebec

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Dr. Valery Fabrikant

THE APPLICANT  
ON HIS OWN BEHALF

William F. Pentney  
Deputy Attorney General of Canada  
Montreal, Quebec

FOR THE RESPONDENT