Federal Court Cour fédérale

**Date: 20171207**

**Docket: 17-T-54**

**Citation: 2017 FC 1115**

**Ottawa, Ontario, December 7, 2017**

**PRESENT: The Honourable Mr. Justice Harrington**

**BETWEEN:**

**DR. V. I. FABRIKANT**

**Applicant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

## ORDER AND REASONS

[1] There are three points to keep in mind in Dr. Fabrikant's appeal from the Order of Prothonotary Tabib dated September 5, 2017, by which she refused to waive a $30.00 filing fee.

[2] The first is that her Order was discretionary in nature. She was under no legal compulsion to waive the fee.

[3] The second is that Dr. Fabrikant has been imprisoned for many years. As a prisoner he receives about $30.00 in disposable income every two weeks. He says he has no other source of funding.

[4] The third point is that as long ago as 1999 he was declared by Madam Justice McGillis, in Docket T-376-99, to be a vexatious litigant. That designation holds true to this day. As a vexatious litigant he needs the Court's leave or permission to institute proceedings as required by s. 40(3) of the *Federal Courts Act*.

[5] This set of reasons is broken down as follows:

a) the requirement to pay filing fees
b) the consequences of being declared a vexatious litigant
c) the case before the Prothonotary
d) the Prothonotary's decision
e) the standard against which appeals from decisions of prothonotaries is to be reviewed
f) analysis and disposition.

## I. Filing Fees

[6] The *Federal Courts Rules* and tariff provide for various Registry fees. The fee payable on a notice of motion for leave to commence a proceeding is $30.00. There is no fee payable on a motion to have the fee waived on the grounds of impecuniosity. In fact there is no Rule which specifically deals with fee-waivers. However, Rule 55 provides that the Court in special circumstances may vary or dispense with compliance with a rule. This Rule has been used to

permit parties to proceed *in forma pauperis*, which includes the privilege of not having to file the Court fees prescribed in the tariff. In determining whether the party would otherwise be deprived of a reasonably arguable case and denied access to justice, the underlying application should be taken into account.

## II. Vexatious Litigants

[7] Section 40 of the *Federal Courts Act* provides that if the Court is satisfied that a person has persistently instituted vexatious proceedings or has conducted a proceeding in a vexatious manner it may order that no further proceedings be instituted by that person except with leave of the Court. Leave may be granted if the Court is satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding. As mentioned above, Dr. Fabrikant was declared to be a vexatious litigant in 1999.

## III. The Case Before the Prothonotary

[8] In this case the underlying application, which was filed separately, sought leave to proceed against the Canadian Human Rights Commission with respect to an informal settlement to which Dr. Fabrikant agreed. The agreement which is said to be confidential dealt with the purchase of kosher food products.

[9] Thus there were two matters before the Prothonotary. Her decision is limited to the waiver of the $30.00 filing fee but, as she should have, she took into account the underlying application for judicial review.

[10] The basis of the claim is a change in the Commissioner's Directive which dealt with the purchase of items for holiday canteen. Prior to 2013 the canteen was available to Christians for purchase at Christmas time. Non-Christians were entitled to purchase their holiday canteen at a time coinciding with their major holidays. Dr. Fabrikant is Jewish.

[11] In 2013 a new Commissioner's Directive 890 was issued. It only provided a single list of items for all religions. This list is said by Dr. Fabrikant not to contain a single kosher item.

[12] Dr. Fabrikant filed a complaint with the Canadian Human Rights Commission which subsequently referred the matter to the Canadian Human Rights Tribunal. It offered him an informal settlement of his complaint which he accepted in September 2016, a settlement which was approved by the Commission on October 12, 2016, as required by the *Canadian Human Rights Act*.

[13] A few days later, Dr. Fabrikant seems to have changed his mind because on October 15, 2016, he sent a letter to the Commission asserting that the agreement which he signed should not have been approved because it was not in the public interest.

[14] He decided to check the Commission's procedure in the settlement approval process. He requested a complete copy of his file in accordance with the *Privacy Act*. Parts thereof were redacted allegedly on the ground of solicitor-client privilege relating to correspondence between lawyers representing the Tribunal and lawyers representing the Commission. This, he says, created a conflict of interest which nullifies the agreement.

[15] However, he also complained that the Commission was not enforcing the agreement as it was required to do. This is a departure from his submission that the Commission had no business to approve the settlement in the first place. The agreement was not in the public interest, he says, because the minutes of settlement he signed state that he agreed that the settlement did not constitute a precedent, meaning that other Jewish prisoners could still be discriminated against and unable to participate in any holiday canteen.

## IV. The Prothonotary's Decision

[16] The Prothonotary noted that the motion record had been dated more than thirty days prior to its submission for filing.

[17] She dismissed the motion to waive the filing fee on the grounds that the evidence of impecuniosity was *prima facie* deficient being based on an affidavit nearly one year old. Although Dr. Fabrikant submitted in written argument that his financial situation had not changed, she noted, quite correctly, that submissions are not evidence.

[18] The Prothonotary also pointed out that the motion was out of time when filed and that she was unable to determine whether it had any merit.

## V. Standard of Review

[19] Assuming, without deciding, that the Prothonotary's discretionary decision was vital to the outcome of the case, the case law has dramatically changed in the light of the decision of the

Federal Court of Appeal in *Hospira Health Corporation v The Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 FCR 331. Prior thereto the appellate standard of review applicable to discretionary orders of prothonotaries was set out in such Federal Court of Appeal cases as *Canada v Aqua-Gem Investments Ltd*, [1993] 2 FC 425. Their decisions should not be disturbed on appeal to a Federal Court Judge unless clearly wrong in the sense that the exercise of discretion was based upon a wrong principle or upon a misapprehension of the facts or that questions were raised which were vital to the outcome of the case. If so, the judge in appeal was to exercise his or her own discretion *de novo.* This is no longer the law.

[20] The standard of review now applicable in appeal of all decisions of prothonotaries is the standard set out by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, which dealt with appeals from decisions of judges.

[21] The new standard as stated by Mr. Justice Nadon, speaking for the Court of Appeal in *Hospira* is:

> [66] In *Housen*, the Supreme Court enunciated the standard of review applicable to decisions of trial judges. More particularly, it concluded that with respect to factual conclusions reached by a trial judge, the applicable standard was that of palpable and overriding error. It also stated that with respect to questions of law and questions of mixed fact and law, where there was an extricable legal principle at issue, the applicable standard was that of correctness (paragraphs 19 to 37 of *Housen).*

[22] As to the meaning of "palpable" as stated at para 5 of *Housen*:

> What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p.

> 1020). The *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

## VI. Analysis and Disposition

[23] There are at least three reasons why this appeal should be dismissed. The first is that a motion should be accompanied by a current affidavit. It is clear in this case that Dr. Fabrikant's circumstances had changed in the several months following the affidavit he proffered to the Court. The second is that applications for judicial review are to be taken within thirty days of communication of that decision. The Court may extend time but there is no motion making that request, and no affidavit explaining, among other things, why the application was not taken within time. The third is that it cannot be said based on the material before the Court that Dr. Fabrikant has an arguable case. This is a factor in determining whether leave to proceed should be given under s. 40(3) of the *Federal Courts Act* to a declared vexatious litigant, as well as to an extension of time.

[24] On the first ground, Prothonotary Tabib was correct in holding that evidence on a motion is to be set out in an affidavit (*Federal Courts Rule* 363). The affidavit was almost a year old. She was entitled to reject it as being stale-dated. Furthermore, in the affidavit which is dated September 7, 2016, Dr. Fabrikant states that the milk distribution was non-kosher so he had to incur the additional expense of purchasing milk from the canteen at an average cost of $1.34 per day.

[25] Dr. Fabrikant deceived the Court by saying his circumstances had not changed. He failed to mention the decision of Madam Justice Gagné in *Fabrikant v Canada (Attorney General)*, 2017 FC 576, issued June 12, 2017 (currently under appeal).

[26] She said at paras 11and 12 thereof:

> [11] The Applicant is Jewish and follows a kosher diet. He argues that since October 24, 2014, he has been forced to buy kosher milk from the canteen as he is of the view that the powdered milk distribution system in the penitentiary is not kosher. Yet it appears from the Assistant Commissioner's decision (at page 2) that the Applicant was provided with a certification from the Kashruth Council of Canada stating that the powdered milk is kosher, along with a confirmation by the Institution Rabbi that the powdered milk distribution system is compliant with established hygiene standards.
>
> [12] Based on the motion record before me, it appears that the Applicant's application for judicial review is prima facie frivolous. Waiving the filing fees in those circumstances would essentially annihilate the effect of the section 40 judgment against the Applicant.

[27] Dr. Fabrikant appears to be of the view that he can spend his money as he sees fit. Indeed, if he does not like the kosher powdered milk offered without charge he is entitled to purchase other kosher milk. It does not follow, however, that the filing fee should be waived. A waiver is unusual and exercise of discretion should not even be considered unless the circumstances are exceptional. That is not the case here. This is but another example of vexatious litigation.

[28] The second ground is that applications for judicial review of decisions of federal boards and tribunals are to be taken within thirty days of communication of that decision (*Federal*

*Courts Act* 18.1). Whatever the starting point, more than thirty days had elapsed by the time the record was proffered for filing.

[29] The Court may on motion extend time. There is no such motion in the record. In any event the Applicant must show, among other things, an arguable case.

[30] The third ground to reject the request for waiver of the filing fee is that Dr. Fabrikant has not made out a case that his application, which is really directed against the Canadian Human Rights Commission, has any merit. On the one hand he wants the settlement he had reached to be set aside because of some vague allegations of conflict of interest based on refusal to provide some of the correspondence between lawyers for the Commission and lawyers for the Tribunal on the grounds of privilege, and that the settlement to which he agreed is contrary to public policy because it is confidential and therefore would not benefit other Jewish prisoners. On the other hand, he alleges that the Commission has failed to enforce the agreement. If I had to decide *de novo,* I would consider the application to be vexatious under *Federal Courts Rule* 221.

[31] Dr. Fabrikant makes a point that from time to time filing fees have been waived. On the other hand, there are times when they have not. As Chief Justice Noël speaking for the Federal Court of Appeal in *Fabrikant v Canada*, 2015 FCA 53, said at para 12:

> … I conclude that it was open to the Federal Court judge, on the record before her, to exercise her discretion as she did. Given the nature of this exercise, the fact that another judge chose to exercise his discretion differently based on a similar record in another proceeding initiated by Dr. Fabrikant is no reason to overturn the Federal Court judge.

[32] Costs were sought. There is no reason why they should not be granted.

[33] In summary, the Prothonotary was correct with respect to questions of law and made no error whatsoever, much less a palpable and overriding error, on questions of fact. Even if she had, I would have come to the same conclusion for the reasons set out herein.

**ORDER in 17-T-54**

**THIS COURT ORDERS that** the appeal is dismissed with costs.

"Sean Harrington"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | 17-T-54 |
| **STYLE OF CAUSE:** | DR. V. I. FABRIKANT v HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | BY WAY OF CONFERENCE CALL BETWEEN OTTAWA, ONTARIO, MONTREAL AND STE-ANNE-DES-PLAINES, QUEBEC |
| **DATE OF HEARING:** | NOVEMBER 29, 2017 |
| **ORDER AND REASONS:** | HARRINGTON J. |
| **DATED:** | DECEMBER 7, 2017 |

**APPEARANCES:**

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| Valery I. Fabrikant | FOR THE APPLICANT (ON HIS OWN BEHALF) |
| Me Anne-Renée Touchette | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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|---|---|
| Nil | FOR THE APPLICANT (SELF-REPRESENTED) |
| Attorney General of Canada<br>Department of Justice Canada<br>Montreal, Quebec | FOR THE RESPONDENT |