Federal Court of Appeal  Cour d'appel fédérale

Date: 20181113

Docket: 18-A-38

Citation: 2018 FCA 206

Present: **STRATAS J.A.**

BETWEEN:

DR. V.I. FABRIKANT

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 13, 2018.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] Dr. Fabrikant wishes to file a notice of appeal. He intends to appeal two Federal Court judgments dated July 5, 2018 and July 18, 2018. He moves for an order relieving him of the obligation to pay filing fees for the notice of appeal.

[2] Dr. Fabrikant has attempted to appeal these judgments before. On that previous occasion, he also sought relief from the filing fee. But this Court found that the issue of the filing fee did

not arise: the notice of appeal he wanted to file was incomplete and frivolous and, thus, could not be accepted for filing.

[3] At the conclusion of its reasons in that earlier decision (*Fabrikant v. Canada*, 2018 FCA 171), this Court noted that its ruling was under Rule 72 and so it was open to Dr. Fabrikant to correct his notice of appeal and present it to the Registry for filing.

[4] Dr. Fabrikant has now done this. As mentioned, he comes to the Registry with a new notice of appeal concerning the same two judgments of the Federal Court and seeks relief from the filing fee.

[5] In considering a preliminary motion concerning the filing of an originating document, here Dr. Fabrikant's motion to waive the filing fee for his notice of appeal, this Court or the Federal Court must follow the methodology set in *Fabrikant*, above: the underlying originating document, here the notice of appeal, must be examined to see if it has a fatal defect.

[6] *Fabrikant* explained the rationale for this as follows (at para. 6):

> …[Litigants presenting notices of appeal sometimes ask] for the requirement to pay filing fees to be waived. In response, too often the Courts concentrate only on the filing fee issue and not on the notice of appeal itself. This can be misguided. If the notice of appeal suffers from a fatal defect and is a nullity, what's the sense in deciding the filing fee issue and, even worse, allowing the appeal to progress, sometimes all the way through to a full hearing? A nullity is a nullity and must be stopped in its tracks.

[7] Following this methodology, I note that the new notice of appeal corrects some of the defects pointed out in *Fabrikant*, above. However, three defects remain: two non-fatal, one fatal.

[8] The first non-fatal defect is that Dr. Fabrikant's new notice of appeal is out of time by several weeks: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 27(2). Dr. Fabrikant must move for an extension of time to file it. He has not done so. This Court's earlier decision tried to help Dr. Fabrikant by notifying him of this problem and advising him to bring a motion for an extension of time (at para. 26). But he ignored this and tried to file his new notice of appeal anyway.

[9] The second non-fatal defect is that the new notice of appeal purports to appeal two judgments of the Federal Court. A notice of appeal can only challenge one order or judgment. Dr. Fabrikant should have presented two notices of appeal.

[10] The fatal defect, however, is the main concern here. The respondent submits that an appeal does not lie in these circumstances. The respondent reminds the Court of two important details: Dr. Fabrikant has been declared to be a vexatious litigant in the Federal Court and the judgments sought to be appealed refused Dr. Fabrikant leave to start proceedings in that Court. As a result, subsection 40(5) of the *Federal Courts Act* applies. It bars appeals from a refusal of leave.

[11] Section 40 of the *Federal Courts Act* provides as follows:

40. (1) If the Federal Court of Appeal or the Federal Court is satisfied, on application, that a person has	**40.** (1) La Cour d'appel fédérale ou la Cour fédérale, selon le cas, peut, si elle est convaincue par suite d'une

persistently instituted vexatious proceedings or has conducted a proceeding in a vexatious manner, it may order that no further proceedings be instituted by the person in that court or that a proceeding previously instituted by the person in that court not be continued, except by leave of that court.	requête qu'une personne a de façon persistante introduit des instances vexatoires devant elle ou y a agi de façon vexatoire au cours d'une instance, lui interdire d'engager d'autres instances devant elle ou de continuer devant elle une instance déjà engagée, sauf avec son autorisation.
(2) An application under subsection (1) may be made only with the consent of the Attorney General of Canada, who is entitled to be heard on the application and on any application made under subsection (3).	(2) La présentation de la requête visée au paragraphe (1) nécessite le consentement du procureur général du Canada, lequel a le droit d'être entendu à cette occasion de même que lors de toute contestation portant sur l'objet de la requête.
(3) A person against whom a court has made an order under subsection (1) may apply to the court for rescission of the order or for leave to institute or continue a proceeding.	(3) Toute personne visée par une ordonnance rendue aux termes du paragraphe (1) peut, par requête au tribunal saisi de l'affaire, demander soit la levée de l'interdiction qui la frappe, soit l'autorisation d'engager ou de continuer une instance devant le tribunal.
(4) If an application is made to a court under subsection (3) for leave to institute or continue a proceeding, the court may grant leave if it is satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding.	(4) Sur présentation de la requête prévue au paragraphe (3), le tribunal saisi de l'affaire peut, s'il est convaincu que l'instance que l'on cherche à engager ou à continuer ne constitue pas un abus de procédure et est fondée sur des motifs valables, autoriser son introduction ou sa continuation.
(5) A decision of the court under subsection (4) is final and is not subject to appeal.	(5) La décision du tribunal rendue aux termes du paragraphe (4) est définitive et sans appel.

[12] The respondent is correct. Due to subsection 40(5) of the *Federal Courts Act*, the notice of appeal Dr. Fabrikant seeks to file is a nullity. As this Court said in *Fabrikant*, above (at para.

6), “a nullity is a nullity and must be stopped in its tracks.” Dr. Fabrikant’s motion for the waiver of the filing fee for his notice of appeal must be dismissed because he has no appeal.

[13] Dr. Fabrikant‘s history in this Court suggests that he may well try to re-raise this issue in some way. The large number of matters that Mr. Fabrikant has brought to this Court over the years and the large number of motions within those matters attests to that. In light of this, should this Court make any further orders concerning this matter?

[14] At the outset, we must note that the Federal Court has declared Dr. Fabrikant to be a vexatious litigant but the Attorney General has not sought a vexatious litigant declaration against Dr. Fabrikant in this Court. Thus, Dr. Fabrikant is free to access this Court.

[15] But, by virtue of being a vexatious litigant elsewhere, Dr. Fabrikant can be subject to a greater level of regulation in this Court. This Court explained this as follows:

> Since Dr. Fabrikant has not been declared to be a vexatious litigant in this Court, like any other litigant he has a full right to appeal Federal Court judgments and orders to this Court. This is the case despite the very large number of proceedings he has prosecuted and attempted to prosecute in this Court.
>
> Unless declared vexatious, litigants are allowed to appeal to this Court when the *Federal Courts Act* gives them a right to appeal. But once litigants enter this Court, they are subject to regulation. And the level of regulation can vary according to the needs of the particular case.
>
> The fact that a litigant has been declared to be vexatious in another court, including the Federal Court, is admissible in proceedings involving the litigant in this Court: [*Canada v. Olumide*, 2017 FCA 42, [2018] 2 F.C.R. 328] at paras. 37-38. A litigant in this Court who has been declared vexatious in another court and who has been behaving similarly in this Court may find that the Court has to use its powers described in para. 3, above and exercise its discretions to regulate the

> litigation—sometimes aggressively, sometimes proactively, sometimes on its own.

(*Fabrikant*, above at paras. 12-14.)

[16] In this case, I consider regulation necessary. Although Dr. Fabrikant has not been declared to be a vexatious litigant in this Court, he has been exhibiting many of the behaviours of a vexatious litigant. To ensure that a further attempt to appeal the two Federal Court judgments dated July 5, 2018 and July 18, 2018 is not made, I will make a specific order that Dr. Fabrikant is prohibited from appealing them to this Court.

[17] In exercising my discretion in this way, I note that Dr. Fabrikant may not be without recourse concerning the Federal Court's judgments. On the authority of section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40 and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, he may be able to seek leave to appeal those judgments to the Supreme Court of Canada. It will be for the Supreme Court to decide whether subsection 40(5) of the *Federal Courts Act* acts as a bar to appealing the Federal Court's judgments to that Court.

[18] This Court has the power to regulate litigants even further: *Fabrikant*, above at para. 3. Is further regulation warranted here?

[19] As mentioned, Dr. Fabrikant is exhibiting in this Court many of the behaviours of a vexatious litigant. In *Canada v. Olumide*, 2017 FCA 42, [2018] 2 F.C.R. 328, this Court

discussed some of the rationales supporting the regulation of vexatious litigants. They are as follows (at paras. 17-20):

> …[T]he Federal Courts are community property that exists to serve everyone, not a private resource that can commandeered in damaging ways to advance the interests of one.
>
> As community property, courts allow unrestricted access by default: anyone with standing can start a proceeding. But those who misuse unrestricted access in a damaging way must be restrained. In this way, courts are no different from other community properties like public parks, libraries, community halls and museums.
>
> The Federal Courts have finite resources that cannot be squandered. Every moment devoted to a vexatious litigant is a moment unavailable to a deserving litigant. The unrestricted access to courts by those whose access should be restricted affects the access of others who need and deserve it. Inaction on the former damages the latter.
>
> This isn't just a zero-sum game where a single vexatious litigant injures a single innocent litigant. A single vexatious litigant gobbles up scarce judicial and registry resources, injuring tens or more innocent litigants. The injury shows itself in many ways: to name a few, a reduced ability on the part of the registry to assist well-intentioned but needy self-represented litigants, a reduced ability of the court to manage proceedings needing management, and delays for all litigants in getting hearings, directions, orders, judgments and reasons.

[20] Here, these rationales are live and relevant. Therefore, I am considering whether further regulation of Dr. Fabrikant's use of this Court is warranted.

[21] This further regulation would reflect the indisputable legal reality created by subsection 40(5) of the *Federal Courts Act*: Dr. Fabrikant cannot appeal the Federal Court's denials of leave to him to start proceedings to this Court. It would also reflect the reality that Dr. Fabrikant, as a person who has not been declared to be a vexatious litigant in this Court, has unrestricted access to this Court. But legally, he has only three avenues of access—an appeal from the Tax Court, a

direct judicial review to this Court from certain particular administrative decisions, and an appeal from judgments and orders of the Federal Court after the Federal Court has granted him leave to start proceedings in that Court: *Federal Courts Act*, subsections 27(1), (1.1), (1.2) and 28(1).

[22] The further regulation I am considering would take the form of an order made on the Court's own motion. Procedural fairness requires that I permit the parties to make written representations. In particular, I invite them to offer submissions on the legality and advisability of such an order and, if an order is made, what terms it should include.

[23] To facilitate the parties' ability to offer written representations, I offer the following as an example of the sort of order that could be made:

> WHEREAS Dr. Fabrikant has been declared to be a vexatious litigant in the Federal Court but not in this Court;
>
> AND WHEREAS, where appropriate, this Court has the power to regulate more strictly litigants who have been declared vexatious elsewhere when they litigate in this Court: *Fabrikant v. Canada*, 2018 FCA 171 at paras. 3 and 13-14;
>
> AND WHEREAS the circumstances here warrant stricter regulation;
>
> AND WHEREAS subsection 40(5) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 prevents Dr. Fabrikant, as a vexatious litigant in the Federal Court, from appealing orders of the Federal Court denying him leave to start proceedings in that Court; yet he has repeatedly sought to appeal such orders to this Court;
>
> AND WHEREAS, in light of subsection 40(5) of the *Federal Courts Act* and Dr. Fabrikant's status as a vexatious litigant in the Federal Court, he can access this Court in only three situations:
>
> (a) as an appellant from a decision or order of the Federal Court under subsection 27(1) of the *Federal Courts Act* after that Court has granted him leave to start proceedings in that Court; for clarity, this does not

include an order of the Federal Court dismissing a motion brought in that Court before he has been given leave to start proceedings in that Court;

(b) as an appellant from a decision or order of the Tax Court of Canada under subsections 27(1) and (1.1) of the *Federal Courts Act*;

(c) as an applicant in a judicial review of an administrative decision listed under section 28 of the *Federal Courts Act*;

AND WHEREAS in this Order each of those three situations shall be defined as a "Permissible Matter";

AND WHEREAS Dr. Fabrikant, like all litigants who have not been declared to be a vexatious litigant in this Court, has a full right to access this Court concerning any Permissible Matter;

AND WHEREAS Dr. Fabrikant does not have any legal access to this Court in matters other than Permissible Matters;

AND WHEREAS the Registry is entitled to examine the form of documents presented for filing and decide on whether they comply with the *Federal Courts Act*, the *Federal Courts Rules* and orders of this Court;

AND WHEREAS, in normal circumstances, a party has the right under Rule 72 to request a judge of this Court to rule on whether document should be filed; but in this case, special circumstances under Rule 55 warrant restricting that right;

AND WHEREAS the plenary powers of the Court give it the power to make this Order; this Court is also authorized to make this Order by various rules in the *Federal Courts Rules*, including Rules 53 and 55 which allow the Court to vary or dispense with compliance with any rule: see discussion in *Fabrikant*, above at para. 3 and authorities cited therein;

THIS COURT ORDERS:

1. At the outset of any new matter in this Court, Dr. Fabrikant must present an originating document to the Registry; this is the case even if he brings a motion seeking an order preliminary to the originating document, such as a motion for waiver of filing fees for the originating document;

2. In any such originating document, Dr. Fabrikant must identify the order or judgment appealed from and describe it with sufficient particularity so that the Registry can determine whether it is a Permissible Matter;

3. The Registry shall reject the originating document (and any preliminary motion related to it) for filing if the Registry is satisfied that:

(a) the originating document does not state and demonstrate that a Permissible Matter is involved; or

(b) the originating document does not provide the Registry with enough information or clarity in order for the Registry to determine that a Permissible Matter is involved.

Only in cases of doubt may the Registry refer the matter to a judge for a ruling.

4. When the Registry acts under para. 3 of this Order, it shall return to Dr. Fabrikant the originating document (and any preliminary motion related to it) and supply a brief written explanation.

[24] In my view, this sort of order might achieve two ends: it would prevent the needless squandering of the Court's resources while clarifying to Dr. Fabrikant when he can freely access this Court.

[25] I welcome the parties' written representations on this. By separate direction, I will set a schedule for the filing of those representations.

[26] In the meantime, for the foregoing reasons, I will dismiss the motion brought by Dr. Fabrikant for a waiver of the filing fee and will prohibit him from bringing further appeals of the two judgments of the Federal Court.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	18-A-38
STYLE OF CAUSE:	DR. V.I. FABRIKANT v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	NOVEMBER 13, 2018

WRITTEN REPRESENTATIONS BY:

Dr. V.I. Fabrikant	ON HIS OWN BEHALF
Joshua Wilner	FOR THE RESPONDENT

SOLICITORS OF RECORD

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT