

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20140402**

**Docket: A-338-13**

**Citation: 2014 FCA 89**

**Present: STRATAS J.A.**

**BETWEEN:**

**DR. V.I. FABRIKANT**

**Appellant**

**and**

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

**Respondents**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 2, 2014.

**REASONS FOR ORDER BY:**

**STRATAS J.A.**

**Federal Court of Appeal**



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**REASONS FOR ORDER**

**STRATAS J.A.**

[1] Dr. Fabrikant is a self-represented inmate at Archambault Institution. He moves to waive the \$50 filing fee for filing a notice of appeal. The respondents oppose.

**A. The Court's jurisdiction in this motion**

[2] Under Rule 71(4) of the *Federal Courts Rules*, a notice of appeal cannot be filed until the proposed appellant pays a fee. Rule 19 provides that the fees are set out in Tariff A. Tariff A currently sets the fee for filing a notice of appeal at \$50.

[3] Rule 55 provides that “in special circumstances...the Court may vary a rule or dispense with compliance with a rule.”

[4] Given the express power under Rule 55, I need not consider whether the Court's jurisdiction is also founded in its plenary or inherent jurisdiction to regulate its own process: see, *e.g.*, *Association des Compagnies de Téléphone du Québec Inc. v. Canada (Attorney General)*, 2012 FCA 203 at paragraphs 26-29; *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at paragraph 48; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50 at paragraph 35.

[5] Accordingly, this Court has the jurisdiction to grant the relief sought. The question is whether this Court should exercise its discretion in favour of waiving the filing fee.

## B. Principles guiding the Court's exercise of discretion

[6] In my view, there are two competing principles at the heart of the Court's exercise of discretion to waive filing fees. The task of the Court is first to consider how these two competing principles play out on the evidence adduced in the motion.

[7] These two competing principles are as follows:

- *The right of access to the Court.* This right is not untrammelled and absolute: *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873. Reasonable restrictions are appropriate. Nevertheless, when considering the exercise of its discretion to waive fees the Court must keep the principle of access to the Court front of mind. It is "one of the foundational pillars protecting the rights and freedoms of our citizens": *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at paragraph 26. Indeed, for over half a millennium, the English legal system we have inherited has exempted those who cannot pay court fees from paying them: *A Means to Help and Speed Poor Persons in their Suits* (UK) (1495) 11 Henry VII c. 12. See also the discussion in *Vilardell v. Dunham*, 2013 BCCA 65, *Polewsky v. Home Hardware Stores Ltd.* (2003), 66 O.R. (3d) 600, 229 D.L.R. (4th) 308 (Div. Ct.), and *Toronto Dominion Bank v. Beaton*, 2012 ABQB 125.
- *The need to charge fees for services rendered.* This also has an access to justice dimension. Courts cannot dispense justice without adequate resources. Reasonable user

fees are an important source of revenue needed by courts to fund their operations. There is nothing objectionable in requiring those availing themselves of the Court's services to pay a fee that contributes to the cost of those services. As the English legislation, above, shows, court fees have also been a feature of the English court system for over half a millennium.

[8] In exercising its discretion, the Court must go beyond a simple weighing of these principles on the evidence adduced in the motion. Rule 71(4) imposes a requirement to pay fees and does so without any qualification. Rule 55 provides that only in "special circumstances" can the Court depart from the requirement to pay fees. For this reason, rare are the cases in which the Court relaxes the requirement to pay fees.

**C. Insistence on evidence of sufficient particularity and credibility**

[9] All of this Court's decisions on this point are in the form of orders, sometimes with explanatory preambles, not reasons. A review of those orders, however, reveals an insistence that the evidence offered in support of the fee waiver be particular and credible.

[10] It is all too easy for those seeking a fee waiver to assert that they are poor. It is also easy to go a little further and assert they cannot afford to pay the fee. But neither of these assertions, without more, will suffice. In the analogous context of evidence of irreparable harm in stay motions, see my similar comments in *Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraph 48,

*Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 at paragraph 31 and *Gateway City Church v. Canada (National Revenue)*, 2013 FCA 126.

[11] In my view, given the requirement that “special circumstances” be shown, only particularized, credible evidence will suffice. In general, parties seeking a waiver of fees must describe, with particularity, their financial situation, with specific reference to numbers setting out sources of funding, assets and expenses.

**D. The evidentiary record in this case**

[12] Before this Court is an affidavit from Dr. Fabrikant and an affidavit from a legal assistant employed by the Department of Justice.

[13] The legal assistant’s affidavit, tendered by the respondents, merely appends a memorandum of fact and law filed by the respondents in file A-274-13. File A-274-13 is Dr. Fabrikant’s appeal from a denial of another request by Dr. Fabrikant for a fee waiver. The relevance of file 274-13 to the present matter is unclear. Indeed, a review of page 4 of the Prothonotary’s decision at issue in file A-274-13 shows that Dr. Fabrikant’s evidence was less particularized than the evidence before me. It will be for a panel of this Court in file A-274-13 to review the decisions below and assess whether there are any grounds to intervene. That is not before me in this motion.

[14] In his affidavit, Dr. Fabrikant states that if the fees are not waived, he “would not be able to proceed any further in this case, which is very important to [him].” He sets out the following information regarding his financial position, information uncontradicted by the respondents:

1. I have been in jail for 21 years by now. My official pay in jail is \$52.50 per two weeks. After all deductions are taken, I get \$20.93, which I can actually spend. This comes to  $\$20.93/14 = \$1.40$  per day. One telephone call to my family costs \$0.57. I used to make 3 calls every day, now due to new deductions, I can not longer afford it [*sic*]. There is no money left for postage or canteen items. My family does not have a car; they can not [*sic*] visit me in jail, so the telephone communication becomes vitally important; jail food is to a great degree inedible and must be supplemented by purchases from canteen.

2. I was extremely lucky to have received full moral support of my family during all these years, and it would be totally inappropriate for me to ask any of them to spend money on me, especially taken into consideration that my wife and children are not financially at ease at all.

3. I have already borrowed significant amounts of money from my relatives to save my life by paying for cardiac care, which Correctional Service refused to pay, as well as to pay for university education for my children.

#### **D. Analysis**

[15] The respondents oppose Dr. Fabrikant’s motion on three grounds.

[16] First, the respondents submit that the evidence does not set out Dr. Fabrikant’s “sources of revenue or his ability to secure financial assistance, by way of loan or voluntary assistance, from family or friends.” I disagree. The passage from his affidavit set out above does exactly that.

[17] Second, the respondents point out that there is an appeal pending in this Court in file A-274-13 from the denial of an application made by Dr. Fabrikant for a fee waiver. That is true but, as I have observed above, the evidentiary record in that matter appears to be different. I would add that Dr. Fabrikant has received fee waivers from this Court on a number of different occasions based on the particular evidentiary records placed before the Court. All I can do is exercise my discretion on the basis of the particular evidentiary record before me.

[18] Third, the respondents suggest that to grant Dr. Fabrikant a fee waiver “would create a precedent for almost every inmate.” I reject this. Different inmates have different financial means. Some inmates have considerable means. The Court should determine whether to grant a fee waiver based on the above principles and the particular evidence before it, not slippery slope arguments based on generalizations.

[19] To the extent that Dr. Fabrikant’s financial condition is similar to those of other inmates, I am concerned that an adverse exercise of discretion in this case would foreclose access to the courts by a whole class of inmate. This matters, as the decided cases show that inmates often need resort to the courts. Indeed, the Rules Committee might wish to consider whether the Rules should be amended to provide for a fee exemption for particular classes of litigant, rather than requiring persons in those classes on a case-by-case basis to bring motions that are time-consuming and sometimes complicated.

[20] I also understand that Dr. Fabrikant has been declared to be a vexatious litigant under section 40 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. But he is entitled under subsection 40(3)



of the Act to seek leave to commence new proceedings and I understand he has done so. Ultimately, he will have to overcome that difficult obstacle. But he remains an individual entitled to access to the Courts, albeit access that can be had at the present time only through the gateway provided by subsection 40(3) of the Act.

[21] Based on the evidence before the Court, the \$50 filing fee is just over five weeks net pay for Dr. Fabrikant before he attends to his other expenses. It is evident from the details provided in Dr. Fabrikant's affidavit that those other expenses are significant and that realistically Dr. Fabrikant cannot draw upon assets or other sources of funding.

[22] In these circumstances, based on the evidentiary record before this Court and the principles set out above, I exercise my discretion in favour of granting the fee waiver.

[23] I emphasize that my decision in this motion is an original exercise of discretion based on the particular evidentiary record before me, not an appeal from an exercise of discretion below that is governed by the standard of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 or *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450, as the case may be.

**E. Disposition**

[24] The motion is granted with costs. The fee of \$50 for the filing of the notice of appeal is waived.

“David Stratas”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-338-13

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

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** STRATAS J.A.

**DATED:** APRIL 2, 2014

**WRITTEN REPRESENTATIONS BY:**

Dr. V.I. Fabrikant ON HIS OWN BEHALF

Éric Lafrenière FOR THE RESPONDENTS  
Guy-Favreau Complex

**SOLICITORS OF RECORD:**

William F. Pentney FOR THE RESPONDENTS  
Deputy Attorney General of Canada