

Federal Court of Appeal



Cour d'appel fédérale

Date: 20150224

Docket: A-367-14

Citation: 2015 FCA 53

**CORAM: NOËL C.J.
GAUTHIER J.A.
BOIVIN J.A.**

BETWEEN:

DR. V.I. FABRIKANT

Appellant

and

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

Respondents

Hearing held by Video-conference
Between Montréal, Quebec and Sainte-Anne-Des-Plaines, Quebec, on February 17, 2015.

Judgment delivered at Ottawa, Ontario, on February 24, 2015.

REASONS FOR JUDGMENT BY:

NOËL C.J.

CONCURRED IN BY:

**GAUTHIER J.A.
BOIVIN J.A.**

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REASONS FOR JUDGMENT

NOËL C.J.

[1] Dr. Fabrikant, a litigant designated as vexatious under subsection 40(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 (the Act), brought before the Federal Court on or about June 23, 2014, a motion for leave under subsection 40(3) of the Act to file an application for judicial review challenging a decision of the Commissioner of the Correctional Service of Canada. He attached to this motion a separate motion to waive the filing fees associated with the first.

[2] On June 26, 2014, Gagné J. (the Federal Court judge) issued the following direction in relation to Dr. Fabrikant's motions: "Motion Record not to be accepted for filing, and filing fees not waived."

[3] On August 11, 2014, Dawson J.A. directed the Registry to accept for filing Dr. Fabrikant's notice of appeal to this Court in relation to the above direction. On September 3, 2014, the parties agreed under Rule 343 of the *Federal Courts Rules*, SOR/98-106, to the contents of an appeal book. Though an appeal book was certified by Dr. Fabrikant, subsequent communications between the parties revealed that Dr. Fabrikant's affidavit in support of his motion to waive filing fees had been omitted.

[4] Due to this omission, the respondents resisted the setting down of a hearing date for the appeal before this Court, arguing before Dawson J.A. that time would be required to supplement the appeal book, as well as to amend their memorandum of fact and law, which had been premised on the erroneous assumption that Dr. Fabrikant's motion to waive filing fees had not been supported by any affidavit. Dawson J.A. rejected this argument, directing on January 9, 2014, that the respondents would be granted 14 days to file, among other things, an amended appeal book, and 21 days to file a memorandum of fact and law amended to remove inaccuracies. Any other amendment would require leave of the Court.

[5] An amended appeal book was subsequently submitted by the respondents. However, the Registry refused to file it, as this was done after the date which had been set by Dawson J.A. On January 30, 2015, the respondents brought a further motion to file an amended memorandum of

fact and law that would include additional submissions, and to bring new evidence in the form of motions material filed in another proceeding before the Federal Court.

[6] During the hearing, Dr. Fabrikant consented to this motion as well as to the filing of the amended appeal book. As a result, the only issues before this Court are those raised in Dr. Fabrikant's appeal. In his notice of appeal, Dr. Fabrikant asks that the Court "quash the decision" of the Federal Court judge, and order that his motion for leave to file be allowed, as well as his motion to waive the fees attaching to this first motion.

[7] In their amended memorandum of fact and law, the respondents conceded that the December 28, 2013 affidavit included in the amended appeal book was before the Federal Court judge (amended appeal book, tab 9). The respondents argued, however, that Dr. Fabrikant had put a similar affidavit before Prothonotary Tabib (the Prothonotary) in a separate proceeding in which he had also moved to have his filing fees waived. Because she dismissed his motion and this exercise of discretion was upheld by this Court (*Fabrikant v. Canada*, 2014 FCA 273 [*Fabrikant 1*]), the respondents argued, we should once again uphold the Federal Court's identical decision on a similar set of facts.

[8] In response, Dr. Fabrikant argued that the evidence before the Prothonotary was unhelpful in disposing of the case at bar, as it was distinct from the evidence that had been before the Federal Court judge. The exact same evidence, however, was put before Stratas J.A., he argued, and the motion to waive filing fees in that case was allowed (*Fabrikant v. Canada*, 2014 FCA 89 [*Fabrikant 2*]).

[9] Before dealing with the parties' submissions, I feel it necessary to briefly characterize the decision under review. Where a court disposes of a motion, this ought to be done by way of an order (see *Fabrikant I* at para. 23). Though directions to the Registry may be issued in connection with an order, a direction itself is not the proper form for disposing of a motion. Where a direction has the practical effect of disposing of a motion, however, as in the case at bar, this Court can review it as though it were an order, provided the wording is sufficiently clear to construe what that order would have held (*ibidem* at para. 21).

[10] It is clear from the wording of her direction that the Federal Court judge intended to deny Dr. Fabrikant's motion to waive filing fees. An issue arises, however, as to whether she intended to deny his motion to file his application for judicial review, or merely directed the Registry not to file his motion record as a consequence of her refusal to waive the filing fees. The better view is that she opted for the latter given that her decision not to waive the filing fees was dispositive of the matter before her.

[11] The issue before this Court is therefore whether the Federal Court judge erred in denying Dr. Fabrikant's motion to waive filing fees. Such a decision is discretionary in nature, and as such, must stand unless the judge below acted on a wrong principle or failed to give appropriate weight to relevant considerations (*Jensen v. Canada (Attorney General)*, 2000 CanLII 15614 (FCA) at para. 2). Where a decision is rendered without reasons, this Court must "consider the record to determine whether there was material before the [Federal Court judge] which could form the basis for [her] exercise of discretion consistent with legal principles and the requirements of Justice" (*ibidem* at para. 3).

[12] As the Federal Court judge provided no reasons, the above test directs this Court to review the record. Having reviewed the contents as agreed upon by the parties, including Dr. Fabrikant's affidavit on his finances, 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.

[13] I would dismiss the appeal with costs.

“Marc Noël”
Chief Justice

“I agree
Johanne Gauthier J.A.”

“I agree
Richard Boivin J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-367-14

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

**HEARING DEALT BY VIDEO-CONFERENCE BETWEEN MONTREAL, QUEBEC
AND SAINTE-ANNE-DES-PLAINES, QUEBEC WITH APPEARANCE OF THE
PARTIES**

DATE OF HEARING: FEBRUARY 17, 2015

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: GAUTHIER J.A.
BOIVIN J.A.

DATED: FEBRUARY 24, 2015

APPEARANCES:

Dr. Valery Fabrikant FOR THE APPELLANT
(SELF-REPRESENTED)

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