Federal Court of Appeal | Cour d'appel fédérale

Date: 20180220

Docket: A-458-16

Citation: 2018 FCA 43

CORAM: **GAUTHIER J.A.**
NEAR J.A.
DE MONTIGNY J.A.

BETWEEN:

DR. V.I. FABRIKANT

Appellant

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Respondent

Heard at Ottawa, Ontario, on February 6, 2018.

Judgment delivered at Ottawa, Ontario, on February 20, 2018.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: GAUTHIER J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

[1] The appellant, Valery Fabrikant, appeals an order of the Federal Court of Canada (per Justice Roussel) dated November 25, 2016 (T-1405-16). The Federal Court dismissed the appellant's appeal from an order of Prothonotary Aylen dismissing the appellant's motion for an order waiving the filing fee of a proposed application for judicial review (*Fabrikant v. Canada*, 2016 FC 954).

[2] The appellant is a prisoner at Archambault Institution. He has been declared a vexatious litigant by the Federal Courts and must be granted leave to file any proceeding. He attempted to file a motion for leave to seek judicial review and a motion for an order waiving the filing fee.

[3] Prothonotary Aylen exercised her discretion not to grant the appellant's motion to waive the filing fee. She explained that the appellant chooses to spend his money on other things and that he has not filed any financial records that support his claim of impecuniosity. She also noted that the appellant has been declared a vexatious litigant and that his previous conduct before this Court is a relevant consideration. Further, she noted that the appellant was out of time to file the claim as it appeared on its face to have been filed more than 30 days after Correctional Services Canada communicated the underlying decision to the appellant. The appellant appealed the Prothonotary's decision to the Federal Court.

[4] The Federal Court dismissed the appellant's appeal. It explained that the standard of review for discretionary orders of prothonotaries is that outlined in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 and that "the decision to waive filing fees is discretionary in nature" (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.L.R. (4th) 497).

[5] In my view, the Federal Court did not make a palpable and overriding error in dismissing the appellant's appeal of the Prothonotary's order dismissing the appellant's motion to waive the filing fee.

[6] First, the appellant did not provide any arguments in his memorandum of fact and law supporting his position that the Federal Court erred in dismissing his motion to waive the filing fee. Rather, his arguments pertain to the merits of the judicial review that he has not yet been granted leave to commence. As the Federal Court explained in *Spatling v. Canada (Solicitor General)*, 2003 F.C.T. 443 at para. 11, 233 F.T.R. 6, "it is for the Applicant … to clearly demonstrate that there are special circumstances by which the fees ought to be waived". In my view, the appellant did not provide precise, credible evidence of his impecuniosity in this case. Rather, he invited the Court to conclude "once and for all" that he be declared impecunious for this and any future proceedings he may initiate largely on the basis that he has been incarcerated for a lengthy period of time. I decline the invitation and find that in this specific case the appellant did not provide the required evidence.

[7] This is not to say that an applicant should be put to an impossible and unattainable standard of proof, such as disproving a negative (e.g. that he does not have any bank accounts). Nor should an applicant be expected not to communicate with his family to save money. Bald assertions of impecuniosity, however, are clearly insufficient.

[8] Second, as the Prothonotary and the Federal Court explained, the decision to waive filing fees is discretionary. Further, the decision of another judge to exercise her or his discretion to waive filing fees in another proceeding does not bind this Court's discretion (*Fabrikant v. Canada*, 2015 FCA 53 at para. 12, [2015] F.C.J. No. 243).

[9] Pelletier J.A. has recently found that, in dealing with a request to waive fees, a court should consider the competing principles of the right to access to a court and the need to charge fees for services rendered (*Fabrikant v. Canada* (9 February 2018), Ottawa, FCA, Pelletier J.A. (*Fabrikant* 2018)). Generally, my colleague found that court fees should not be a barrier which prevents an indigent litigant with an arguable case from being heard. However, he also found that where an applicant is a heavy user of court services then the need to recover the costs of that heavy use becomes more significant:

> Dr. Fabrikant is a frequent litigant in the Federal Court and appeals practically every adverse decision in that Court to this Court. Dr. Fabrikant's frequent resort to the courts imposes costs on those who must defend themselves from his proceedings. They also impose costs on the courts: see *Fabrikant* [*v. Canada*, 2014 FCA 89 at para. 7, 459 N.R. 163]. It is not in the interests of justice to permit a litigant to repeatedly impose costs on the court system without requiring a litigant to contribute to those costs, however modestly, services by paying the prescribed filing fees. Where the merits of an indigent litigant's case is clear, the interests of justice require that even a frequent litigator have his day in Court. But where the merits appear to be dubious, it is not unreasonable to require Dr. Fabrikant to assume his portion of the costs associated with his appeal.
>
> (Fabrikant 2018)

I agree with this approach.

[10] In this case, Dr. Fabrikant is litigating Archambault Institution's decision to not allow prisoners to purchase fresh grapes. The material filed with the Court includes a response from Correctional Services Canada explaining that they denied the purchase of fresh grapes on the basis of the need to curtail the production of illegal alcohol within the prison. Dr. Fabrikant alleges that this decision was made in bad faith because in his view this measure has little impact, if any, on the illegal production of alcohol. No evidence was put forward before the Federal Court to support this serious allegation of bad faith. In such circumstances, in my view,

the Federal Court did not make a palpable and overriding error in dismissing the appellant's appeal of the Prothonotary's order dismissing the motion to waive the filing fees.

[11] That said, I agree with Dr. Fabrikant that Prothonotary Aylen made a palpable error when she noted that the leave motion was filed more than 30 days after Correctional Services Canada communicated the underlying decision to the appellant (Prothonotary Decision at para. 14). The Federal Court does not expressly deal with this issue in its reasons. This timeline, however, was disputed by the appellant before us and the respondent conceded that the underlying decision was in fact communicated to the appellant on July 22, 2016—well within 30 days of when the appellant filed his leave motion on August 11, 2016. Thus, in my view, the filing of the leave motion was in fact timely. The Prothonotary's error, however, is not overriding as it would not change the outcome of the decision.

[12] I would dismiss the appeal without costs.

"David G. Near"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE ROUSSEL DATED NOVEMBER 25, 2016, DOCKET NO. T-1405-16

DOCKET:	A-458-16
STYLE OF CAUSE:	DR. V.I. FABRIKANT v. HMTQ
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 6, 2018
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	GAUTHIER J.A. DE MONTIGNY J.A.
DATED:	FEBRUARY 20, 2018

APPEARANCES:

Dr. V.I. Fabrikant	FOR THE APPELLANT (ON HIS OWN BEHALF)
Anne-Renée Touchette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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