Federal Court of Appeal | Cour d'appel fédérale

Date: 20180921

Docket: 18-A-38

Citation: 2018 FCA 171

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 September 21, 2018.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] Dr. Fabrikant has presented a notice of appeal to this Court. He asks that it be filed without payment of the filing fee.

[2] In response, the Registry has referred the notice of appeal to this Court. Its authority for doing so is Rule 72 of the *Federal Courts Rules*, SOR/98-106. Rule 72 allows the Registry to

refer a document sought to be filed to the Court for a ruling where, among other things, a condition precedent for its filing has not been fulfilled. The condition precedent here is the payment of the filing fee.

[3] Under Rule 72, the Court directs the acceptance or rejection of the document for filing. In the case of the former, the Court may require the document to be corrected or may require "any conditions precedent" to be fulfilled. Rule 221, made applicable to originating documents in this Court by Rule 4, allows this Court to reject those that are, among other things, frivolous or an abuse of process of the Court. And on top of this, the Court has a general power to impose conditions, vary a rule, or dispense with compliance with any rule, including any rule relating to notices of appeal and their filing: Rules 53 and 55. And even more, the Court can regulate particular proceedings before it and address actual or potential abuses of its process by using broad plenary powers. These powers necessarily inhere in this Court because of its function and status of a court: as a court and to be a court, this Court must be able to do certain things when appropriate. See *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 at paras. 35 to 38, *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50; [2013] 3 C.T.C. 126, *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143, the *Mazhero v. Fox* trilogy, 2014 FCA 219, 2014 FCA 226 and 2014 FCA 238, and many other cases. All of these powers are shaped by the objectives set out in Rule 3 ("the just, most expeditious and least expensive determination of every proceeding on its merits") and the conservation of the Court's scarce resources to serve the public.

[4] When a document is presented to the Registry for filing, the Registry may see a particular issue with it. Under Rule 72, it may refer the document to the Court for a ruling. But in making its ruling, the Court is not limited to the particular issue identified by the Registry. Under Rule 72, it can address "any conditions precedent." And it has all the powers set out in the preceding paragraph and, when appropriate, can exercise them to address other pressing issues.

[5] The Registry referred Dr. Fabrikant's notice of appeal to this Court under Rule 72 because of his desire that it be filed without payment of a filing fee. But here there is another pressing issue: Dr. Fabrikant's notice of appeal suffers from a fatal defect and cannot be accepted for filing.

[6] A review of litigation started by Dr. Fabrikant in the Federal Court and in this Court shows that when he presents notices of appeal to the Registry, he asks 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] Dr. Fabrikant's notice of appeal concerns a Federal Court direction made on July 5, 2018 (considered the equivalent of an order) and a Federal Court order made on July 18, 2018 (both *per* Locke J.). Of the two, the Federal Court order of July 18, 2018 is the salient decision.

[8] In its July 18, 2018 decision, the Federal Court dismissed Dr. Fabrikant's application for leave to commence a judicial review.

[9] In the Federal Court, Dr. Fabrikant needed leave to commence a judicial review because some time ago the Federal Court declared Dr. Fabrikant to be a vexatious litigant: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 40. Once a litigant is declared vexatious, the litigant must seek the leave of the court before commencing any proceedings: *ibid.*, s.40(4).

[10] While the Federal Courts have broad powers to prevent abuses of their processes, they are not allowed to declare a litigant vexatious on their own motion. Only the Attorney General can apply for such a declaration. Though the Attorney General has a broad discretion to decide whether or not to apply for such a declaration, she must take into account certain important considerations: *Canada v. Olumide*, 2017 FCA 42 at paras. 44-46.

[11] The Attorney General applied for a declaration against Dr. Fabrikant in the Federal Court. The Federal Court granted the declaration. But the Attorney General has not applied for a declaration concerning Dr. Fabrikant in this Court.

[12] 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.

[13] 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.

[14] 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: *Olumide*, above 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.

[15] For example, at the outset of litigation, using Rules 53, 55 and 337(*d*), this Court, where warranted, can direct a litigant declared vexatious elsewhere to provide more particulars in the notice of appeal in order to determine whether the appeal has been brought in good faith and is not frivolous. Where the notice of appeal is permitted to be filed, closer-than-normal management of the appeal may be necessary. The Rules and the robust plenary powers of this Court are available throughout the appeal to ensure that the objectives set out in Rule 3 are met.

[16] As in the case of any litigant in this Court, Dr. Fabrikant's notice of appeal is subject to review under Rule 72 and must pass muster. Here, his notice of appeal fails.

[17] Dr. Fabrikant's notice of appeal seeks to overturn the Federal Court's denial of leave. Under Rule 337, his notice of appeal must provide, among other things, a "statement of the grounds intended to be argued." This statement must be "complete."

[18] In the context of notices of application, this Court has made it clear that this is a very serious requirement: *Canada (National Revenue) v. J.P. Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557. Bald, unparticularized and vague statements of the grounds will not suffice. Nor will irrelevant grounds or grounds that do not give rise logically to the relief sought. As well, the grounds cannot be frivolous or vexatious.

[19] These requirements apply equally to notices of appeal and, thus, apply in this particular case: *Wong v. Canada (Citizenship and Immigration)*, 2016 FCA 229, 487 N.R. 294 at para. 26.

[20] Given the nature of the decision that Dr. Fabrikant wishes to appeal—a discretionary one—his notice of appeal must identify an error of law or extricable legal principle or palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Palpable and overriding error is a very high test: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38, citing *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31 at para. 46; see also the extensive discussion in *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157.

[21] In a case like this, it is not enough to use the bald phrase "palpable and overriding error." The Court must be assured that the concept of palpable and overriding error, as understood in the

above authorities, is being asserted. And the grounds must be relevant in the sense that they are legally capable of leading to this concept. Otherwise, the notice of appeal is incomplete. Finally, if the grounds collectively are incapable of triggering the concept of palpable and overriding error, the notice of appeal is "frivolous" within the meaning of the *Federal Courts Rules*.

[22] I find Dr. Fabrikant's notice of appeal both incomplete and frivolous. Thus, it should not be accepted for filing.

[23] It alleges one error of law: the Federal Court had a duty to deal with the issue of the filing fee, not the merits of the seeking of leave to commence a judicial review. That is frivolous: as explained above, the Federal Court acting under Rule 72 is not restricted to the filing fee issue. Under Rule 72, the Federal Court is free to address any defect, especially fatal defects, in the notice of appeal.

[24] As for palpable and overriding error, it is unmentioned in the notice of appeal. More importantly, the concept of palpable and overriding error is not asserted. The notice of appeal challenges one inconsequential finding of fact by the Federal Court: the prison refused to upgrade computer hardware, not computer software. It also alleges that the Federal Court ignored evidence offered concerning the valuable nature of certain research Dr. Fabrikant wanted to conduct. But assertions that the Court ignored evidence without more count for nothing—the Federal Court is presumed to have taken all evidence into account when making its decision: *Housen*, above at para. 46.

[25] In these circumstances, I consider it appropriate to make my Rule 72 ruling by way of order. I shall order that the notice of appeal is not to be accepted for filing.

[26] Documents rejected under Rule 72 may be corrected and presented to the Registry for filing along with, if necessary, a formal written motion seeking an order extending the time to appeal: see, *e.g.*, the classic criteria for an extension of time in *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (C.A.), as discussed in *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184. In this matter, if Dr. Fabrikant proceeds in this way and the Registry seeks a ruling from the Court under Rules 72 or 74, I direct that I remain seized.

"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:	SEPTEMBER 21, 2018

WRITTEN REPRESENTATIONS BY:

Dr. V.I. Fabrikant	ON HIS OWN BEHALF