Federal Court of Appeal  Cour d'appel fédérale

Date: 20181210

Docket: 18-A-38

Citation: 2018 FCA 224

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 December 10, 2018.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

A. Introduction

[1] Further to its reasons in *Fabrikant v. Canada*, 2018 FCA 206 (*Fabrikant No. 2*), and having received and considered written representations on the matter, this Court concludes that a further regulatory order should be made clarifying and defining the circumstances in which Dr.

Fabrikant can legally access this Court. The following are the reasons supporting the making of this further regulatory order.

B. Background

[2] Section 40 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 empowers the Federal Court and this Court to declare a person vexatious. Section 40 provides as follows:

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

[3] Long ago, the Attorney General applied to have Dr. Fabrikant declared a vexatious litigant only in the Federal Court, not in this Court. On November 1, 1999, the Federal Court granted the declaration.

[4] As a result of the Federal Court's declaration, for over nineteen years Dr. Fabrikant has not been able to start matters in the Federal Court unless that Court gives leave: subsection 40(1) of the *Federal Courts Act*. And he has been barred from appealing to denials of leave to this Court: subsection 40(5) of the *Federal Courts Act*. But for the subsection 40(5) bar, Dr. Fabrikant has enjoyed full access to this Court.

[5] Dr. Fabrikant often tries to start applications in the Federal Court. When he does, he usually brings a motion to waive the filing fee for his notice of application for judicial review. The Federal Court has been ruling on these motions, usually dismissing them. This causes Dr. Fabrikant to appeal the dismissals to this Court. These appeals are not barred by subsection 40(5) of the *Federal Courts Act*.

[6] In all, during the last six years, eleven separate files in this Court have been opened at the behest of Dr. Fabrikant. But this does not reflect all of Dr. Fabrikant's activity in this Court. When Dr. Fabrikant presents a notice of appeal to this Court, it is usually accompanied by a motion to waive the filing fee. When this happens, the Registry's practice has been not to open a file. If the motion is dismissed, which it usually is, that is the end of the matter. The motion, the written representations on the motion, the Court's consideration of them, and the dismissal are not captured statistically.

[7] Noting the large number of matters started by Dr. Fabrikant, indications of vexatious behaviour in this Court, and his status as a vexatious litigant in the Federal Court, this Court held that both Federal Courts should examine his matters at an early stage to verify that he was accessing the Courts appropriately: *Fabrikant v. Canada*, 2018 FCA 171 (*Fabrikant No. 1*).

[8] Specifically, this Court held in *Fabrikant No. 1* that when a motion is before the Federal Court seeking the waiver of filing fees for an application for judicial review, the Federal Court should not deal exclusively with the motion. Instead, it should first scrutinize the merits of the application or the granting of leave to start the application. If the application is unmeritorious or if leave should not be granted, the Federal Court should dismiss the motion. "[A] nullity is a nullity and must be stopped in its tracks": *Fabrikant No. 1* at para. 6. *Fabrikant No. 1* also held that this Court should follow the same methodology when Dr. Fabrikant presents motions to waive the filing fee for a notice of appeal.

[9] *Fabrikant No. 2* concerned a notice of appeal from two judgments of the Federal Court and an accompanying motion in this Court for an order waiving the filing fee. Following the guidance of *Fabrikant No. 1*, this Court went first to the merits of the appeals. It noted that the appeals concerned a denial by the Federal Court of leave to start proceedings under subsections 40(3) and 40(4) of the *Federal Courts Act*, and so the subsection 40(5) bar applied to the appeals. Thus, on the spot, it dismissed the motion and prohibited Dr. Fabrikant from bringing further appeals of the two judgments of the Federal Court.

[10] Further, in *Fabrikant No. 2*, this Court notified the parties that it was contemplating a further regulatory order. It offered a draft of the order it was contemplating (at para. 23) and offered rationales for issuing it. This Court invited the parties to make written representations on whether a further regulatory order of this sort was warranted and, if so, what form it should take.

[11] Both Dr. Fabrikant and the Attorney General have filed their written representations. Dr. Fabrikant has filed a written reply to the Attorney General's written representations. The Court has read and considered them.

C. Analysis

(a) Preliminary issue

[12] In his written representations, Dr. Fabrikant requests that I recuse myself on the ground that I suffer from "intellectual incapacitation" and "lack of proper moral qualities." He also alleges that I am biased against him.

[13] Properly construed, Dr. Fabrikant's accusations of incapacity and moral deficiency are just strong expressions of disagreement with my reasons in *Fabrikant No. 1* and *Fabrikant No. 2*. Out of consideration for his interests as a self-represented litigant, I remind him that he is welcome to express his disagreement by seeking leave to appeal to the Supreme Court: *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 40(1) and 58(1)(*a*).

[14] I must recuse myself if I have actual bias or if there is apparent bias. The test for bias is whether a reasonable, fully-informed person, thinking the matter through, would conclude that it is more likely than not that I, whether consciously or unconsciously, would not decide the present appeal fairly: *Committee for Justice and Liberty et al. v. National Energy Board et al*., [1978] 1 S.C.R. 369 at page 394. Here, this test is not made out.

[15] On the issue of actual bias, I confirm that I have approached this matter with an open mind. I have always felt that every matter Dr. Fabrikant brings before this Court and every set of submissions he makes deserve separate, impartial, and fair consideration. I recognize that one of

his matters may have no merit but another may. Indeed, as he knows, in the past I have decided a matter in his favour. As is true for all litigants, the outcome of his matters depends on the facts and the law, nothing more. Further, my call for written representations and the care I took in *Fabrikant No. 2* to delineate the issues on which representations are needed would lead any reasonable, fully-informed person to conclude that I am open-minded. I assure Dr. Fabrikant that I have never had any ill-will or other negative sentiment against him or any *animus* arising from the matters he has brought or the representations he has made, including his written representations in this matter.

[16] On the issue of apparent bias, much of what I said in the previous paragraph is relevant here. As well, my reasons in *Fabrikant No. 1* and *Fabrikant No. 2*, in Dr. Fabrikant's other matters and in this matter—all comprehensive and detailed, with plenty of research, investigative work and sourcing—would demonstrate to the reasonable, fully-informed person that I am committed to acting judicially, impartially, fairly and in a dedicated way, assessing the evidence only against accepted legal principle.

(b) The merits

[17] The main objective of the further regulatory order was set out in *Fabrikant No. 2*. Put positively, the further regulatory order clarifies and defines when Dr. Fabrikant can access the Court free from the subsection 40(5) bar. Put negatively, it prevents Dr. Fabrikant from accessing the Court when the subsection 40(5) bar applies. It does not restrict Dr. Fabrikant's

right of legitimate access to the Court; rather, it clarifies and defines his right of legitimate access. It does nothing more.

[18] A litigant interested in accessing this Court only in legally permitted circumstances would welcome the further regulatory order and its helpful clarification and definition of those circumstances. But Dr. Fabrikant expresses an astonishing level of hostility to even the very idea of a further regulatory order. His reaction calls into question his understandings, motivations or intentions regarding accessing this Court. It would seem that the constraining, binding effect of the further regulatory order is needed.

[19] Dr. Fabrikant suggests that the further regulatory order would be inconsistent with all of the other times when this Court has determined matters brought by him despite the existence of the subsection 40(5) bar. Specifically he suggests that this Court's invocation of the subsection 40(5) bar in *Fabrikant No. 2* is contrary to *Fabrikant No. 1* where it was not invoked. Implicitly, Dr. Fabrikant suggests that this Court should have invoked the subsection 40(5) bar in *Fabrikant No. 1*.

[20] This Court has sometimes entertained Dr. Fabrikant's matters in the face of the subsection 40(5) bar. But this Court is bound by statutory law and must apply it. To the extent that this Court has wrongly overlooked the subsection 40(5) bar at times, the further regulatory order will ensure that this never happens again.

[21] Some unusual circumstances sometimes cause the subsection 40(5) bar to be overlooked. Dr. Fabrikant's many matters have been assigned to different judges, many of whom are unaware of what others are doing. Many are challenged by the unique situation here: a litigant who, nineteen years ago, has been declared vexatious in the Federal Court but has since been left quite free to litigate in this Court. And the Attorney General, similarly deluged with matters and represented by many different counsel over the last nineteen years, sometimes assists the Court by preparing responding submissions, and sometimes not, and, at best, those submissions show us only a sliver of Dr. Fabrikant's litigation history. These unusual circumstances underscore the need for the making of the further regulatory order.

[22] On another point, Dr. Fabrikant notes that in *Fabrikant No. 2* this Court observed that he was exhibiting certain vexatious characteristics. Dr. Fabrikant complains that this Court did not give examples of his vexatious characteristics.

[23] Sometimes there is good reason for the Court not to give examples: *Canada v. Olumide*, 2017 FCA 42, [2018] 2 F.C.R. 328 at para. 39 (said in the context of vexatious litigants, but nevertheless of general application to all litigants). Nor is it necessary for the Court to give examples. Reasons are to be read in light of the record and they need not be encyclopedic on every point: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at paras. 35 and 55; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at paras. 66-69. However, to assist Dr. Fabrikant, he might wish to re-read the written representations he has filed in various matters, including the ones here, against the discussion of vexatiousness in *Olumide*.

[24] Dr. Fabrikant attacks this Court's observations in *Fabrikant No. 2* and *Olumide*, above, that certain litigants need to be regulated in order to preserve the scarce resources needed for others. He denies that we have a resource issue.

[25] Most certainly there is a resource issue, even at the best of times: *Olumide* at paras. 17-21. And the best of times is not now. The legal complement of the Court has fallen behind Canada's population growth. Sprawling, multifarious cases with complexity as great as this Court has ever seen now vie for space in an already full, difficult docket. We have tried to cope by adopting a proactive approach to litigation management guided by two principles: unnecessary and unmeritorious cases should be rooted out and quashed as early as possible—or, even better, prevented in the first place—and other cases should be simplified to the extent they can. Despite this, the resource issue remains pressing, impairing litigants' access to timely justice.

[26] The further regulatory order fits well with other tools we have recently innovated, refurbished or repurposed as part of this proactive approach to litigation management: *Olumide*, above and *Olumide v. Canada*, 2016 FCA 287 (clarifying and streamlining vexatious litigant applications); *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 (providing for summary dismissals of applications that are improperly brought or doomed to fail); *Mazhero v. Fox*, 2014 FCA 219 (prohibiting certain conduct; limiting court filings; giving the registry enhanced powers to reject documents; summary dismissal of motions); *Mazhero v. Fox*, 2014 FCA 226 (prohibiting certain filings; threatening summary dismissal of the proceeding for disobedience); *UHA Research Society v.*

Canada (Attorney General), 2014 FCA 134 (restricting the availability of adjournments); *Mary David et al. v. Her Majesty the Queen* (direction dated September 20, 2018 in file 18-A-27) (restricting communications and requests to the Registry); *Fabrikant (No. 1)*, above (dismissing motions and closing files where the underlying proceedings suffer from a fatal flaw); *Rock-St Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192, 434 N.R. 144 (encouraging the greater use of Rule 74 to prune unmeritorious proceedings); *Philipos v. Canada (Attorney General)*, 2016 FCA 79, [2016] 4 F.C.R. 268 (restricting the resurrection of discontinued litigation); *Lee v. Canada (Correctional Service)*, 2017 FCA 228 and *Forner v. Professional Institute of the Public Service of Canada*, 2016 FCA 35 (calling for submissions to quash unmeritorious proceedings as soon as the originating document is filed); *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143 (staying extant proceedings until an application for a vexatious litigant declaration is determined; consolidating proceedings on the Court's own motion); *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116 and *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174, 414 D.L.R. (4th) 373 (streamlining procedures in massive, multi-party litigation).

[27] The further regulatory order is analogous to many of these indispensable tools. Its use in these circumstances is both appropriate and fair.

[28] In exercising my discretion, I have not confined myself to the concerns raised by Dr. Fabrikant in his written representations. In particular, I have carefully considered the scope of the further regulatory order I set out at para. 23 of *Fabrikant No. 2*. In my view, it is too broad. I

need to limit it to proceedings initiated by Dr. Fabrikant. The order should not restrict Dr. Fabrikant's ability to respond to matters started by others.

[29] Last week, after the release of *Fabrikant No. 2* but nineteen years after the Federal Court declared Dr. Fabrikant vexatious in the Federal Court, the Attorney General started an application to declare Dr. Fabrikant vexatious in this Court. Having just done this, the Attorney General asks this Court to stand down and not make the further regulatory order. In her view, this Court should wait until the file for the application is complete and then decide the application. In his reply, Dr. Fabrikant agrees that this Court should stand down.

[30] No doubt, the parties' agreement is a factor to consider. But it is not binding. This Court exists to serve the interests of all litigants, both present and future, and the public at large—not just the preferences of particular parties in a particular case. It must manage its own resources and any litigation before it in the public interest in accordance with the imperatives in Rule 3 of the *Federal Courts Rules*, SOR/98-106, the objectives of the *Federal Courts Act*, and the constitutional principles that underlie and guarantee an independent, effective judiciary.

[31] Perhaps the Attorney General has adopted this position because she presumes this Court will soon declare Dr. Fabrikant vexatious. After all, in *Fabrikant No. 2* this Court observed that Dr. Fabrikant has been exhibiting vexatious characteristics.

[32] If that is so, the Attorney General is presuming too much. Litigants who exhibit vexatious characteristics are not always declared vexatious. It all depends. A litigant is declared vexatious

only when the particular evidence filed satisfies a strict legal test: see, *e.g.*, *Olumide*, above. My exercise of discretion here should turn on what is necessary and fair now—not on some speculation about how the vexatious litigant application will turn out.

[33] Even assuming for argument's sake that a vexatious litigant declaration here is a sure thing, the Attorney General's submission overlooks the differences between the further regulatory order and a vexatious litigant declaration. The former regulates Dr. Fabrikant differently than the latter. The latter is not a substitute for the former. And the regulation offered by each is additive.

[34] But all this is beside the point. The further regulatory order merely clarifies and defines the rights of legitimate access to this Court that Dr. Fabrikant has now. It protects the Court's resources now. It is needed now. So this Court should issue the further regulatory order now.

D. Disposition

[35] The further regulatory order will issue. It will be substantially in the form set out at para. 23 of *Fabrikant No. 2*, with amendments to give effect to some of my observations, above, and to reflect the possibility that the Attorney General's vexatious litigant declaration might be granted.

[36] To assist the development of the jurisprudence in this difficult area of law and to guide this Court and parties in situations like this, the further regulatory order that will issue is set out in Schedule "A" to these reasons.

[37] I think it best that another judge of this Court hear the Attorney General's application to declare Dr. Fabrikant vexatious in this Court and any interlocutory matters arising in it. That judge will determine whether the additional layer of regulation supplied by a vexatious litigant declaration is necessary and appropriate on the facts and the law.

"David Stratas"

J.A.

SCHEDULE "A"

WHEREAS on November 1, 1999 Dr. Fabrikant was 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 as an appellant or an applicant 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*; and

(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 as an applicant or appellant in matters other than Permissible Matters;

AND WHEREAS, in appeals or applications started in this Court by others where Dr. Fabrikant is only a responding party, Dr. Fabrikant has a full right to access this Court to respond; and this Order should not apply to that situation.

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;

AND WHEREAS further reasons for this Order appear in *Fabrikant v. Canada*, 2018 FCA 171, *Fabrikant v. Canada*, 2018 FCA 206 and *Fabrikant v. Canada*, 2018 FCA 224;

AND WHEREAS the Attorney General has now applied in this Court for a declaration that Dr. Fabrikant is a vexatious litigant in this Court; and that declaration, if granted, should not displace the regulation provided by this Order; but this Order should accommodate that declaration, if it is granted;

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, judgment or decision 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 any of the following defects is present:

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

    (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;

    (c) in the event that Dr. Fabrikant has been declared to be a vexatious litigant in this Court, the originating document is not accompanied by a motion for leave to start a proceeding under subsection 40(3) of the *Federal Courts Act*;

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 invoking the authority of this Order.

5. This Order:

(a) does not apply to proceedings in which Dr. Fabrikant is only a responding party, *i.e.*, responding to appeals or applications started by others;

(b) does not affect the Registry's other powers under the *Federal Courts Act* and *Federal Courts Rules* to reject documents for filing; and

(c) shall survive any judgment or order of this Court declaring Dr. Fabrikant a vexatious litigant.

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:	DECEMBER 10, 2018

WRITTEN REPRESENTATIONS BY:

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

SOLICITORS OF RECORD:

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