Federal Court of Appeal  Cour d'appel fédérale

Date: 20141124

Docket: A-274-13

Citation: 2014 FCA 273

CORAM: **NADON J.A.**
GAUTHIER J.A.
WEBB J.A.

BETWEEN:

DR. V. I. FABRIKANT

Appellant

and

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

Respondents

Heard at Ottawa, Ontario, on October 14, 2014.

Judgment delivered at Ottawa, Ontario, on November 24, 2014.

REASONS FOR JUDGMENT BY: WEBB J.A.

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

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REASONS FOR JUDGMENT

WEBB J.A.

[1] As a result of an Order issued pursuant to subsection 40(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, (the Act) Dr. Fabrikant had previously been designated as a vexatious litigant. The current proceeding before us arose because he was granted leave to file a notice of appeal to this Court in relation to an order of Prothonotary Tabib dated January 18, 2013 (T-376-99) and in relation to the directions of Scott J. (as he then was) issued on July 24, 2013.

[2] Subsections 40(1), (3), (4) and (5) of the Act provide 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.
…	[…]
(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] As a result of these provisions, Dr. Fabrikant may apply to the Federal Court for leave to institute a proceeding, provided however, if such application for leave is denied, there is no right of appeal from that decision.

Decision of Prothonotary Tabib

[4] Dr. Fabrikant attempted to commence two applications for judicial review – one was a claim against the Crown for $15,000 and the other was a request to reclassify Dr. Fabrikant as a minimum security prisoner. He was not allowed to file the motion to request leave to commence these proceedings as the filing fee had not been paid. Dr. Fabrikant then brought a motion before Prothonotary Tabib to waive the filing fee.

[5] The Prothonotary reviewed the documents that had been filed by Dr. Fabrikant and the submissions made by Dr. Fabrikant. After referring to another decision to deny Dr. Fabrikant's request to waive the filing fee rendered on December 1, 2011 (and upheld on appeal to the Federal Court by order dated January 19, 2012), the Prothonotary stated that:

> …In the exercise of my discretion, I have taken into account the fact that the Plaintiff has been designated a vexatious litigant, and that he appears to have been multiplying motions for leave to commence legal proceedings in recent years. Many of these motions are refused for filing, or are not successful, or when successful, are not pursued diligently, such that the use of these motions for leave by the Plaintiff is becoming a significant burden on the Court's resources. I have also taken into account the fact that the Applicant's motion relies on exactly the same evidence that was found by this Court to be manifestly insufficient to support the granting of the same relief a year ago. The Plaintiff knew that this Court had found this evidence insufficient, yet he chose to rely on the very same insufficient evidence to support his motion. Presumably, the Plaintiff believes that the informal direction of the Court of Appeal overcomes his failure to appeal a formal Order of this Court. That belief is mistaken.

[6] The Prothonotary also addressed Dr. Fabrikant's submission that the filing fee had previously been waived by the Federal Court. She noted that the filing fee had not been waived – it had simply been an oversight to allow him to file applications for leave to commence proceedings under subsection 40(3) of the Act without paying the required fee.

[7] The Prothonotary noted that Dr. Fabrikant does "not question or contest that the *Federal Courts Rules* and the Tariff clearly require the payment of a $30.00 fee for the filing of each of [his] proposed motions".

[8] The Prothonotary dismissed his motion for a waiver of the filing fee.

[9] When Dr. Fabrikant attempted to appeal this Order of the Prothonotary, a direction was issued by Roy J. stating that Dr. Fabrikant's motion for an appeal of this order could not be accepted for filing. He was then allowed to file an appeal to this Court. Therefore, on this appeal, there is no decision of a Judge of the Federal Court addressing the appeal of the Order of the Prothonotary on its merits.

[10] In *Merck & Co. v. Apotex Inc.*, [2003] FCA 488; [2004] 2 F.C.R. 459, this Court noted that the applicable standard of review, when a Judge is considering an appeal of a discretionary order of a prothonotary, is that a judge should not interfere with such order unless:

(a) the prothonotary has made an error in law, including the exercise of his or her discretion based upon a wrong principle or upon a misapprehension of the facts; or

(b) the order raises a question that is vital to the final issue of the case.

[11] This is the standard of review that should be applied in this case as the appeal of the Prothonotary's Order was not considered by the Federal Court Judge.

[12] It does not seem to me that the Prothonotary made any error of law or that she exercised her discretion based upon a wrong principle or a misapprehension of the facts. It was within her discretion to make this decision. There was no indication of what other assets or sources of revenue may be available to Dr. Fabrikant and, in all of the circumstances of this case, this was not an inappropriate exercise of her discretion to not waive the filing fees.

[13] In the matters for which Dr. Fabrikant was seeking leave to commence proceedings, the final issue in one matter was whether the Crown should be required to pay Dr. Fabrikant $15,000 and the final issue in the other matter is whether Dr. Fabrikant should be reclassified as a minimum security prisoner. The Order dismissing his motion for a waiver of filing fees did not raise a question that is vital to either of these final issues. The waiver of filing fees is a preliminary matter related to his application for leave to commence these proceedings. Even if he were to be permitted to file his application for leave without paying the filing fee, he would still have to obtain leave to commence these proceedings.

[14] As a result, I would not interfere with the decision of the Prothonotary and I would dismiss the appeal from the Order of Prothonotary Tabib.

The Four Directions of Scott J.

[15] Dr. Fabrikant submitted Notices of Motion for leave to commence the following proceedings:

(a) the cancellation of the designation of Dr. Fabrikant as a vexatious litigant or, alternatively, leave to continue present proceedings in Court File T-376-99;

(b) a proceeding related to the decision of the Commissioner in relation to certain grievances of Dr. Fabrikant;

(c) a claim against Service Canada to recover payment of Old Age Pension and Supplement from January 1, 2011 onward; and,

(d) a claim against the Crown for $350, plus costs and punitive damages in relation to a computer monitor that Dr. Fabrikant alleges was damaged.

[16] On July 24, 2013, Scott J. issued the following direction for each of the above applications:

The Court directs that leave is denied.

[17] By an Order of Sharlow J.A. dated August 29, 2013, Dr. Fabrikant's amended notice of appeal (to include a reference to these directions) was accepted for filing. The proceeding arising from this amended notice of appeal is the proceeding that is now before us.

[18] In his submissions at the hearing of this matter, Dr. Fabrikant relied on a direction to the Registry that I had issued in relation to another appeal that he was attempting to file from a decision denying him leave to commence a proceeding. His reliance on this direction is misplaced. The direction was not with respect to the matters that are now before this Court and

the comments in the direction were based only on the wording of the Order issued by Sharlow J.A. allowing him to amend his notice of appeal.

[19] In the Order of Sharlow J.A., she noted in the recitals that:

> the direction of Justice Scott refused, without written reasons, to permit the filing of four motions apparently seeking leave to commence other proceedings.

[20] Based on this wording, it would appear that the directions issued by Scott J. were not decisions made under subsection 40(4) of the Act (following an application for leave to institute a proceeding) but rather directions denying Dr. Fabrikant the right to apply under subsection 40(3) of the Act for leave to commence a proceeding.

[21] However, the actual wording of the directions issued by Scott J. (which are part of the record in this matter) was as noted above in paragraph 16. The wording of the directions is not as set out in the Order of Sharlow J.A. The actual wording is that "leave is denied", which is the wording that would be used to reflect a decision rendered under subsection 40(4) of the Act, as under this subsection "leave" to commence the proceeding is either granted or denied. Therefore, this would not be a direction refusing Dr. Fabrikant permission to file the four motions seeking leave to commence other proceedings. Rather, the directions issued by Scott J. were decisions denying Dr. Fabrikant leave to commence the proceedings referred to above.

[22] As a result of the provisions of subsection 40(5) of the Act, these decisions are not subject to appeal. I would therefore quash the appeal of Dr. Fabrikant from these directions.

[23] As a final note, when dealing with motions, including those made pursuant to subsection 40 (4) of the Act, the Federal Court should be issuing orders and not directions.

Conclusion

[24] I would, therefore, dismiss the appeal of Dr. Fabrikant from the order of Prothonotary Tabib dated January 18, 2013 and quash the appeal of Dr. Fabrikant from the four directions of Scott J. dated July 24, 2013, all without costs.

"Wyman W. Webb"
J.A.

“I agree
M. Nadon J.A.”

“I agree
Johanne Gauthier J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-274-13
STYLE OF CAUSE:	DR. V. I. FABRIKANT v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA, CORRECTIONAL SERVICE CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 14, 2014
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NADON J.A. GAUTHIER J.A.
DATED:	NOVEMBER 24, 2014

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