Federal Court of Appeal | Cour d'appel fédérale

**Date: 20220718**

**Docket: A-62-22**

**Citation: 2022 FCA 129**



**CORAM:** **BOIVIN J.A.**
**WOODS J.A.**
**LEBLANC J.A.**

**BETWEEN:**

**CHINEDU GIDEON UBAH**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 18, 2022.

REASONS FOR ORDER BY: LEBLANC J.A.

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

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## REASONS FOR ORDER

**LEBLANC J.A.**

[1] The appellant is subject to a vexatious litigant Order issued by the Federal Court (as *per* Pallotta J.) on December 23, 2021 (2021 FC 1466), under the authority of subsection 40(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act). That Order was issued on the basis that the appellant's conduct was both ungovernable and harmful (the VL Order).

[2] Central to this appeal is the fact that in addition to the usual order prohibiting vexatious litigants from instituting or continuing proceedings without leave, Pallotta J. felt that further restrictions were required because of the appellant's tendency to relitigate matters and litigate by proxy. Those further restrictions took the form of a preliminary procedure consisting in the appellant obtaining from the Federal Court permission to serve and file a full application for leave under subsection 40(3) of the Act.



[3] The VL Order was made applicable to all pending Federal Court matters listed in the Order's Schedule A, with the exception of file T-756-20. Pallotta J. outlined her reasons for carving out file T-756-20 as follows:

> That proceeding is case-managed, and the [Attorney General of Canada] has already brought a motion to strike out the statement of claim. The motion was granted with leave to amend. [The appellant] has filed an amended statement of claim but there has been no further activity because the action was stayed. If [the appellant]'s amended statement of claim in T-756-20 is not struck out, and the proceeding is allowed to continue in whole or in part, then the Court can decide whether, in addition to case management, the proceeding should be subject to the terms of this order or other restrictions should be imposed, as the Court considers appropriate.
>
> (VL Order at para. 52)

[4] On February 14, 2022, the Federal Court (as *per* Prothonotary Steele) struck out the appellant's amended Statement of Claim in file T-756-20, dismissed his action and removed the amended Statement of Claim from the Court record (the Removal Order). Prothonotary Steele also ordered that any further steps in the T-756-20 proceeding, including any appeal of the Removal Order, be subject to the terms of the VL Order.

[5] The appellant sought permission to bring an application under subsection 40(3) of the Act for leave to appeal the Removal Order. On March 14, 2022, the Federal Court (as *per* Pentney J.) denied that permission (2022 FC 343) (the Pentney Order). After having set out a three-prong test for granting permission to seek leave, which, he held, ought to be different and less stringent than the test for seeking leave, he concluded that the appellant had failed to satisfy the second and third branches of the permission test. In particular, Pentney J. found that the appellant's pleadings were so confusing that it was impossible to conclude, on a preliminary assessment, that they had merit. He also held that it was not in the public interest to allow the appellant's action to continue, as allowing it to be pursued "would add to the [Respondent]'s and the Court's burden, in a manner that the vexatious litigant declaration was intended to prevent" (Pentney Order at para. 55).

[6] The appellant appealed that decision. This is the matter now before us. Given that subsection 40(5) of the Act bars appeals of any decision denying a vexatious litigant leave to institute or continue a proceeding, this Court, on June 13, 2022, directed the appellant to show cause why the present appeal should not be dismissed for want of jurisdiction.

[7] This direction was issued under the authority of section 74 of the *Federal Courts Rules*, SOR/98-106 (the Rules) as well as of the Court's plenary jurisdiction to manage and regulate its own proceedings. Rule 74 empowers the Court, on its own initiative, to order, at any time, that a document that was not filed in accordance with the Rules, an Order of the Court or an Act of Parliament, to be removed from the Court file. The Court's plenary jurisdiction allows it to summarily dismiss, on its own initiative as well, appeals that have no reasonable prospect of

success or are an abuse of the process of the Court (*Coote v. Canada (Human Rights Commission)*, 2021 FCA 150, [2021] F.C.J. No. 787 (QL/Lexis) at para. 16, quoting *Dugré v. Canada (Attorney General)*, 2021 FCA 8, [2021] F.C.J. No. 50 (QL/Lexis) at paras. 19-21).



[8] The appellant essentially claims that the Pentney Order is not a decision denying leave to institute or continue a proceeding, but merely a decision denying permission to seek leave. Therefore, he says, the Pentney Order is not a decision contemplated by subsection 40(4) of the Act, *i.e.* a decision made on a subsection 40(3) application, and is not subject, as a result, to the appeal bar set out in subsection 40(5) of the Act. The appellant contends that this Court's decision in *Fabrikant v. Canada*, 2014 FCA 273 (*Fabrikant*), is dispositive of the issue since it establishes, in the appellant's view, that for a decision to qualify as a subsection 40(4) decision, one must find in the decision's conclusion the words "leave is denied", which is not the case here.

[9] The appellant is mistaken. First, he reads too much from *Fabrikant*. Indeed, I am not satisfied that the Court went so far in that case so as to require the presence of similar language as a necessary pre-condition for finding, whatever the circumstances, that a decision falls under subsection 40(4) of the Act.

[10] *Fabrikant* must not be divorced from the unique set of facts that were before the Court. The primary concern in that case was related to the fact that the impugned "decisions" at issue were directions that one judge of the Court interpreted as mere refusals to permit the filing of four motions seeking leave to commence other proceedings (*Fabrikant* at para. 19). Although the

three-judge panel that decided the matter found that, viewed in this manner, the directions at issue could be interpreted as not being decisions made under subsection 40(4) of the Act, the panel held that the actual wording of these directions that "leave is denied" reflected decisions made under that provision, not directions merely dealing with a filing issue (*Fabrikant* at paras. 20-21).



[11] I agree with the respondent in the present matter that *Fabrikant* rather shows how broadly courts have interpreted what constitutes a "decision" for the purposes of subsections 40(4) and 40(5) of the Act. *Fabrikant* simply does not have the restraining effect the appellant claims it has.

[12] As noted by the respondent, there are other examples of such a broad interpretation. In *Emilius Margareta Marcus Mennes v. Attorney General of Canada*, this Court, in an unreported Order dated February 4, 2010, in file A-8-10 (*Mennes*), dismissed, for want of jurisdiction, the appeal of an order of the Federal Court dismissing a motion for an extension of time to commence an application for judicial review. The appellant, in that case, had been declared a vexatious litigant and could not, as a result, institute proceedings in the Federal Court, except by leave of that Court. This Court held that the impugned decision, although the underlying motion was not explicitly brought under subsection 40(3) of the Act, amounted to a decision taken under subsection 40(4) of the Act, and that it was, therefore, not appealable as stated in subsection 40(5).

[13] The decision of the Ontario Court of Appeal in *Chavali v. The Law Society of Upper Canada*, 2007 ONCA 482, 2007 CarswellOnt 4206 (WL Can) (*Chavali*) is another such example. Like the appellant in the present matter, the vexatious litigants in that case were subject to a pre-screening process requiring that they seek permission in order to bring an application for leave to commence or continue a proceeding under subsection 140(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the equivalent of subsection 40(3) of the Act.

[14] Before the Ontario Court of Appeal was an appeal of two decisions denying motions requesting such a permission. Noting that the pre-screening process was designed to prevent the appellants from abusing the leave power set up in subsection 140(3), the Ontario Court of Appeal considered that the screening motions were brought pursuant to that provision. It held that the decisions to dismiss the screening motions were not subject to appeal because of paragraph 140(4)(*e*) of the *Courts of Justice Act*—the equivalent of subsection 40(5) of the Act—which precludes any appeal from a refusal to grant leave under subsection 140(3). That Court held that reading any qualifying language into paragraph 140(4)(*e*) would render that provision virtually ineffective.

[15] In *Canada v. Olumide*, 2017 FCA 42, [2018] 2 F.C.R. 328 (*Olumide*), this Court noted that section 40 of the Act was similar to the vexatious litigant provisions found in the statutes governing courts in other jurisdictions, and that much of the case law of these other jurisdictions could therefore assist in interpreting section 40 of the Act (*Olumide* at para. 16). One such other statute is Ontario's *Courts of Justice Act*. In *Olympia Interiors Ltd. v. Canada*, 2004 FCA 195, 323 N.R. 191, referred to in *Olumide* at paragraph 16, this Court held, at paragraph 9 of *Olympia*,

that it was entirely appropriate, in interpreting subsection 40(1) of the Act, to seek guidance from the decisions of the Ontario Courts regarding the power contained in subsection 140(1) of the *Courts of Justice Act*, as the wording of that provision "closely resembles" subsection 40(1) of the Act. The same is true of the wording of subsections 140(3) of the *Courts of Justice Act* and 40(3) of the Act, and of paragraph 140(4)(*e*) of the *Courts of Justice Act* and subsection 40(5) of the Act.



[16] I fully agree with the respondent that although the permission motion was not formally brought under subsection 40(3) of the Act, as was the motion in *Mennes*, the end result of the Pentney Order, from a substantive standpoint, is that the appellant was denied leave under subsection 40(4). I note that in *Chavali*, the motion judge in that case considered the pre-screening motions as motions brought under subsection 140(3) of the *Courts of Justice Act*, which shows, in my view, that the difference between pre-screening motions and formal leave applications under subsection 40(3) is purely technical, not substantive, and that both should be treated alike when applying that provision of the Act.

[17] As stated in *Olumide*, section 40 of the Act "is aimed at litigants who bring one or more proceedings that, whether intended or not, further improper purposes, such as inflicting damage or wreaking retribution upon the parties or the Court." It is also aimed at "ungovernable litigants", that is "those who flout procedural rules, ignore orders and directions of the Court, and relitigate previously-decided proceedings and motions" (*Olumide* at para. 22).

[18] It cannot have been Parliament's intent to provide to vexatious litigants whose degree of vexatiousness justifiably requires an extra layer of restrictions, a right of appeal of a pre-screening decision denying them leave to commence or continue a proceeding, while making that right unavailable to litigants who do not require this extra layer of restrictions and who are denied such leave. In my view, Parliament cannot have intended such an absurd result (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4$^{e}$) 193 at para. 27). I agree with the respondent that allowing the present appeal to proceed would run contrary to the rationale behind section 40 of the Act.

[19] Lastly, there is no merit to the appellant's argument that *Chavali* and *Mennes* should be disregarded because they were decided prior to *Fabrikant*. As previously mentioned, *Fabrikant* does not limit the scope of subsections 40(4) and 40(5) of the Act in the way the appellant suggests. Determining the applicability of these provisions, in any given case, cannot just be a matter of wording of the impugned order, as contended by the appellant.

[20] For all these reasons, I find that the appellant's permission motion amounts to an application brought under subsection 40(3), that the Pentney Order is a decision rendered under subsection 40(4) of the Act and that, based on subsection 40(5) of the Act, this decision is not subject to appeal.

[21] Given the powers vested in this Court by its plenary jurisdiction and by section 74 of the Rules, I would summarily dismiss this appeal for want of jurisdiction and remove the Notice of Appeal from the Court record.

[22] The respondent is seeking costs of $500 in the appeal. Since I propose that the appeal be summarily dismissed, I would reduce that amount to $250.

"René LeBlanc"

J.A.

“I agree.
Richard Boivin J.A.”

“I agree.
Judith Woods J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-62-22 |
| **STYLE OF CAUSE:** | CHINEDU GIDEON UBAH v. HER MAJESTY THE QUEEN |

**DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

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| **REASONS FOR ORDER BY:** | LEBLANC J.A. |
| **CONCURRED IN BY:** | BOIVIN J.A.<br>WOODS J.A. |
| **DATED:** | JULY 18, 2022 |

**WRITTEN REPRESENTATIONS BY:**

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|---|---|
| CHINEDU GIDEON UBAH | FOR THE APPELLANT<br>SELF-REPRESENTED |
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