Federal Court  Cour fédérale

Date: 20121218

Docket: T-1981-11

Citation: 2012 FC 1496

Ottawa, Ontario, December 18, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

DR. V.I. FABRIKANT

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Dr. Fabrikant, is currently incarcerated in a federal penitentiary, where he is serving a sentence of life imprisonment for four counts of first degree murder, a single count of attempted murder and two counts of forcible confinement. While in prison, Dr. Fabrikant has authored numerous articles that have been published in a variety of scientific journals. It appears that in the past Dr. Fabrikant was able to send electronic copies of his articles on diskette to members of his family, whom he states forwarded the diskettes to the journals to facilitate publication. He asserts that a new article he wrote was accepted for publication in March 2010,

based on a typewritten draft that he submitted, but claims that the journal that accepted it requires that he provide the article in electronic format for it to be published. Dr. Fabrikant alleges that he is prevented from sending the diskette of this article to members of his family or to the journal by virtue of a Bulletin issued in December 2009 by the Acting Director, Security of Correctional Services Canada [CSC]. The Bulletin prohibits inmates from sending any "form of electronic media through the mail to destinations outside of CSC institutions" and constitutes an amendment to one of the Commissioner's Directives issued under section 98 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA].

[2] Dr. Fabrikant was previously declared by this Court to be a vexatious litigant, and thus leave was required for him to institute this judicial review application. Such leave was granted by Justice Bédard of this Court on May 26, 2011. In this application for judicial review, Dr. Fabrikant seeks to have the prohibition set out in the Bulletin declared to violate section 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*] as a contravention of his constitutionally-guaranteed right to freedom of expression. He requests an order allowing him to mail computer diskettes to his family, enforceable immediately, regardless of whether or not the respondent appeals from any order that I might issue in his favour.

[3] The respondents, for their part, argue that this application should be dismissed as Dr. Fabrikant has failed to pursue a grievance in respect of the refusal to allow him to send a diskette to his family that he could have brought under Commissioner's Directive 081, *Offender Complaints and Grievances*, dated November 29, 2011, as provided for by section 90 of the CCRA

[Commissioner's Directive 081]. The respondents submit that the *Charter* issues raised in this application ought to have been determined, at least in the first instance, through the grievance procedure. In the alternative, the respondents assert that the prohibition on forwarding information via electronic media set out in the Bulletin does not offend section 2(b) of the *Charter* because the Bulletin merely limits the manner in which inmates may communicate with those outside CSC. The respondents argue in this regard that restrictions on the method of expression – as opposed to restrictions on the content of an expressive act – do not violate section 2(b) of the *Charter*. In the further alternative, the respondents submit that any restrictions on inmates' freedom of expression in the Bulletin are reasonable limits prescribed by law that are demonstrably justified in a free and democratic society, within the meaning of section 1 of the *Charter*, and are thus allowable.

[4] During the hearing of this application (which was conducted by way of videoconference with Dr. Fabrikant participating from the penitentiary), Dr. Fabrikant argued that I should disregard the Affidavit of Guy Campeau, filed by the respondents, because it is virtually identical to an earlier affidavit filed in another application by Dr. Fabrikant. Due to the similarities between the two affidavits, Dr. Fabricant submits that Mr. Campeau's Affidavit was drafted by counsel for the respondents and should be struck as offending Rule 82 of the *Federal Courts Rules*, SOR/98-106. Rule 82 provides that a solicitor shall not depose to an affidavit and present argument to the Court based on the affidavit except with leave of the Court.

[5] In response to this submission, counsel for the respondents noted that the previous affidavit was sworn by Mr. Campeau's predecessor but conceded that the two affidavits in question are virtually, if not totally, identical. He stated, though, that Mr. Campeau read his predecessor's

affidavit, concurred completely with it, and indicated he was prepared to swear to the veracity of its contents in his own affidavit, which is what occurred. The respondents argue that as Mr. Campeau replaced the previous deponent in the position of CSC's Director, Intelligence Operations, Policy and Programs, Correctional Operations and Program Sector, it is to be anticipated that the two deponents would possess similar knowledge. The fact that the two affidavits are identical in all material respects, according to the respondents, does not render Mr. Campeau's Affidavit inadmissible nor offend Rule 82.

[6] The respondents are correct in this assertion and the fact that the two affidavits are virtually – if indeed not completely – identical does not offend Rule 82 nor render Mr. Campeau's Affidavit inadmissible. I note that it is common practice for counsel to draft affidavits, putting the words and evidence of a deponent onto paper. Provided counsel behave ethically in doing so – and the evidence is that of the deponent and not of counsel – there is nothing improper in an affidavit's being drafted by counsel. There is no suggestion here that Mr. Campeau's Affidavit is anything other than his own evidence. Thus, there is no basis to strike it, and it in no way offends Rule 82.

[7] Insofar as concerns the other issues raised by the parties, I need only consider the first argument advanced by the respondents since, for the reasons set out below, I have determined that this application for judicial review will be dismissed because the applicant ought to have pursued his claim through the grievance process, which was available to him under Commissioner's Directive 081.

[8] In this regard, the record establishes that Dr. Fabrikant was denied the right to mail diskettes to his family members in 2008 and filed two grievances under Commissioner's Directive 081 in respect of that denial. Although these grievances were denied at the third level of the grievance procedure on May 4, 2009, the upshot of them was that Dr. Fabrikant was allowed to forward diskettes containing his articles to his family, twice per year, as a personal effect through the Admissions and Discharge department, as opposed to mailing the diskettes to his family via the Visits and Correspondence department.

[9] With respect to the 2010 paper, Dr. Fabrikant submitted a request to be allowed to send the diskette containing his article to members of his family, which was denied on June 7, 2010. In denying the request, CSC relied on the applicable Commissioner's Directive. Unlike 2008, however, Dr. Fabrikant chose not to file any grievance in respect of the 2010 denial and instead sought to make the present judicial review application to this Court.

[10] It would have been possible for Dr. Fabrikant to grieve this denial, like the previous denials. The right of inmates to present grievances is set out in sections 90-91 of the *Corrections and Conditional Release Act*, SC 1992, c 29, which provide:

Grievance procedure	Procédure de règlement
90. There shall be a procedure for fairly and expeditiously resolving offenders' grievances on matters within the jurisdiction of the Commissioner, and the procedure shall operate in accordance with the regulations made under paragraph 96(*u*).	90. Est établie, conformément aux règlements d'application de l'alinéa 96*u*), une procédure de règlement juste et expéditif des griefs des délinquants sur des questions relevant du commissaire.

91. Every offender shall have complete access to the offender grievance procedure without negative consequences.	91. Tout délinquant doit, sans crainte de représailles, avoir libre accès à la procédure de règlement des griefs.

As noted above, Commissioner's Directive 081 outlines the detailed procedure to be followed for inmate grievances.

[11] Dr. Fabricant could well have raised the *Charter* issues he now seeks to put before this Court in a grievance, it being settled that such issues may be decided under the CSC grievance procedure (see e.g. *Ewert v Canada (Attorney General)*, 2007 FC 13; *Bouchard v Canada (Attorney General)*, 2006 FC 775). Indeed, the Supreme Court of Canada has recently confirmed the ability of administrative tribunals which decide questions of law to make *Charter* determinations; in *R v Conway*, 2010 SCC 22, Justice Abella referenced "the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction" (at para 79). Thus, the issues raised in this application for judicial review could have been raised by Dr. Fabrikant in a grievance under Commissioner's Directive 081.

[12] Applications for judicial review engage the discretionary jurisdiction of the reviewing court, which may decline to hear a judicial review application in appropriate circumstances, including, notably, where another procedure for redress is available. The effect of the right to institute grievances on the availability of judicial review of CSC decisions was recently considered by Justice Bédard in *Reda v Attorney General*, 2012 FC 79, [2012] FCJ No 82 [*Reda*], where she declined to hear a judicial review application in respect of a challenge by a prisoner to place him in

a medium security institution because he had not exhausted his right to grieve the decision. *Reda* contains a useful review of the principles applicable in a case such as the present, where an available grievance remedy was not pursued by the inmate. There, Justice Bédard wrote as follows:

> 13 It has long been established that the Court may exercise its discretion to not hear an application for judicial review of a decision if an adequate alternative remedy exists that the applicant could have pursued before applying to Court (*Harelkin v University of Regina*, [1979] 2 SCR 561, 26 NR 364. In *C.B. Powell Ltd. v Canada (Border Services Agency)*, 2010 FCA 61, 200 NR 367, the Federal Court of Appeal clearly set out the doctrine of exhaustion:
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> > 31 Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
> >
> > 32 This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, e.g., *Consolidated Maybrun*, *supra* at paragraph 38; *Greater Moncton International Airport Authority v*.

> *Public Service Alliance of Canada*, 2008 FCA 68at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, e.g., *Consolidated Maybrun, supra* at paragraph 43; *Delmas v. Vancouver Stock* (1994), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd, (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48.

[13] Similar conclusions have frequently been reached by this Court in circumstances where inmates sought to judicially review CSC decisions without first addressing their concerns through the grievance procedure. For instance, in *Spidel v Canada (Attorney General)*, 2010 FC 1028, [2010] FCJ No 1292, Justice Phelan declined to allow an application for judicial review by a prisoner to proceed because the prisoner had not waited for a decision with respect to his grievance. Justice Phelan noted at paragraph 12 that:

> The Court's discretion with respect to hearing a judicial review where there is an adequate alternative remedy is subject to consideration of whether there are exceptional circumstances which might otherwise require the Court to hear a matter despite the existence of an adequate alternative remedy. [Citations omitted.]

[14] Additionally, in March of this year, Justice Martineau dismissed a motion for leave to institute a proceeding by Dr. Fabrikant regarding the seizure of his personal computer by CSC. Justice Martineau found that Dr. Fabrikant was impermissibly attempting to challenge a grievance

decision of CSC in an unrelated proceeding (*Fabrikant v Canada*, 2012 FC 375, [2012] FCJ No 383).

[15] The case law thus establishes that, absent exceptional circumstances which would render the grievance procedure available to inmates ineffective, this Court should decline to hear judicial review applications in respect of matters that may be the subject of a grievance under Commissioner's Directive 081.

[16] The fact that Dr. Fabrikant's claims are *Charter* claims represents a further reason why this Court should defer to the grievance process. In this regard, the Supreme Court of Canada has indicated that it is essential that constitutional claims and, in particular, *Charter* claims be decided based on an adequate factual record (see *MacKay v Manitoba*, [1989] 2 SCR 357, [1989] SCJ No 88).

[17] The record before the Court in this matter is far from fulsome. There is little evidence regarding the nature and timing of the requirements of the scholarly journal for an electronic version of Dr. Fabrikant's article and relatively limited evidence regarding the justification for the Bulletin. A more fulsome record might well be developed through the grievance process if the matter were grieved. More importantly, because Dr. Fabrikant has not grieved, CSC has not had the opportunity to rule on whether the prohibition in the Bulletin would allow Dr. Fabrikant to nonetheless continue to provide his diskettes to members of his family as a personal effect twice per year. The Bulletin prohibits inmates from forwarding diskettes (or other electronic media) via mail. It is unclear whether it likewise prohibits forwarding diskettes to family members as part of an inmate's personal

effects. Whether such prohibition exists is a central fact relevant to determining both whether there is a *prima facie* breach of section 2(b) of the *Charter* and to determining whether, if such breach exists, it is nonetheless less justifiable under section 1 of the *Charter*. This represents a further reason why I have determined that these issues should be decided in the first instance through the grievance process as this would allow for an appropriate record to be compiled.

[18] Thus, for these reasons, this application for judicial review is dismissed. As concerns costs, there is no reason to derogate from the general rule that costs follow the event in this case, particularly in light of the similarity between this matter and that dismissed by Justice Martineau for similar reasons earlier this year. Thus, the respondents are entitled to their costs. In the exercise of my discretion, I believe it to be preferable to fix them in a lump sum amount and determine the amount of $1500.00 to be reasonable, in light of the complexity of the issues and length of the hearing.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is dismissed, with costs, which are fixed in the amount of $1500.00.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1981-12
STYLE OF CAUSE:	*Dr. V.I. Fabrikant v Her Majesty the Queen in Right of Canada, Correctional Service Canada*
PLACE OF HEARING:	Ottawa, Ontario (By videoconference)
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REASONS FOR JUDGMENT AND JUDGMENT:	GLEASON J.
DATED:	December 18, 2012

APPEARANCES:

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