



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Hobbs v. Canada (Privacy Commissioner)*, 2023
NLCA 5

Date: February 8, 2023

Docket Number: 202201H0054

BETWEEN:

RICHARD HOBBS

APPELLANT

AND:

PRIVACY COMMISSIONER OF CANADA

FIRST RESPONDENT

AND:

MICHAEL HARVEY, in his capacity as THE INFORMATION AND
PRIVACY COMMISSIONER OF NEWFOUNDLAND AND
LABRADOR

SECOND RESPONDENT

Coram: W. H. Goodridge, F. J. Knickle and K. J. O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 202201G3538

Appeal Heard: February 8, 2023

Oral Judgment: February 8, 2023

Written Reasons Filed: February 15, 2023

Reasons for Judgment by: W. H. Goodridge J.A.
Concurred in by: F. J. Knickle and K. J. O'Brien JJ.A.

Counsel for the Appellant: Self-represented
Counsel for the First Respondent: No appearance
Counsel for the Second Respondent: No appearance

Authorities Cited:

CASES CITED: *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *Healey v. Barrett*, 2019 NLCA 64; *Snelgrove v. Butler*, 2015 NLCA 46, 372 Nfld. & P.E.I.R. 51; *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77, leave to appeal to SCC refused 34861 (1 November 2012); *R. v. G.F.*, 2021 SCC 20; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *Ma v. Zhao*, 2019 BCCA 248; *Vilardell v. Dunham*, 2013 BCCA 65, rev'd on other grounds 2014 SCC 59.

STATUTES CITED: *Income and Employment Support Act*, SNL 2002, c. I-0.1.

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, rule 7.19; *Court of Appeal Rules*, NLR 38/16, rules 44(5), 44(7).

W. H. Goodridge J.A.:

[1] Richard Hobbs appealed the August 26, 2022, Order of the Supreme Court of Newfoundland and Labrador (General Division), which dismissed his application for a waiver of the court fees associated with an Originating Application he sought to issue.

[2] Mr. Hobbs submitted that, by virtue of Rule 7.19 of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, he qualified for the fee waiver because he was in receipt of income support under the *Income and Employment Support Act*, SNL 2002, c. I-0.1. He argued that the Judge erred in dismissing the application; and in particular, erred in failing to provide any reasons for doing so.

[3] The respondents had notice of the appeal hearing and elected not to participate.

[4] At the hearing, the appeal was allowed.

Issue

[5] The issue was whether the Judge erred in dismissing the fee waiver application, and in failing to provide any reasons.

Standard of Review

[6] The Order under appeal involved a discretionary decision of a judge. The standard of review of a discretionary decision is set out in *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48:

[41] ... A discretionary decision...is generally entitled to deference and may only be interfered with if there is a legal error (considered to be an error in principle), a palpable and overriding factual error (viewed as a material misapprehension of the evidence) or a failure to exercise discretion judicially (which includes acting arbitrarily or being "so clearly wrong as to amount to an injustice")

Background

[7] Mr. Hobbs filed the application for a waiver of court fees in relation to an Originating Application that he intended to have issued in the Supreme Court of Newfoundland and Labrador (General Division). The Originating Application sought an extension of time for filing an appeal of decisions made by the respondents following a privacy breach complaint.

[8] The fee waiver application included an affidavit from Mr. Hobbs declaring that he was in receipt of income support under the *Income and Employment Support Act*, and a current cheque stub from the Government of Newfoundland and Labrador with breakdown of the payments made to him under that *Act*. The Registrar forwarded the application and supporting documents to the Judge who dismissed it without a hearing and without reasons;

the Judge merely made a checkmark on a pre-printed form, adjacent to the following statement:

The fees payable pursuant to the *Supreme Court Fees Regulations* shall not be waived, pursuant to Rule 7.19 of the *Rules of the Supreme Court, 1986*

Waiver or Reduction of Fees

[9] Rule 7.19 of the *Rules of the Supreme Court, 1986*, sets out a hearing fee scheme that allows an exemption or reduction of the fees to anyone for whom payment would constitute an undue hardship:

7.19. (1) A person may apply to the Court to have the fees payable pursuant to the *Supreme Court Fees Regulations* waived or reduced.

(2) An application pursuant to this rule shall be in Form 7.19A and may be accompanied by an affidavit or supporting documents.

...

(6) Upon receipt of an application pursuant to this rule, the registrar shall

(a) waive the fees payable if the registrar is satisfied that the applicant is in receipt of income support under the *Income and Employment Support Act*, or

(b) forward the application to a judge.

(7) The Court may allow an application summarily at any time.

(8) The Court may allow an application in whole or in part if

(a) paying the fee would

(i) constitute an undue hardship for the applicant, and

(ii) prevent the applicant from advancing a non-frivolous and non-vexatious claim or defense; or

(b) the fee for accessing or copying documents would prevent the applicant from pursuing studies, reporting, or research in the public interest.

(9) In exercising its discretion under this rule, the Court may consider whether

(a) the applicants claim, application, notice, defense, or filing

- (i) discloses no reasonable claim or defence,
 - (ii) is scandalous, frivolous, or vexatious,
 - (iii) may prejudice, embarrass, or delay the course of a proceeding, or
 - (iv) is otherwise an abuse of the Court's process;
- (b) the applicants claim, application, notice, defense, or filing is pursued in good faith in the public interest;
 - (c) the applicants claim, application, notice, defense, or filing raises a question of public importance;
 - (d) the applicants proposed studies, reporting, or research is pursued in good faith in the public interest;
 - (e) the Court has already waived fees for the applicant; and
 - (f) the applicant has filed every document in the applicants control that might support the applicants claim.

...

Analysis

[10] In *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 46, McLachlin C.J. (for the majority) discussed the importance, and constitutional imperative, of having a hearing fee scheme that does not prevent individuals from exercising the right of access to the courts, “A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum ...”.

[11] Rule 7.19 aims to establish a constitutionally compliant hearing fee scheme that allows an exemption or reduction of fees to anyone for whom payment of the fees would constitute an undue hardship, provided that the matter involved is non-frivolous and non-vexatious. The rule ensures that a litigant who lacks financial means may, nonetheless, exercise the right of access to the courts (see *Healey v. Barrett*, 2019 NLCA 64, at paras. 3-4; and *Snelgrove v. Butler*, 2015 NLCA 46, 372 Nfld. & P.E.I.R. 51, at paras. 17-23).

[12] In a situation, as we have here, where Mr. Hobbs established that he was in receipt of income support under the *Income and Employment Support Act*, the Registrar should have exercised the authority under rule 7.19(6)(a) to grant the

waiver without referring the application to a judge. There is no explanation, and no apparent reason, as to why the Registrar failed to exercise that authority. At the same time, there is no explanation, and no apparent reason, as to why the Judge ultimately dismissed the application.

[13] When exercising discretion to dismiss a fee waiver application, particularly where undue hardship is apparent, a judge must provide reasons, and those reasons must be sufficient, when considered in light of the record before the court, to permit appellate review. Here we have no reasons, and nothing disclosed in the record, to permit appellate review. It was not possible for Mr. Hobbs or this Court to determine why the Judge dismissed the application.

[14] The proper functioning of the judiciary within our constitutional framework requires judges to provide reasons that give rational justifications for decisions (*Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77, leave to appeal to SCC refused 34861 (1 November 2012), at para. 109). Legal sufficiency of reasons requires that the aggrieved party be able to meaningfully exercise the right of appeal (*R. v. G.F.*, 2021 SCC 20, at para. 74). In a routine matter, such as dismissal of a fee waiver application, a sentence or two as reasons might be legally sufficient, depending on the circumstances. If the financial information filed with the application can reasonably be interpreted as supporting the proposition that the individual cannot afford to pay court fees without undue hardship (as we clearly have here with Mr. Hobbs) then the reasons must include an explanation for rejecting such evidence.

[15] McLachlin C.J. discussed the legal sufficiency of reasons in a civil context, in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129:

[101] In determining the adequacy of reasons, the reasons should be considered in the context of the record before the court. Where the record discloses all that is required to be known to permit appellate review, less detailed reasons may be acceptable. ...

[16] *Ma v. Zhao*, 2019 BCCA 248, had similarities to the current matter. It involved the dismissal of a fee waiver application, without explanation, despite financial information that appeared to establish undue hardship. The court found that the failure to address the question of undue hardship, or explain the conclusion, was an error in principle:

[21] ...[I]f the financial information can reasonably be interpreted as supporting the proposition that the appellant cannot afford to pay court fees without foregoing reasonable expenses, some explanation for rejecting such evidence would be necessary in light of the constitutional dimension of this issue.

[22] ... [O]nce it is determined that the applicant cannot afford to pay the fees, without undue hardship, to bring a non-frivolous claim, there will be few cases where the discretion may be exercised against the applicant. Again, some explanation would be required to indicate why the discretion was being exercised against the no fees order in such circumstances.

...

[26] I conclude that the failure either to address the question of undue hardship, or explain the conclusion that the appellant could afford to pay court fees in the face of unchallenged evidence to the contrary, constitutes an error in principle that warrants appellate intervention.

(Emphasis added.)

[17] I conclude that the failure of the Judge to provide any reasons to explain why he dismissed Mr. Hobbs' fee waiver application constitutes an error in principle that warrants appellate intervention.

Disposition

[18] I would allow the appeal and set aside the Order.

[19] Ordinarily, we would send the matter back to the trial court for decision, but the effect of doing so would only be more costs and inconvenience for Mr. Hobbs. His financial information establishes that he was entitled to a fee waiver under rule 7.19(6)(a), and there is no suggestion that the issue raised (extension of a filing deadline) is frivolous or vexatious. Applying a practical approach, appropriate in the circumstances (similar to *Vilardell v. Dunham*, 2013 BCCA 65, rev'd on other grounds 2014 SCC 59, at para. 42, and *Ma*, at para. 30) I would allow the application and grant Mr. Hobbs the fee waiver. The waiver is effective from the date of his application; he is entitled to the return of any court fees that have been paid because of the decision of the Judge.

[20] Mr. Hobbs also requested (in his factum) a waiver of fees associated with the present appeal. That request was granted at the outset, under rule 44(5) and 44(7) of the *Court of Appeal Rules*, NLR 38/16, and accordingly, no fees were incurred in this Court.

W. H. Goodridge J.A.

I concur: _____
F. J. Knickle J.A.

I concur: _____
K. J. O'Brien J.A.