

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20190531**

**Docket: A-36-19**

**Citation: 2019 FCA 167**

**Present: STRATAS J.A.**

**BETWEEN:**

**JENNIFER VIRGO**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 31, 2019.

**REASONS FOR ORDER BY:**

**STRATAS J.A.**

**Federal Court of Appeal**



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**REASONS FOR ORDER**

**STRATAS J.A.**

[1] The appellant, Jennifer Virgo, has brought an appeal to this Court from an order of the Federal Court dated December 17, 2018, which upheld an earlier order by a Prothonotary. However, there is now a most serious problem with this appeal. Action has to be taken.

### **Vexatious litigant order flagrantly breached**

[2] The appellant, Jennifer Virgo, is the spouse of Ade Olumide. Ade Olumide has been declared a vexatious litigant by this Court: *Canada v. Olumide*, 2017 FCA 42, [2018] 2 F.C.R. 328. In declaring Ade Olumide a vexatious litigant, this Court prohibited him from starting new proceedings without leave, whether acting for himself or through others.

[3] Ade Olumide is litigating his interests through Jennifer Virgo. He has not sought leave to do so. Therefore, he is breaching the prohibition contained in the vexatious litigant order against him. And the breach is flagrant.

[4] In this case, both the Prothonotary and the Federal Court found that Jennifer Virgo's name was "a thin veneer to disguise [Ade] Olumide as the directing mind behind these proceedings." These findings are not challenged in this Court.

[5] In fact, the findings of the Prothonotary and the Federal Court are understated. The situation is much worse. The material filed shows that the true appellant is Ade Olumide, not Jennifer Virgo. Jennifer Virgo has no interest in this appeal. Only Ade Olumide has an interest in it. The documents filed supposedly by Jennifer Virgo are those of Ade Olumide; indeed, on some documents he explicitly acknowledges his authorship. Further evidence of authorship is seen by the style of reasoning and writing in the documents. They are indistinguishable from documents that Ade Olumide has filed in his other appeals in this Court. Ade Olumide has started a new

proceeding without leave, acting through others, and, thus, has breached the vexatious litigant order.

[6] Certain serious consequences are now live. Before discussing them, I wish to describe some of the background leading up to this matter. The background shows that this Court has given Ade Olumide and Jennifer Virgo a full and fair opportunity to offer explanations for their conduct and to address the consequences of their conduct.

### **The background**

[7] Roughly four weeks ago, a motion said to be brought by Jennifer Virgo was placed before the Court for decision. Within seconds of reviewing the motion materials, the Court apprehended that Ade Olumide may be litigating his interests through Jennifer Virgo contrary to the vexatious litigant order. The respondent certainly made this clear, as he has in previous motions brought in this appeal.

[8] This circumstance called for the use of Rule 74. Rule 74 provides that a document that is filed contrary to an order of the Court “must be removed from the Court file.” But Rule 74 also provides that this can happen only after the parties have been given an opportunity to make submissions and only where it is warranted.

[9] Also alongside Rule 74 are this Court’s plenary powers—the powers all courts have by virtue of their status and function as courts: see, e.g., *Fabrikant v. Canada*, 2018 FCA 171 at

para. 3 (*Fabrikant No. 1*) and cases cited therein; see also section 4 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (Federal Courts, established as they under section 101 of the *Constitution Act, 1867*, are “superior courts of record”). Among other things, these plenary powers allow the Court to restrain abuses of its process and to stop meritless proceedings in their tracks.

[10] Acting under Rule 74, the Court issued a direction. In it, the Court stated its preliminary view that the appeal was contrary to the vexatious litigant order against Ade Olumide. The Court gave the parties named in this appeal and Ade Olumide an opportunity to file evidence and written representations on the matter. In particular, the Court asked the parties to address five questions:

1. Does the notice of appeal put in issue the factual statements made by the Federal Court judge and the Prothonotary relating to Mr. Olumide’s involvement in this appeal? Are grounds pleaded that would allow this Court to set aside such statements?
2. Does Ms. Virgo have a direct interest and, thus, standing to be an appellant in this matter? If so, the Court directs that an affidavit be filed proving same. The affidavit should be detailed and particular as to the nature of Ms. Virgo’s interest in this appeal and her interest and involvement in the matters described in the notice of appeal.
3. Is the notice of appeal contrary to the vexatious litigant order of March 6, 2017 made against Mr. Olumide?
4. As a result of the foregoing and any other relevant considerations, should the notice of appeal be removed from the file and the file closed under Rule 74 and the Court’s plenary power?
5. If so, should any other directions and orders be made to prevent a recurrence of this conduct?

[11] Jennifer Virgo and Ade Olumide were invited to file first. They did not file anything. In particular, they filed no evidence whatsoever to rebut the Court's preliminary view. The Attorney General then filed representations. Jennifer Virgo and Ade Olumide did not file representations in reply.

[12] For the foregoing reasons, the Court is satisfied that Jennifer Virgo and Ade Olumide have had a full and fair opportunity to speak to this matter and influence the Court's decision-making.

### **The composition of the Court in this matter**

[13] One other preliminary issue needs to be addressed: the composition of the Court to deal with this matter. Can this matter be determined by one judge or must it be determined by three judges of this Court? For the following reasons, one judge of this Court can deal with this matter.

[14] Section 16 of the *Federal Courts Act* provides that "[e]xcept as otherwise provided in [the] Act...every appeal...shall be heard...before not fewer than three judges sitting together." Otherwise, a single judge may suffice. Is the matter before the Court a hearing of an appeal? No.

[15] Before the Court is section 40 of the *Federal Courts Act*, a vexatious litigant order made under that section, and a breach of that order. A single judge can make a vexatious litigant order under section 40: see, *e.g.*, *Olumide*, above. It stands to reason that a single judge can address the

issue of how to deal with non-compliance with that order, including whether the order needs to be amended or supplemented.

[16] It is true that as a result of the remedial power under Rule 74, this Court can order that the notice of appeal be removed from the file and the file closed. And it is true that such an order effectively terminates the appeal. But the order is merely a way of ensuring compliance with the vexatious litigant order and in no way disposes of the appeal on its merits.

[17] This is different from the use of Rule 74 to terminate an appeal because the Court has no jurisdiction to hear it: see, *e.g.*, *Rock-St Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192, 434 NR 144; *Wong v. Canada (Citizenship and Immigration)*, 2016 FCA 229. When Rule 74 is used in those circumstances, the Court considers its ability to hear the appeal—a matter going to the appeal’s merits.

### **The consequences of the breach of the vexatious litigant order**

[18] Now to the potential consequences that can follow from the breach of the vexatious litigant order. They are among the most severe possible in a free and democratic society.

[19] This Court can start contempt proceedings against Ade Olumide for breaching the vexatious litigant order. Those proceedings can start right now. The Court can start them on its own initiative. If this Court ultimately finds Ade Olumide guilty of contempt, any or all of the following life-changing consequences can follow: imprisonment for up to five years, a fine of

any amount justified by the circumstances, an order to do or not do certain acts, the seizure of any property justified by the circumstances, and liability for all costs. See Rules 466-472.

[20] Given the importance of vexatious litigant orders, their critical role in protecting the Court and the litigants before it, the need for specific and general deterrence of those minded to breach such orders, the Court's paramount duty to enforce the rule of law, and the flagrant breach of the vexatious litigant order in this case, this Court is certain that it can now start contempt proceedings against Ade Olumide.

[21] However, just because contempt proceedings can be started does not mean that they should be started. It is a discretionary call.

#### **Exercise of discretion in this case**

[22] In considering the exercise of its discretion, this Court has examined all of the decisions in various jurisdictions across Canada in which orders have been made against Ade Olumide, including all the jurisdictions in which he has been declared a vexatious litigant. Each of these jurisdictions has provisions for contempt of court similar to our own. From this examination, it appears that while Ade Olumide has been told about the possibility of contempt proceedings, he has never been told in detail about the serious consequences that can follow from them.

[23] This case is a close call. But on this one occasion, delivery of a clear and strong warning outlining the serious consequences is appropriate.



[24] Ade Olumide is warned that he is playing with fire: evidence of a recurrence of the conduct here or conduct similar to it in breach of any of this Court's orders will be met with proceedings for contempt. Jennifer Virgo is warned that if evidence arises suggesting complicity with Ade Olumide in a breach of an order of the Court, she may have contempt proceedings brought against her. If those proceedings result in a guilty verdict, the potential severe consequences discussed above will all be in play.

[25] In this case, the Court has chosen to write widely accessible reasons in this matter rather than issuing a less-accessible speaking order. Why?

[26] The Court wants the judges and Prothonotaries in the Federal Courts system and judges and judicial officers in other jurisdictions' courts to know that Ade Olumide and Jennifer Virgo have been given a strong warning to comply with court orders, particularly vexatious litigant orders. In case there has been any previous doubt on the matter, all doubt has now been eliminated: Ade Olumide and Jennifer Virgo now know about the ease with which, in circumstances like these, contempt proceedings can be started and the serious consequences that can follow. In particular, they now know that a long period of imprisonment and a substantial fine are a real possibility. If, in the future, here or elsewhere, Ade Olumide, Jennifer Virgo or both ignore the warning given in these reasons, they may well find themselves enmeshed in proceedings fraught with danger.

## Postscript

[27] In response to multiple motions within this appeal, the respondent has complained that Ade Olumide was breaching the vexatious litigant order. The respondent was most appropriate in doing so. Ideally, this Court should have considered the respondent's complaint and taken action sooner. This being said, and I mean no criticism by this, right after receiving the notice of appeal the respondent could have forced the Court to deal with the breach—the respondent could have asked the Court to grant relief under Rule 74 or its plenary power.

[28] Multiple means exist by which this Court can summarily terminate illegitimate proceedings or proceedings doomed to fail and many of these means can be pursued immediately after proceedings are started in this Court: for just a partial list, see *Fabrikant No. 1*, above at para. 3 and *Fabrikant v. Canada*, 2018 FCA 224 at para. 26 (*Fabrikant No. 2*); for the general power to quash, see *Canada (National Revenue) v. J.P. Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557, *Lee v. Canada (Correctional Service)*, 2017 FCA 228 and *Forner v. Professional Institute of the Public Service of Canada*, 2016 FCA 35. A search for cases where this Court has invoked and exercised its plenary jurisdiction will yield many more useful cases.

[29] These means should be top of mind for every respondent and every judge and Prothonotary operating in the Federal Courts system. The early quashing of messy, time-consuming, illegitimate or hopeless proceedings—particularly those that spawn multiple

motions—can free up resources better spent elsewhere. Our Court has recently underscored this point (at para. 25 of *Fabrikant No. 2*):

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.

[30] Given all of the available tools and given the Supreme Court’s strong encouragement to courts and parties to develop and use tools to address this problem (see *Hryniak v. Mauldin*, 2014 SCC 9, [2014] 1 S.C.R. 87), I am baffled why so many messy, time-consuming, illegitimate and hopeless proceedings are allowed to fester in our court system.

### **Disposition of this matter**

[31] For the foregoing reasons, this appeal, and in particular the filing of the notice of appeal, are contrary to the vexatious litigant order. Therefore, under Rule 74 and this Court’s plenary power, I would order that the notice of appeal be removed from the file and the file closed. The respondent does not seek its global costs of the appeal.

[32] The respondent also requests an order that Ade Olumide be prohibited from representing or otherwise conducting litigation on behalf of his spouse or any other individual. This goes a

little beyond the prohibition contained in the vexatious litigant order against Ade Olumide against starting new proceedings without leave, whether acting for himself or through others: the requested order would prevent Ade Olumide from conducting litigation for another party in any circumstance regardless of whether he has an interest in the litigation.

[33] Under the Court’s plenary power to prevent abuses and Rule 55, I would make the requested order. Rule 119 already prohibits Ade Olumide from representing others unless he gets leave of the Court. The requested order is somewhat broader than that envisaged by Rule 119 but is justified in these special circumstances: absent leave, a vexatious litigant of this sort, especially one who has breached a vexatious litigant order, should not be participating in litigation in any way whatsoever, absent leave of this Court.

[34] It will be recalled that the bringing of a motion within this appeal led this Court to call for submissions under Rule 74. The Court has not decided this motion. Since the appeal before this Court will no longer exist, the motion must necessarily be dismissed. On the motion, the respondent seeks his costs. That is appropriate. Therefore, I would dismiss the motion with costs.

“David Stratas”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:**

A-36-19

**STYLE OF CAUSE:**

JENNIFER VIRGO v. ATTORNEY  
GENERAL OF CANADA

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

**REASONS FOR ORDER BY:**

STRATAS J.A.

**DATED:**

MAY 31, 2019

**WRITTEN REPRESENTATIONS BY:**

Jennifer Virgo

ON HER OWN BEHALF

Joanie Roy

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Nathalie G. Drouin  
Deputy Attorney General of Canada

FOR THE RESPONDENT