Date: 20010807

Docket: T-2210-00

Neutral Citation: 2001 FCT 859

Ottawa, Ontario, Tuesday the 7th day of August 2001

**PRESENT:** The Honourable Madam Justice Dawson

**BETWEEN:**

**HER MAJESTY THE QUEEN**

Applicant

- and -

**OLYMPIA INTERIORS LTD. and MARY DAVID**

Respondents

**REASONS FOR ORDER AND ORDER**

**DAWSON J.**

[1] Her Majesty the Queen seeks an order that the respondents not be permitted to institute further proceedings in this Court except with leave of the Court, and that all pending proceedings previously instituted by the respondents not be continued except

with leave of the Court. The application is brought, with leave of the Attorney General of Canada, pursuant to section 40 of the *Federal Court Act*, R.S.C. 1985, c. F-7 ("Act").

**PRELIMINARY EVIDENTIARY ISSUES**

[2] The applicant supported this application by filing the affidavits of Zoran Samac, sworn on September 11, 2000 and November 20, 2000. Mr. Samac swore to being a solicitor with the firm of solicitors representing the Crown in this proceeding and that:

> 6. As regards matters in the Federal court action and as regards matters in the Ontario Court actions occurring up to June 15, 2000, occurring up to February 1995, I am advised of the following by Bonnie J. Boucher and verily believe the same. Relative to matters involving the Federal Court action since February 1995 and events in the Ontario Court actions since the middle of June 2000, I am advised of the following by Bryan C. McPhadden, and verily believe the same.

[3] The source of Mr. Samac's knowledge of the pre-1995 Federal Court matters is not properly explained by this paragraph. However, in any event, Rule 81 of the *Federal Court Rules, 1998*, SOR/98-106 provides that:

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| 81. (1) Affidavits shall be confined to facts within the personal knowledge of the deponent, except on motions in which statements as to the deponent's belief, with the grounds therefor, may be included. | 81. (1) Les affidavits se limitent aux faits don't le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête, auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui. |
| (2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts. | (2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables. |

[4] The affidavits filed on the applicant's behalf therefore did not comply with the requirements of Rule 81(1) and did not indicate why evidence based on personal knowledge was not before the Court.

[5] The respondents filed the affidavits of Ms. David, sworn on November 30, 2000 and December 4, 2000 in opposition to this proceeding.

[6] Neither deponent was cross-examined.

[7] The respondents, who were self-represented, did not directly object to the applicant's failure to comply with Rule 81. The issue was raised by the Court with the applicant's counsel during oral argument. It was argued by the applicant that complying with Rule 81 would have deprived the applicant of the services of the solicitor who has had carriage of the various matters for more than six years and that to require that this solicitor give evidence would be unfair and unreasonable. Even if that is so, this does not explain why Ms. Boucher, who instructed counsel, was not available to provide properly admissible evidence.

[8] The failure to comply with the Rules of this Court is never a trivial matter. Here, at least one of the evils Rule 81 is intended to prevent manifested itself in errors in Mr. Samac's affidavit which someone with personal knowledge of the matters at issue would have been less likely to make. To illustrate, a wrong order of September 11, 1995 was exhibited to the first Samac affidavit as Exhibit BB, and the first affidavit was simply wrong when it stated in paragraphs 48 and 49 that appeals from orders of Jerome A.C.J. were dismissed by the Court of Appeal in proceedings numbered A-458-96 and A-459-96. Those appeals related to other orders.

[9] As a result of the second error, a direction from this Court issued after the oral hearing requiring supplementary evidence and submissions from the parties.

[10] In response, the applicant filed a supplementary application record which contained the affidavit of Lindsay Darling, another solicitor who swore to knowledge gathered by reviewing the client file and by receiving advice from the solicitor who had carriage of the file.

[11] The respondents did not object to this evidence and filed submissions.

[12] While the Darling affidavit corrected and clarified Mr. Samac's first affidavit, it too appears to have contained at least one error of fact: in paragraph 21 it was sworn that "Olympia and Mary David brought at least two motions and not the one alluded to in Mr. Samac's affidavit, seeking to set aside the two Certificates. The motions dismissed by Mr. Justice Rothstein were considered on their merits".

[13] In fact, the orders of Justice Rothstein attached as Exhibits K and L to the Darling affidavit referred to an application made on behalf of the applicant pursuant to Rule 324 for an order extending the time to file and serve an application for judicial review, and stated that it was that application which was denied.

[14] The orders therefore indicate that the respondents' applications to set aside the certificates were not dealt with on their merits, but rather did not proceed because they were brought out of time, and the time for bringing the applications was not extended. In view of the respondents' continuing efforts with respect to those certificates, as discussed below, the misstatement in the affidavit did not go to a trivial point.

[15] All this to say that in the present case the failure to comply with Rule 81 led to confusion and illustrates the wisdom of requiring applications to be supported by affidavits sworn by persons with personal knowledge who review their affidavits with care and attention.

[16] As to the consequence of this failure, I gave consideration to dismissing this application solely on this basis with leave to re-apply. However, that result would not secure the just, most expeditious and least expensive determination of the issue between the parties.

[17] In the present case, the respondents did not directly challenge much of the evidence before the Court, although some dispute appears to exist as to the extent orders for costs remain unpaid. The respondents instead concentrated their submission on the merits of their underlying claims against the Crown, and submitted that they were entitled “to bring these litigations and their claim for damages to the Courts in a free and democratic society”.

[18] Under Rule 55 the Court may dispense with compliance with any Rule, and Rule 81(2) permits the drawing of an adverse inference. These Rules provide a less draconian means of dealing with the deficiency in the evidence than the one mentioned above.

[19] In these circumstances, particularly in view of the gravity and extraordinary nature of the proceeding, I will have regard to that portion of the applicant's evidence which consists of the identification of true copies of pleadings, orders, judgments, reasons for judgment and the like filed in, or issued out of, this Court. I have also had regard to the recorded entries maintained in the records of this Court in proceedings T-2210-00, T-1436-92, ITA-8447-92 and GST-41-92 and to reasons given by this Court, all involving the respondents. I note that in *Foy v. Foy (No. 2)* (1979), 102 D.L.R. (3d) 342 (Ont. C.A.), the Court of Appeal for Ontario stated that in proceedings of this nature a court is entitled to take notice of its own records and of the proceedings contained therein.

[20] Confining my attention to this evidence provides, in my view, no substantive basis for objection to the propriety of the applicant's evidence. To the extent this material is not identified by a witness with personal knowledge, I dispense with compliance with Rule 81 to that limited extent.

[21] To the extent that the applicant's affidavit materials dealt with proceedings in the courts of Ontario and the actions of the respondents in those proceedings, I find that evidence to be of little or no relevance. I accept, as it was not disputed before me and because the judge's reasons are reported,

that the respondents were declared to be vexatious litigants in Ontario. It follows that their conduct in courts of Ontario has already been dealt with. While this Court may, as discussed below, have regard to the conclusion of the Ontario Court, in my view when reviewing the respondents' conduct this Court should be concerned with conduct in this Court and whether it is such as to bring the respondents within the ambit of section 40 of the Act.

**FACTUAL BACKGROUND**

[22] I turn now to review the evidence which I consider to be relevant and properly established.

[23] Mary David at all relevant times was the president, sole director and principal shareholder of Olympia Interiors Ltd. ("Olympia"). Olympia designed, manufactured and installed customized architectural drapes and window coverings for commercial premises. Olympia was a substantial supplier in that field. It was required to report and to remit federal sales tax under the *Excise Tax Act*, R.S.C. 1970, c. E-13.

[24] In August of 1986 officials of Revenue Canada executed a search warrant at Olympia's premises, seizing substantial quantities of documents,

financial books and records. In 1987 Olympia and Ms. David were charged with 73 counts of offenses under the *Excise Tax Act*.

[25] The matter went to trial before the Ontario Court (Provincial Division) commencing in October of 1989 and continuing, on an intermittent basis, until mid-1990. At the beginning of the trial the prosecution withdrew ten counts. On June 4, 1990 the Crown moved to stay the balance of the proceedings.

[26] It was alleged by Ms. David and Olympia that as a result of the prosecution Olympia was rendered unable to carry on its affairs. Olympia's factory building and equipment were seized by creditors. Ms. David, who had personally guaranteed Olympia's liabilities, declared personal bankruptcy.

[27] In 1991, Ms. David and Olympia commenced an action in this Court ("original Federal Court action") against the Crown prosecutor who had prosecuted the charges under the *Excise Tax Act*. The claim also named as defendants those officials with the Ministry of National Revenue who had been involved in the investigation which led to the charges. Her Majesty The Queen was also named as the defendant, it being alleged that the Crown was vicariously liable for the acts of its servants.

[28] The statement of claim in the original Federal Court action alleged that the prosecution was malicious and negligent, and that Ms. David's rights guaranteed by sections 7, 8 and 15 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 ("Charter"), were violated.

[29] On October 18, 1991, the Associate Senior Prothonotary struck out the statement of claim against the individual defendants on the ground that the Court lacked jurisdiction over those defendants. The claim against Her Majesty The Queen was struck out without prejudice to the right of the respondents to file a fresh statement of claim. An appeal from that order was dismissed by Joyal J., as was a request for reconsideration of Joyal J.'s order. The Federal Court of Appeal dismissed an appeal from the order of Joyal J.

[30] In 1992, Olympia and Ms. David commenced a fresh action, T-1436-92 ("second Federal Court action") against Her Majesty The Queen as they were entitled to do. That claim alleged that the criminal charges were fabricated by illegal means, that their rights guaranteed under sections 7, 8, 11(*b*) and 15 of the Charter were violated, that Crown agents conspired to injure the plaintiffs, that there had been misfeasance and an abuse of authority, and that the prosecution was negligent and malicious.

[31] In 1992, Ms. David also commenced the three separate claims in the Ontario Court of Justice (General Division) against the individuals named in the original Federal Court action. Another action was commenced in Ontario against a former employee of Olympia who had provided information to officials of the Ministry of National Revenue.

[32] A number of steps and proceedings were subsequently taken in the Ontario Court of Justice. Ultimately, an order was pronounced providing that no further proceedings could be commenced by either Ms. David or Olympia in the Ontario Court of Justice and that any proceeding previously initiated by either of them should not be continued, except by leave of that court.

[33] The trial of the second Federal Court action proceeded in October of 1998 before Mr. Justice MacKay. Prior to that trial, among other things, the following transpired in the Federal Court:

i. Default certificates were filed in the Court by the Minister of National Revenue pursuant to notices of assessment issued under the *Excise Tax Act* and the *Income Tax Act*, R.S.C. 1985, c.

1 (5th Supplement). Those were filed respectively in GST-41-92 and ITA-8447-92;

ii. In August and October of 1995 Olympia moved respectively in GST-41-92 and ITA-8447-92 for orders setting aside the certificates filed. Those motions were initially ordered to be heard on January 23, 1996. Subsequently, Jerome A.C.J. ordered that the motions be dealt with in writing.

iii. At about the same time the plaintiffs also moved in T-1436-92 for an order striking out paragraph 56 of the Crown's amended statement of defence. In that paragraph a set-off was claimed by the Crown on account of federal sales tax, interest and penalties owing under the *Excise Tax Act*.

iv. On March 21, 1996, Jerome A.C.J. issued an order, and reasons for order, styled in T-1436-

92, GST-41-92 and ITA-8447-92. The reasons referenced only the motion to strike paragraph 56 of the amended statement of defence and dismissed that motion. The ground advanced for striking the defence, which the then Associate Chief Justice rejected, was that the matter was *res judicata* by virtue of the prior criminal proceeding. Because the criminal proceeding had been stayed, the Associate Chief Justice concluded that no issue had been decided as is required in order for the plea of *res judicata* to apply.

v. On March 28, 1996, the Crown moved in T-1436-92 for reconsideration of Justice Jerome's order of March 21, 1996 because the order had not addressed the motions by Olympia to set aside the GST and ITA certificates. While the affidavit of Lindsay Darling filed before me refers to an order of February 7, 1997 dismissing the motion for reconsideration, no

such order was exhibited to that affidavit, nor is there any recorded entry in T-1436-92 reflecting an order dated February 7, 1997. There is, however, no suggestion that the motion to reconsider was successful.

vi. The plaintiffs on March 27, 1996 appealed the March 21, 1996 order of Jerome A.C.J. On June 25, 1996, the plaintiffs discontinued that appeal.

vii. On March 28, 1996, Olympia filed two applications for judicial review seeking *certiorari*, *mandamus*, *quo warranto*, and declaratory relief and for orders extending the time for the bringing of those applications. The first application, T-723-96, related to the certificate issued in ITA-8447-92, while the second application, T-724-96, sought relief in respect of the certificate issued in GST-41-92. Both applications asserted, among other things,

that the requirements for issue estoppel had been met as a result of the criminal proceeding and asserted an abuse of process. On May 30, 1996, Rothstein J. (as he then was) dismissed both applications to extend time.

viii. On May 31, 1996, the orders of Rothstein J. were appealed by the respondents. Those appeals were dismissed by the Court of Appeal on July 28, 1997 on motions brought by the Crown, presumably on the basis of delay on the part of the plaintiffs in prosecuting the appeals.

ix. By order dated October 31, 1996, MacKay J. dismissed a motion brought by the plaintiffs in T-1436-92 and ITA-8447-92 for summary judgment. Justice MacKay noted in his reasons that in oral argument Ms. David had agreed that no new evidence or argument was then before the Court beyond that which was before Rothstein J. who had on November 22, 1995

dismissed a motion for summary judgment and who had dismissed, on December 15, 1995, a motion for reconsideration of his November 22, 1995 order.

x. By order dated November 20, 1996, MacKay J. dismissed a motion brought by the respondents to strike portions of the Crown's statement of defence, including paragraph 56.

xi. By order dated December 16, 1996, MacKay J. granted an order on T-1436-92, GST-41-92, ITA-8447-92 that the respondents could only file further motions or applications in those proceedings with prior leave of the Court.

xii. By order dated May 1, 1998, MacKay J. dismissed a motion for joinder of the issues raised in GST-41-92 and ITA-8447-92 with those in T-1436-92.

[34] On March 31, 1999, Justice MacKay, after a trial lasting 16 days, pronounced judgment dismissing the action brought by the respondents with costs to the defendant. Specific findings made in the detailed and carefully considered reasons for judgment of Justice MacKay were:

i. The evidence established that there was reasonable and probable cause for the Crown to commence the prosecution against Olympia and Ms. David and there was evidence supporting the prosecutor's assessment that the prosecution would probably succeed;

ii. there was "simply no evidence of maliciousness on the part of any Crown servant";

iii. there was no abuse of process and no evidence upon which to base any finding of malice or improper purpose;

iv. the evidence did not support a claim for abuse of authority;

v. there was no negligence shown by any of the Crown’s servants;

vi. there was no evidence of any agreement between two or more public servants;

vii. there was no basis on which to find infringement of rights protected by sections 7, 8, 11, 12, or 15 of the Charter.

[35] On September 13, 1999, the Federal Court of Appeal dismissed with costs an appeal from the judgment of Justice MacKay.

[36] On January 20, 2000, the Supreme Court of Canada dismissed with costs an application for leave to appeal from the decision of the Court of Appeal. On June 22, 2000, an application for reconsideration was dismissed by the Supreme Court with costs.

[37] On August 23, 2000, Pinard J. issued directions that the Registry should accept for filing an application brought under Rule 369 of the *Federal Court Rules, 1998*, by the respondents in GST-41-92 seeking a declaration that the certificate filed in that proceeding was without force and effect. The written material filed by the respondents alleged that the certificate violated rights guaranteed under section 12 of the Charter, that the prior criminal charges violated Ms. David's section 7 Charter rights, and also alleged misfeasance on the part of the investigators and prosecutor.

[38] By order dated October 27, 2000, Blais J. dismissed that application on the ground that Jerome A.C.J. had previously dismissed a similar motion, that *res judicata* applied and the motion was an abuse of process. On October 31, 2000, an appeal was filed from that order which appeal also sought nine million dollars on account of general, special and exemplary damages.

[39] On December 8, 2000, an order was made in the Ontario Court of Justice declaring the plaintiffs to be vexatious litigants.

[40] Subsequent to the receipt of the supplementary submissions in this proceeding referenced at the outset, Ms. David has continued to correspond with the Court.

[41] By letter dated April 19, 2001, Ms. David wrote including in the letter a complaint that the Department of Justice has refused to supply particulars in respect of certificates ITA-8447-92 and GST-41-92.

[42] On April 25, 2001, Tremblay-Lamer J. in ITA-8447-92 dismissed an unfiled motion for an extension of time to bring an appeal from the May 1, 1998 order of MacKay J. on the grounds that there was no explanation why

the appeal was not brought within the time limit, and the Court was not satisfied that there was an arguable case.

[43] An appeal from that order was filed on May 4, 2001.

[44] On May 9, 2001, Ms. David wrote to the Court, providing a copy of the order of Justice Tremblay-Lamer and requesting that I set a date for the continuation of ITA-8447-92. Reliance was placed on “case laws shown under R. 399 and the Order issued by Madam Justice Tremblay-Lamer”.

[45] On May 24, 2001, Ms. David wrote inquiring “if we have to wait for the Appeal Division now, or if Your Ladyship is able to hear submissions not covered by [pending] Appeals, such as damages?”

[46] To summarize, Ms. David’s claim to damages for malicious prosecution, misfeasance, breaches of her Charter rights, and the like, was wholly unsuccessful. All avenues of appeal have been exhausted. Both before and after the trial of the second Federal Court action Ms. Davis has sought on a number of occasions to challenge certificates issued as a result of notices of assessment under the *Excise Tax Act* and the *Income Tax Act*. Most recently, Blais J. dismissed an application attacking the certificate GST-41-92 as being

an abuse of process and Tremblay-Lamer J. would not extend the time for pursuing an appeal in ITA-8447-92. Appeals are pending from those orders.

[47] Notwithstanding, the respondents still search for avenues to attack the two certificates and to obtain damages.

## RELEVANT STATUTORY PROVISIONS

[48] Section 40 of the *Act* provides as follows:

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| 40. (1) Where the Court is satisfied, on application, that a person has persistently instituted vexatious proceedings or has conducted a proceeding in a vexatious manner, the Court may order that no further proceedings be instituted by the person in the Court or that a proceeding previously instituted by the person in the Court not be continued, except by leave of the Court. | 40. (1) La Cour 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. |
| (2) An application under subsection (1) may be made only with the consent of the Attorney General of Canada, who shall be entitled to be heard on the application and on any application made under subsection (3). | (2) La présentation de la requête nécessite le consentement du procureur général du Canada, lequel a le droit d'être entendu à cette occasion de même que lors de toute contestation portant sur l'objet de la requête. |
| (3) A person against whom an order under subsection (1) has been made 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 à la Cour, demander soit la levée de l'interdiction qui la frappe, soit l'autorisation d'engager ou de continuer une instance devant la Cour. |

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| (4) Where an application is made 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), la Cour peut, si elle est convaincue 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 rendue par la Cour aux termes du paragraphe (4) est définitive et sans appel. |

[49] The jurisprudence of this Court has not set forth, in any detail, the purpose of subsection 40(1) of the *Act*. However, in *Mishra v. Ottawa (City),* [1997] O.J. No. 4352, Sedgwick J. of the Ontario Court of Justice (General Division) considered the purpose of the equivalent provision of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C. 43 and stated at paragraph 52 of his reasons:

> [52] An order will not readily be granted by this court that would restrict in any way the free access of any person to the courts to assert his or her civil rights and remedies. The access must be exercised responsibly and with due regard for the applicable laws and rules of procedure and the integrity of the administration of justice, including the protection accorded to others against being indiscriminately made the subjects of vexatious proceedings.

[50] An order under subsection 40(1) is an extraordinary remedy. However in appropriate cases the remedy is necessary in order to maintain respect for the judicial process and to protect others from frivolous and pointless litigation.

**FACTORS TO BE CONSIDERED**

[51] As for the factors to be considered when an application is brought pursuant to subsection 40(1) of the *Act*, in *Vojic v. Canada (Minister of National Revenue)*, [1992] F.C.J. No. 902, T-663-92 and T-1300-92 (October 2, 1992) (T.D.), McGillis J. of this Court stated as follows:

> Since this section is similar in wording to subsection 150(1) of the *Courts of Justice Act*, 1984, S.O. 1984 c. 11, guidance may be obtained in determining the law applicable to vexatious proceedings by referring to judgments rendered in Ontario.
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> A review of the Ontario authorities reveals that the categories for vexation are never closed and the history of the proceedings must be examined carefully to determine if the conduct of the litigant is vexatious in nature. Proceedings have been held to be vexatious in circumstances where there were no reasonable grounds to institute the action, the issue had already been determined by the court and unsuccessful appeals were pursued. [See *Foy v. Foy* (1979), 102 D.L.R. (3d) 342 (Ont. C.A.); *Re Mascan Corp. and French* (1988), 49 D.L.R. (4th) 434 (Ont. C.A.); *Lang Michener et al. and Fabian et al.* (1987), 37 D.L.R. (4th) 685 (Ont. H.C.J.)]. In *Lang Michener et al. and Fabian et al.*, supra, the court observed that it is "... a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented...". [underlining added]

[52] A respondent's behaviour both in and out of the court has been held to be relevant. In *Canada (Attorney General) v. Mishra*, [1998] F.C.J. No. 562, T-617-98 (May 1, 1998) (F.C.T.D.), aff'd [2000] F.C.J. No. 1734, A-311-98 (October 24, 2000) (F.C.A.). Nadon J. placed emphasis on the fact that a similar order had been made declaring the respondent to be a vexatious litigant in Ontario.

**ANALYSIS**

[53] I think it important to state expressly that Ms. David does not in any way appear to be motivated by vindictiveness. She says, in her affidavit sworn in opposition to this proceeding, and I accept that "I have done the best I could to represent myself and my corporation and apologize for any delays I may have caused, it was not my intention. I had to struggle with the legal aspects of the case, after my lawyers gave up and I had run out of money".

[54] Ms. David continues to seek a venue in which to have an acquittal entered in the criminal proceedings which were stayed, and is convinced of her right to continue to litigate her obligation, if any, to pay the income tax and excise tax reflected as owing in the two certificates filed in this Court.

[55] Unfortunately, Ms. David does not accept that in view of what has gone before, she cannot obtain either vindication or acquittal in this Court.

[56] Her efforts in that regard, I find, are properly characterized as taking issues related to tax indebtedness and allegations of improper conduct on the part of Crown servants, rolling them together in subsequent proceedings, and then repeating and supplementing those issues even after they have been determined against Ms. David and her company.

[57] I have considered that some uncertainty may have arisen as a result of the fact that the March 21, 1996 reasons and order of the then Associate Chief Justice did not expressly reference the pending proceedings in GST-41-92 and ITA-8447-92. Indeed the Crown sought reconsideration of the order on that basis. However, the respondents appealed from that order, but then discontinued their appeal.

[58] Subsequent attacks on the certificates were not allowed by Justice Rothstein who refused to extend time for the bringing of the applications for judicial review and who dismissed motions brought by the respondents for summary judgment.

[59] Most telling, however, are the reasons of Justice MacKay issued May 1, 1998 in respect of the respondents' motion for joinder:

> 5. For the plaintiffs, Mrs. David submits that the claims of the Crown as set out in the two files initiated by filing of certificates of amounts due (files GST-41-92 and ITA-8447-92) are in essence the same claims as were the bases of the criminal proceedings in which the plaintiffs in Court file T-1436-92 did not have opportunity to fully present their defence, that the amounts claimed by the Crown in the certificate files are in error in any event. Moreover, it is the claims of the Crown, as well as the aborted criminal proceedings, that are said to have led to the plaintiffs' action in T-1436-92.
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> 6. Those submissions on behalf of the plaintiffs fail to take into account that assessments of tax under the Excise Tax Act, or of payments due on behalf of employees under the Income Tax Act, if not questioned by the party assessed and thereafter revised by the Minister, and here those steps did not occur, are ultimately recoverable by the Crown by filing of a certificate in this Court which certificate is then enforceable as a judgment of the Court. Here the assessments were not contested within the 90 day

limitation periods applicable under the respective statutes, a period that terminated long before the certificates were filed. Moreover, the validity of those certificates does not appear to have been contested for more than two years after the certificates were filed. In the case of the certificate in Court file GST-41-92 filed in November 1992 and amended in December 1992, the first steps by Mrs. David to contest the certificates appears from the file to have been initiated in August 1995. In the case of the certificate in Court file ITA-8447-92 filed in November 1992, the first step initiated by the plaintiffs, an application for an order for particulars, was made in August 1995. As I have noted, long before those first steps were initiated, indeed before the certificates were filed, the 90-day limitation period, fixed by statute, for questioning the assessments underlying the certificates, had expired.

7. On October 23, 1995 two motions were filed on behalf of the corporate plaintiff Olympia Interiors Ltd. with respect to each of the certificates filed in Court files GST-41-92 and ITA-8447-92, each seeking an order that the certificate be set aside. Those motions were ordered to be heard at a later date by orders dated November 16, 1995. Subsequently, they were heard by Associate Chief Justice Jerome, together with a motion by the plaintiffs in Court file T-1436-92 for an order striking out paragraph 56 of the Amended Statement of Defence. That paragraph refers to a possible set-off, if the plaintiffs succeed in their action, of amounts owing with respect to the corporate plaintiff's non-payment of taxes and failure to remit payroll deductions, plus interest and penalty. His Lordship found then, as his Reasons dated March 21, 1996 point out, that the plaintiffs' claim was not established, and that the Crown's paragraph 56 defence to a possible set-off was not res judicata because of the criminal proceedings, as the plaintiffs contended. Rather, as documents then filed by Mrs. David made clear, the criminal proceedings were stayed at the direction of counsel for the Attorney General of Canada and the "matter", i.e., criminal liability of the plaintiffs, was not disposed of by the Court which had heard evidence in the prosecution before the stay was ordered.

8. While those Reasons of the Associate Chief Justice make no specific reference to the plaintiffs' motions to set aside the certificates in files GST-41-92 and ITA-8447-92, implicitly, dismissal of the plaintiff corporation's motion to strike paragraph 56 of the Amended Statement of Defence accepts the continuing validity of the Crown's claims under the certificates in question.

9. Subsequently, the status of the certificates was implicitly supported by Orders issued on July 5, 1996 by the Associate Chief Justice, in response to motions filed October 25, 1995 on behalf of the Minister of National Revenue, one in each of files GST-41-92 and ITA-8447-92, directing Mary David, as an officer of Olympia Interiors Ltd. to attend a debtor's examination concerning the property of Olympia Interiors Ltd. and debts owed to it.

10. Further, in Court files T-723-96 and T-724-96 the plaintiffs in Court file T-1436-92 brought separate applications for judicial review,

> seeking certiorari, mandamus, quo warranto and declaratory relief in relation to the certificate filed in Court file ITA-8447-92 and that filed in Court file GST-41-92, respectively. Those two applications were heard together by Mr. Justice Rothstein who denied them by Orders rendered on May 30, 1996. The plaintiffs initiated appeals in relation to those two Orders of Rothstein J. but the appeals were not pursued and, upon motions of the Crown, the appeals were dismissed on July 28, 1997 (Court files A-458-96 and A-459-96).
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> Determination
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> 11. The purpose of the plaintiffs' application for joinder, in the application now before the Court, is essentially to raise again the question of the validity of the assessments, and of the certificates based upon them. I agree with counsel for the defendant that is not an appropriate purpose in light of the plaintiff corporation's failure to contest the underlying assessments within the times limited by statute. Further, in view of the previous decisions of this Court by the Associate Chief Justice and by Mr. Justice Rothstein, the validity of the certificates is not a matter that is open for further review in the trial of issues arising in the action in T-1436-92. Thus, there are no issues in Court files GST-41-92 and ITA-8447-92, relating to the validity of the certificate filed in each of those files, and thus no issues to be joined with those arising in the action by the plaintiffs in Court file T-1436-92. [underlining added]

[60] I respectfully agree with Justice MacKay's conclusion that there are no justiciable issues in files GST-41-92 and ITA-8447-92. See also: *Marcel Grand Cirque Inc. v. Canada (Minister of National Revenue)* (1995), 107 F.T.R. 18 (F.C.T.D.).

[61] In the face of Justice MacKay's reasons on the issue of joinder, and his subsequent judgment and reasons after the conclusion of the trial in T-1436-92, I am satisfied that the subsequent steps taken in this Court by the respondents commencing in August 2000, as described in these reasons constitute the persistent institution of vexatious proceedings.

[62] I conclude therefore that this is an appropriate case to grant the relief requested by the Crown. That relief will not preclude Ms. David or Olympia from commencing meritorious actions, but the Court will through the requirement of leave ensure that there are no further steps taken to pursue issues which have been conclusively decided against Ms. David or Olympia.

## COSTS

[63] The applicant sought the costs of this application on a solicitor and client scale.

[64] The Federal Court of Appeal has held that solicitor and client costs are exceptional and generally to be awarded only on the ground of misconduct connected with the litigation: *Apotex Inc. v. Canada (Minister of National Health and Welfare)* (2000), 9 C.P.R. (4th) 289 (F.C.A.). There has been no misconduct on the part of the respondents in this proceeding to attract an award of solicitor-and-client costs.

[65] As to costs on a lower scale, in view of the applicant's failure to comply with Rule 81, and the resulting confusion referred to earlier in these

reasons, in the exercise of my discretion I consider this to be an appropriate case for each party to bear their own costs.

## ORDER

**[66] IT IS HEREBY ORDERED THAT:**

1. No further proceedings may be instituted by Olympia Interiors Ltd. or Mary David in this Court, except by leave of the Court.

2. Proceedings previously instituted in this Court by Olympia Interiors Ltd. or Mary David may not be continued, except by leave of the Court.

3. No costs are awarded to either party.

"Eleanor R. Dawson"

Judge