

Federal Court of Canada
Trial Division



Section de première instance de
la Cour fédérale du Canada

2-20-97

Court File No. T-1436-92

BETWEEN:

OLYMPIA INTERIORS LTD. AND MARY DAVID

Plaintiffs

- and -

HER MAJESTY THE QUEEN

Defendant

AND

Court File No. GST-41-92

In the matter of an assessment by the Minister of
National Revenue under the *Excise Tax Act* against

OLYMPIA INTERIORS LTD.,
c/o Mary David
11 Albion Hills Drive
Palgrave, Ontario
L0N 1P0

AND

Court File No. ITA-8447-92

IN THE MATTER OF THE *Income Tax Act*

AND IN THE MATTER OF an assessment or assessments by the Minister
of National Revenue under one or more of the *Income Tax Act, Canada*
Pension Plan, Unemployment Insurance Act

against OLYMPIA INTERIORS LTD.
11 Albion Hills Drive
of Palgrave
in the Province of Ontario

REASONS FOR ORDERS

MacKAY J.:

These reasons concern orders issued, after considering submissions by Mary David, a plaintiff in the action in Court file T-1436-92, who appeared on her own behalf and as representative of the corporate plaintiff, Olympia Interiors Ltd. (Hereinafter, Mary David and Olympia Interiors Ltd. are sometimes referred to as the "plaintiffs").

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The submissions in this matter were made in support of applications by the plaintiffs, pursuant to Rule 355 of the *Federal Court Rules*, for the Court to issue show cause orders. The orders sought would have directed that Mr. McPhadden, counsel of record representing Her Majesty the Queen, and Ms. Boucher, as instructing counsel from the office of the Department of Justice to counsel of record in these proceedings, should appear and show cause why each of them should not be sentenced for contempt of court.

At the hearing before me, both of the counsel against whom the orders were sought, were represented by counsel who made representations in response to those of Ms. David, who is not a lawyer. For both counsel cited by plaintiffs' motions, submissions were made that the plaintiffs' applications both be dismissed with costs.

For the record, I note that the plaintiffs' motion directed against counsel of record, Mr. McPhadden, was received by the Court on August 21, 1996, and was made in relation to Court file ITA-8447-92. It was ordered to be filed at the hearing of this matter on October 23, 1996. A Memorandum of the Plaintiffs in support of that motion, received by the Court on October 18, 1996, and directed to be filed at the hearings, is identified as being in relation to Court file numbers T-1436-96, GST-41-92 and ITA-8447-92, and that memorandum includes the styles of cause of the three files. An affidavit of Mary David in support of the motion, sworn August 21, 1996, is included in a bound collection with that memorandum but the affidavit bears only Court file ITA-8447-92.

The plaintiffs' motion for a show cause order directed to Ms. Boucher, instructing counsel for the Attorney General, is dated

September 18, 1996; it was received by the Court and later was directed to be filed at the hearing on October 23. It bears Court file numbers T-1436-92 and GST-41-92. It is supported by a Memorandum of the Plaintiffs received October 18 and also directed to be filed at the hearing, and that memorandum carries the style of cause and the Court file number T-1436-92 only. Appended to that Memorandum is a further affidavit of Mary David, sworn, October 18, 1996, which bears all three Court file numbers and styles of cause.

Because all three Court files are interrelated, and with a view to avoiding any confusion, I direct that a copy of these Reasons, relating to both of the plaintiffs' motions, be filed on each of the three Court files. Similarly, the Order accompanying these Reasons is directed to be filed on each of these files.

Background

The three Court files, for the proceedings which include these motions for show cause orders, originated after assessments for income tax and for excise taxes were made against Olympia Interiors Ltd. relating to taxation years in the 1980's. Thereafter, that company and perhaps Mary David were declared bankrupt; at one time criminal proceedings were initiated, by information laid, I believe, against both of the plaintiffs. Subsequently, in June 1990 one or more charges were withdrawn and all other criminal proceedings were stayed. At one time, as a result of the criminal charges and the outstanding tax claims of the Crown, Mary David initiated other proceedings in the Ontario Courts claiming, in part at least, damages against Crown servants. Those proceedings remain outstanding, if dormant, at this stage.

Meanwhile, on behalf of the Minister of National Revenue, the process for recovery of taxes assessed as unpaid was continuing, and is said by the Crown to have been in accord with the statutory powers of the Minister. Ultimately, in 1992 certificates were filed in this Court, in accord with the statutory provisions for recovery of taxes assessed but which remain unpaid. Separate proceedings thus were initiated in relation to income taxes assessed as owing, in Court file ITA-8447-92, and in relation to excise taxes assessed as owing, in Court file GST-41-92. While seeking to contest those assessments by applications in each of those files, Mary David on behalf of Olympia Interiors Ltd., and for herself, as plaintiffs, also initiated proceedings in Court file T-1436-92 against Her Majesty the Queen, for relief in relation to the Crown's effort to recover taxes said to be outstanding and for other relief. By an earlier order of the Court Mary David was authorized to act on behalf of the corporate plaintiff, now bankrupt, of which she was at relevant times and is now the principal shareholder and director.

When these motions for show cause orders came on for hearing on October 23, 1996, they were among a number of applications outstanding, initiated by both parties. The others were dealt with following hearings on October 23 and November 19, and these Reasons deal only with the two motions for show cause orders. The grounds for each motion differ somewhat.

The motion in relation to counsel of record

The motion for a show cause hearing against Mr. McPhadden is set out in a document entitled "Application for a Show Cause Order, Rule 355 of the *Federal Court Rules*". It gives notice of a motion to be made on September 9, 1996, but ultimately the matter was set over to be heard with other outstanding matters on the three files in which one or both of the

parties had initiated procedural steps. The application, was received by the Court on August 21, 1996 and filed by my direction at the hearing. Two affidavits of Mary David are related to this motion, one sworn on August 21, 1996 and the other, contained in a bound Memorandum of the Plaintiffs, in support of the show cause motion, sworn October 18, 1996, was received by the Court that day and directed to be filed at the hearing.

Only the first of those affidavits describes the factual basis on which the motion is based, and it appends certain documents or excerpts as exhibits. The second affidavit simply appends true copies of some of the same documents and a number of others as exhibits. The first of the affidavits describes the facts as follows:

1. On July 10, 1996 His Lordship Justice J. A. Jerome of the Federal Court of Canada issued an Order pursuant to Rule 2200 of the Federal Court Rules. Attached hereto and marked exhibit "A" to this my affidavit is a true copy of this Order.
2. On August 8, 1996 Bryan C. McPhadden served a Direction to Attend on me pursuant to the Order issued by His Lordship Justice Jerome. Attached hereto and marked exhibit "B" to this my affidavit is a true copy of the Direction to attend.
3. Difficulties arose during the judgment debtor examination. Mr. McPhadden wanted to re-examine me on matters already covered in previous examinations on this file and on matters dating back to 1984, contrary to Rule 2200. Attached hereto and marked exhibit "C" to this my affidavit are true copies of pgs. 48 & 49 of the examination.
4. Counsel McPhadden asked that I again supply all the documentation which was seized by the Government and which they held for 50 months and have made copies of. Also, during discoveries on September 20, 1995 in this matter, all additional corporate documents were shipped to the Department of Justice, copies were made and the boxes were then returned to me. These documents are listed in the Affidavit of documents. Attached hereto and marked exhibit "D" to this my affidavit are true copies of the examinations.
5. At 6 minutes after 12:00 I left the examination. Attached hereto and marked exhibit "E" to this my affidavit are true copie [sic] of transcripts.
6. Mr. McPhadden followed me into the elevator when I was leaving the offices of Alfred Devenport, Official Examiner. We were alone in the elevator. Mr. McPhadden positioned himself face to face with me and without saying a word kept staring at me until the elevator reached the ground floor.
7. I experienced very rapid heartbeat and proceeded to the Federal Court Offices in an attempt to reach a Judge of the Federal Court and lay a complaint against Mr. McPhadden. When I reached the 8th floor of 330 University, I had to be helped by the staff, I was close to a heart attack. No judges were available.

8. The demands made on me by Mr. McPhadden and the actions taken by him are in violation of my Charter Rights. I have supplied the Government with schedules of documents listed by number and by date and require to know the relevance and foundation of any further demands.

9. On August 19, 1996, Mr. Alfred C. Devenport conducted a Judgment Debtor Examination of me in the matter herein. I have filed same in the Federal Court. Mr. Devenport had been asked by Ms. Bonnie Boucher and Mr. Bryan McPhadden to conduct such an examination on September 20, 1995.

The grounds for the motion are set out in the plaintiffs' application and their Memorandum, and the evidence in support of them, in the affidavit of Mary David, is that set out above. My conclusions about those grounds as alleged and argued can be summarized under the four headings which follow, i.e., abuse of process; non-compliance with the Order for judgment debtor examination; needlessly abuse, hector and harass, or needlessly inconvenience a witness; and abuse of the plaintiffs' *Charter* rights.

Abuse of process

The plaintiffs apparently perceive, as I understand from their memorandum dated October 18, 1996, that Mr. McPhadden, as solicitor for the Minister "is aware that the Certificate of Default GST-41-92 represents the alleged criminal charges, for which the Plaintiffs were prosecuted in the Ontario Court Criminal Division for 11 days and against which the presiding Judge entered a final stay under the Constitution Act of Canada". From this I infer, the plaintiffs conceive that proceedings under file GST-41-92 are an abuse of process, as if the stay of criminal proceedings, which might have led to penalties upon conviction for criminal activities arising in relation to tax claims, would automatically result in the wiping from the record the Crown's right to proceed to recover taxes claimed.

The facts supporting such an inference are not set out in any evidence, i.e. a sworn affidavit or document before the Court. The conclusion underlying the inference, if facts were established to support it, that is, that by staying criminal proceedings the Court granting the stay determined the tax liability of the plaintiffs, or that the Crown by seeking or supporting a stay of criminal proceedings, was *ipso facto* foregoing its right to recover outstanding taxes, are legal conclusions that would require argument and a finding by the Court on the basis of facts properly established. No facts are in evidence to support the argument and no finding has been made by any court in support of the plaintiffs' conclusion.

There is no basis established for concluding that proceedings by the Minister to recover outstanding excise taxes claimed constitute an abuse of process. Even if it were so established, that would not provide a basis for a show cause order directed against counsel for the Minister, as I note in general discussion of contempt proceedings at the conclusion of these Reasons.

Non-compliance with Order for Judgment Debtor Examination

So far as facts are in evidence before the Court about this failure alleged of Mr. McPhadden, those are set out in paragraphs 1 to 5 of the affidavit of Mary David quoted earlier in these reasons, and in supporting documents related to those paragraphs. As I understand this aspect of the plaintiffs' claims it concerns an examination of Mary David as a judgment debtor, ordered by the Honourable Associate Chief Justice Jerome in July 1996 by orders made in each of files GST-41-92 and ITA-8447-92, in relation to the claims of the Crown respectively, in regard to excise taxes and income taxes certified as outstanding and unpaid. The plaintiffs' perception appears to be that questions in such an examination are to be directed to the current status of financial assets of, and debts owed to, the party examined. As the terms of Rule 2200(1)(a) and (b) of the *Federal Court Rules* provide, and the Orders of Jerome A.C.J. in this case reflect and direct, examination may be directed not only to current assets and debts, but to all assets and debts of the party examined since incurring the obligation that is the basis of the judgment or order. Thus, the terms of the orders here issued include provision for Mary David to attend and be examined on the following questions

- a) as to all the property that Olympia Interiors Ltd. possesses or has possessed since incurring the obligation that is the basis of the Certificate filed in this Court, and
- b) without limiting the generality of paragraph (a), whether and, if so, what debts are owing to the judgment debtor.

Excerpts from transcripts of the examination presented in relation to this complaint indicate questions asked by Mr. McPhadden concerning the financial status of the corporate plaintiff, and his perception that the corporation incurred a substantial loss, in 1984. That year is one for which claims for taxes unpaid are outstanding. In my opinion, questions related to the financial status of the company at that time are within the scope of the Court's rules and of the orders issued in this case. If Mary David takes exception to questions asked at the examination ordered she may object and decline to answer those, subject to any subsequent order of the Court that might require the questions to be answered. She does not comply with the orders to be examined by deciding not to answer and, without reference to the examiner or to the Court, by leaving the examination.

In my opinion, there is no basis established for concluding that there was any failure on the part of Mr. McPhadden to comply with an order of the Court, and this allegation, not established by evidence, provides no basis for a show cause order to be issued.

Needlessly abuse, hector and harass a witness; and
needlessly inconvenience a witness

The factual basis for these allegations is set out in paragraphs 4 and 8, and possibly 9, of the affidavit of Mary David sworn August 21, 1996. Argument by Mary David at the hearing and in the written memorandum of the plaintiffs urged that the plaintiffs have previously been thoroughly examined in these three files, and that the Crown had

already copied all of the plaintiffs' documents, yet Mr. McPhadden required her to bring boxes and boxes of documents to the examination. I presume that is the examination commenced, but not yet completed, under the Order of Jerome, A.C.J. That task was said to be physically difficult for her and it could have been alleviated had notice been given in advance of the examination of the documents expected to be required for the questions to be asked.

I note that the plaintiffs appear to misunderstand the nature of an examination, arranged to be before a designated examiner. As I understand it, Ms. David was surprised that at the examination questions were asked by Mr. McPhadden representing the Crown, and not by the examiner designated. But the examiner is a hearing officer and in such an examination it is the regular process for counsel of the judgment creditor, in this case Mr. McPhadden for the Crown, to ask appropriate questions for the judgment creditor, who knows the case, subject only to the questions being disallowed by the hearing officer, i.e., the examiner before whom the examination is conducted, or later by Court order.

Again, in my opinion no basis is here established for an order to show cause directed to Mr. McPhadden for his questioning of the witness at the examination in August 1996.

I note for the record that following the hearing of these show cause motions on October 23, 1996, completion of the examination of Mary David was arranged, this was to be accomplished in premises of the Court where the documents of the plaintiffs might be retained and readily available until completion of the examination.

Abuse of the Plaintiffs' Charter Rights

The factual basis of the plaintiffs' claim in this respect is set out in paragraphs 6, 7 and 8 of the affidavit of Mary David sworn August 21, 1996. The alleged abuse of *Charter* rights is said to concern two matters. First, is "the demands made. . .by Mr. McPhadden" which can only relate to questions asked by him and to the requests to produce documents, which I have already indicated provide no basis for finding the questions or requests to be abusive or a basis for a show cause order. Second, is the action alleged to have been taken by Mr. McPhadden in following Mary David to and riding with her in an elevator. In the circumstances, Ms. David, who had walked away from the examination without its being completed, may have considered she was threatened, but there is no evidence before me that there was an intention to create that perception. Even if that were established, the conduct alleged might be subject to discipline or penalty by other processes. It would not establish any abuse of *Charter* rights that would constitute a basis for a show cause order.

The motion in relation to instructing counsel

As I understand it, the principle allegation concerning Ms. Boucher, now instructing counsel, is that she was counsel of record earlier

in this action and perhaps in other proceedings in the Ontario Courts, and that she must have been aware that criminal proceedings against the plaintiffs had been stayed when the certificate of outstanding excise taxes unpaid was filed in this Court in file GST-41-92 and similarly in relation to income taxes in file ITA-8447-92. In the plaintiffs' view, the proceedings commenced by filing certificates are wrong, representing the same matter as the criminal proceedings. While that may be Mary David's opinion, there is no basis established yet for that conclusion, indeed a primary purpose of the action against Her Majesty in Court file T-1436-92 is to establish that.

Other allegations in regard to Ms. Boucher concern an affidavit filed in Ontario proceedings, an affidavit said to have been sworn and presented when she was counsel of record in those proceedings some years ago. The facts supporting these allegations are not established by any affidavit evidence. Even if they were, they would provide no basis for finding that a show cause order is warranted against Ms. Boucher. There is no evidence of any action or failure to act by her which would establish a basis for a show cause order concerning alleged contempt of this Court on her part.

The nature of contempt proceedings

Having found that the plaintiffs have not established by their allegations any basis for the Court to issue show cause orders to require justification of actions that might otherwise be deemed to be contempt, there is no necessity to say more.

Yet since these proceedings are not yet complete and Mary David appears not to fully understand the nature of contempt proceedings, I propose to discuss that briefly. Rule 355(1) provides:

Anyone is guilty of contempt of court who disobeys any process or order of the Court or a judge thereof, or who acts in such a way as to interfere with

the orderly administration of justice, or to impair the authority or dignity of the Court.

In this case the closest circumstance alleged to be within Rule 355, is the allegation that Mr. McPhadden did not comply with the order concerning the examination of the plaintiff corporation as a judgment debtor. But that order was directed not to him or to the Crown, but to Mary David, and Mr. McPhadden did not disobey that order. There is no evidence of any other activity which would warrant a conclusion that Mr. McPhadden or Ms. Boucher acted in any way that would interfere with the orderly administration of justice, or to impair the authority or dignity of this Court. For any such claim there must be activity alleged which clearly appears to be contrary in some specific manner to this Court's responsibility for the administration of justice, and none is here suggested.

Contempt of court is a most serious process. Proceedings in relation to contempt are quasi-criminal in the sense that if the serious penalties of a fine or imprisonment are to be imposed, the person ultimately found guilty of contempt must have had fair notice of the facts on which he or she is charged and must have been found beyond a reasonable doubt to have knowingly committed the offence. A definition of the offence will usually be with reference to the failure to comply with a particular order of the court or of a judge; otherwise the particular offence may be difficult to establish.

Abuse of the process of the court, by using its processes for unwarranted ends, would not ordinarily constitute contempt of court by a party. Abuse of process may be dealt with by the striking out of pleadings or dismissal of actions or motions, and it may be "penalized" by awards of costs. Alleged abuse of a witness, or alleged violation of a *Charter* right, cannot

constitute contempt of court unless it also violates an order of the court or in some particular manner also interferes with the orderly administration of justice.

Procedural steps by a party in an action are not, as the claims of Mary David in these applications would appear to assume they are, considered as the personal responsibility of counsel who represents the party in question. Thus, for example, the filing of a certificate of excise taxes claimed to be outstanding in Court file GST-41-92 is not an action for which counsel is personally responsible. It is an action which counsel takes only on instructions of and for the party he or she represents; in this case it was done for the Minister, or the Crown. A party may be responsible for the action. It would be extraordinary for counsel to be held in contempt for actions undertaken for and on instructions of the party represented. In the same way, it would be unusual for this Court to find Mary David personally responsible for action undertaken by her in these proceedings on behalf of the corporate plaintiff Olympia Interiors, so long as she is permitted to represent the corporate plaintiff, unless that action contravened a specific court order.

Where there is a basis for contempt proceedings within Rule 355, the motion and supporting affidavit for a show cause order must be sufficiently precise about the violation of a court order, or about other alleged interference with the orderly administration of justice. That permits the respondent to the motion to know the basis of the wrong alleged and to respond, and it permits the Court to determine whether there is a *prima facie* case that can be described in adequate detail to provide fair notice and an opportunity to answer by the respondent when the order to show cause is returned for hearing before the court. The motions and affidavits before the Court in these proceedings do not precisely describe activity that is contrary

to an Order of or contrary to the orderly administration of justice in, this Court.

Conclusions

On the basis of the motions and affidavits in support, I find there is no case made out for the issue of a show cause order directing either Mr. McPhadden or Ms. Boucher to answer why he or she should not be sentenced for contempt of this Court. In each case, in my opinion, the motion was misconceived, for no factual evidence establishes that either of those persons, as counsel involved in proceedings in relation to these three Court files, committed any act that was in disobedience of any process or order of this Court or a judge, or that constituted any interference with this Court's responsibility for the administration of justice or any impairment of its authority or dignity.

Counsel for the solicitors against whom show cause orders were sought, urged at the hearing that the Court's file be sealed to protect the names and reputations of counsel whom he represented. In my opinion, that would be an extraordinary step and I see no real basis for that. Indeed, there seems to me to be merit in keeping this matter within the context of the open file of these proceedings, particularly since I find no basis to issue the orders sought.

At the hearing counsel for the solicitors against whom show cause orders were sought also urged that dismissal of both of the plaintiffs' motions be ordered, with costs in each case awarded against the plaintiffs, payable forthwith, in an amount of \$1,000.00, plus disbursements, in each case. At a later hearing, on November 19, 1996 while this matter was still on reserve, counsel for Her Majesty the Queen suggested that costs in relation

to the applications for show cause orders might be addressed after decision was rendered on the merits of the applications. I propose to deal with costs on the basis of submissions made on October 23 when the applications were heard.

My conclusion, in dismissing the plaintiffs' motions, is that I am prepared to award costs against the plaintiffs in the case of each of the two motions in an amount of \$500.00 plus disbursements. The amount is less than asked since the two motions were argued at the same time, as one, with brief reference to the differences in factual allegations. Those costs now directed shall be paid in any event of the cause. I do not direct they be paid forthwith at this stage of proceedings. In light of arrangements, ordered following further hearing of other outstanding motions, for leave of the Court to be required for formal filing of further motions or applications of the plaintiffs, and for discoveries and examination of the plaintiff corporation as a judgment debtor to proceed, these arrangements for costs, in relation to the plaintiffs' motions for show cause orders, seem to me to be appropriate, with a view to facilitating trial on an expedited basis, if that be possible.

W. Andrew MacKay

JUDGE

OTTAWA, Ontario
January 29, 1997.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: T-1436-92, GST-41-92, ITA-8447-92
STYLE OF CAUSE: OLYMPIA INTERIORS LTD. AND MARY DAVID
v. HER MAJESTY THE QUEEN
PLACE OF HEARING: TORONTO, ONTARIO
DATE OF HEARING: OCTOBER 23, 1996
REASONS FOR ORDERS OF THE HONOURABLE MR. JUSTICE MACKAY
DATED: JANUARY 29, 1997

APPEARANCES:

MARY DAVID	PLAINTIFF ON HER OWN BEHALF AND ON BEHALF OF OLYMPIA INTERIORS LTD.
BRYAN MCPHADDEN BONNIE BOUCHER	FOR DEFENDANT

SOLICITORS OF RECORD:

BRYAN MCPHADDEN TORONTO, ONTARIO	FOR DEFENDANT
GEORGE THOMSON DEPUTY ATTORNER GENERAL OF CANADA	FOR DEFENDANT

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