

CORAM: STONE J.A.
STRAYER J.A.
DÉCARY J.A.

BETWEEN:

EMILE MARGUERITA MARCUS MENNES

Appellant

AND:

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa (Ontario) on Tuesday, September 9, 1997.

Judgment rendered from the Bench on September 9, 1997.

**REASONS FOR JUDGMENT
OF THE COURT DELIVERED BY:**

DÉCARY J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa (Ontario)
on Tuesday, September 9, 1997.)

DÉCARY J.A.

This appeal is against two Orders made by the Motions Judge on April 29, 1992 in Court File No. T-289-91. In the first Order, the Motions Judge struck out the statement of claim and he also dismissed an application brought against the Deputy Minister of Justice for contempt of court. In the second Order, he prohibited the appellant from instituting any further proceedings in this Court without first obtaining the express consent of a judge.

The respondent readily concedes that the two Orders are susceptible to attack. The problem with the first Order is that there was no application before the Motions Judge to strike out the pleadings and that the application for contempt of court was not

before him. The problem with the second Order is that it could presumably only be justified under section 40 of the *Federal Court Act*¹ but there was no application pursuant to that section and the consent of the Attorney General of Canada had not been provided.

We have therefore no other choice but to allow the appeal and quash the two Orders for having been made improperly.

What was before the Motions Judge was a motion under Rule 1733 by the appellant seeking to impeach a decision of the Associate Chief Justice made on July 24, 1991. The Motions Judge did not deal with that motion. He could not in any event have dealt with it since there was simply no decision, the Associate Chief Justice having never signed a formal Order in Court File No. T-289-91, the action in question here. What the Motions Judge ought to have done is to have directed that the matter be returned to the Associate Chief Justice so that a formal Order might be taken out before the application under Rule 1733 proceeded. This is precisely the direction which we have chosen to give.

Counsel for the respondent has invited the Court in his Memorandum of Fact and Law to impose a stay pursuant to paragraph 50(1)(b) of the *Federal Court Act*. Counsel argues that the appellant at the end of the day does not have a viable cause of action and that a stay of proceedings would best serve the interests of justice.

¹L.R.C. 1985, c. F-7, as amended. Section 40 of the *Federal Court Act* reads as follows:

- 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 of that a proceeding previously instituted by the person in the Court not be continued, except by leave of the Court.
- (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).

[...]

Assuming, for the sake of discussion, that a stay such as the one requested by the respondent can be ordered under paragraph 50(1)(b) of the *Federal Court Act* without a formal application, we would decline to order one, if only for the reasons that the very appeal before us concerns orders which the Motions Judge was not in a position to issue and that the very application which was before the Motions Judge was never dealt with. The appellant, at this stage, can hardly be blamed for what has happened. It seems to us that if a stay order is warranted under paragraph 50(1)(b) of the *Federal Court Act*, or if a vexatious proceedings order is warranted under section 40, such order should be applied for in the Trial Division once a formal Order is signed by the Associate Chief Justice.

The appeal will therefore be allowed with costs fixed at \$100.00 payable forthwith, the Orders of the Motions Judge dated April 29, 1992 will be set aside and the matter will be referred back to the Associate Chief Justice for signature of an Order *nunc pro tunc* in Court File No. T-289-91 implementing his reasons dated July 24, 1991, and to the Trial Division for disposition of the appellant's motion under Rule 1733.

"Robert Décary"
J.A.

FEDERAL COURT OF APPEAL

A-566-92

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