Date: 20100706

Docket: A-216-09

Citation: 2010 FCA 176

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

INGREDIA S.A.
and
LES PRODUITS LAITIERS ADVIDIA INC.

Appellants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
THE CANADA CUSTOMS AND REVENUE AGENCY
THE CANADA BORDER SERVICES AGENCY

Respondents

Heard at Montreal, Quebec, on May 20, 2010.

Judgment delivered at Ottawa, Ontario, on July 6, 2010.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from the Judgment of Harrington J. of the Federal Court, 2009 FC 389, dated April 24, 2009, which allowed the respondents' motion for summary judgment and, as a result, dismissed the appellants' statement of claim. More particularly, Harrington J. (the "Judge") concluded that the appellants' action was subject to the provisions of subsection 106(1) of the *Customs Act*, 1985 (2nd Suppl.), c. 1, C-52.6 (the "Act"), and that it had not been commenced, as

required by the subsection, within three months "after the time when the cause of action or the subject-matter of the proceeding arose".

[2] A brief summary of the facts will be helpful to place this appeal in its proper context.

[3] The appellant Ingredia S.A. ("Ingredia") is a French producer of dairy ingredients, such as milk protein isolates. The other appellant Les produits laitiers Advidia Inc. ("Advidia") is a Quebec subsidiary of Ingredia, responsible for marketing Ingredia's products in Canada. Cemma International Inc. ("Cemma") is a Quebec corporation and acted as an international trade consultant to and as an agent for the appellants.

[4] At the relevant time, the respondent, the Canada Customs and Revenue Agency ("CCRA") was the government agency responsible for administering and enforcing the Act and the *Customs Tariff*. In the course of its duties, the CCRA created the National Customs Ruling ("NCR") Program, an administrative program under which the CCRA provides guidance on the tariff classification an importer should use when importing goods to Canada.

[5] On October 25, 1999, Cemma, acting on behalf of Group Lactel, a potential importer of milk protein isolates produced by Ingredia and imported by Advidia , requested a NCR to classify PROMILK 872A and PROMILK 872B (the "milk products") under tariff heading 35.04.

[6] On December 1, 1999, the CCRA issued a NCR (the "1999 NCR") to Cemma determining that the milk products were milk protein isolates and classified them under tariff item 3502.20.00.00, subject to a duty of 6.5%.

[7] Relying on the prospect of a 6.5% rate of duty, the appellants proceeded with their plans to market PROMILK 872B in Canada.

[8] On August 10, 2001, the CCRA, at the request of the appellants, issued a revised NCR (the "2001 NCR"), changing the beneficiary of the NCR to Agropur Coopérative and Advidia, in effect issuing a new NCR to Agropur.

[9] On April 26, 2003, the respondents, through one of their officers, Mr. André Blais, a customs compliance and verification officer, revoked the benefits of the 1999 and 2001 NCRs after conducting a compliance verification. Mr. Blais issued a 2003 NCR which classified PROMILK 872B under tariff heading 04.04, which imposed a duty of 270%.

[10] The appellants complained that the revocation was wrong and pointed out that ALAPRO 4900, a competing product to PROMILK 872B, was classified under tariff heading 35.04 and subject to a duty of 6.5%.

[11] Following information received from CBSA officers, Advidia imported a quantity of PROMILK 872B on 30 June 2003. This importation was classified by the CCRA under tariff

heading 04.04, in accordance with Mr. Blais' conclusions. Advidia then appealed the tariff classification of PROMILK 872B to the Canadian International Trade Tribunal ("CITT")..

[12] On March 8, 2005, the CITT granted the appeal and determined that PROMILK 872B should be classified under tariff heading 35.04.

[13] The Commissioner of the CCRA appealed the CITT's decision to this Court and, on January 31, 2006, the Commissioner's appeal was dismissed.

[14] On January 24, 2006 – one week prior this Court's decision dismissing the Commissioner's appeal, more than 16 months after the CITT hearing and nearly three years after the issuance of the 2003 NCR – the appellants commenced an action in damages against the Crown by filing a Statement of Claim pursuant to section 17 of the *Federal Courts Act*.

[15] On November 12, 2008, the respondents filed a notice of motion for summary judgment, seeking the dismissal of the appellants' action on the grounds that it was statute-barred pursuant to subsection 106(1) of the Act and that it otherwise raised no genuine issue for trial.

[16] On April 24, 2009, the Judge granted the respondents' motion and dismissed the appellants' action. Thus, the present appeal.

THE FEDERAL COURT'S DECISION

[17] The Judge began by discussing the legal basis of the Crown's liability and pointed out, at paragraph 16 of his Reasons, that "the vicarious liability of the Crown has to be grounded in s. 3(a)(i) [of the *Crown Liability and Proceedings Act*], i.e. damage caused by the fault of one of her servants."

[18] He then summarized, at paragraph 17, the allegations made by the appellants in their Statement of Claim against the Crown. He wrote as follows:

> [17] The plaintiffs allege a cornucopia of faults on the part of Crown servants, namely Customs officials. To name but some: the NCR was changed in 2003 without regard to the adopted guidelines or legislative requirements and in an exercise of bad faith; the decision was made without regard to procedural fairness and the right to be heard; discrimination in that a product from New Zealand, said to be virtually identical, was allowed to be imported under a different tariff to the benefit of the plaintiffs' commercial competitors and to their detriment; undue consideration was given to the position of the Dairy Farmers of Canada who were opposed to the first classification of PROMILK 872B (the Dairy Farmers were given intervener status before the CITT and the Federal Court of Appeal) and improper consideration of the position taken by the United States Customs Service.
>
> [Emphasis added]

[19] Then, at paragraphs 18 through 20, the Judge set out the Crown's grounds of defence. More particularly, he explained the Crown's position in the following terms:

> [19] Finally, the claim is statute-barred under section 106 of the Customs Act which provides a three-month limitation for actions against those for whom the Crown is vicariously liable. It is further asserted that under sections 10 and 24 of the Crown Liability and Proceedings Act, the Crown is not liable unless its servant would have been liable, and that it may raise any defence that would have been available in an action against that person, including time-bar.

> [20] The Statement of Claim was filed 24 January 2006. According to the Crown, the cause of action would have accrued before 24 October 2003.

[20] After discussing the principles applicable to summary judgments, the Judge turned to the time-bar issue. First, he reproduced subsection 39(1) of the *Federal Courts Act*, R.S. 1985, c. F-7, and section 106 of the Act. This led him to opine that if the relevant time-bar provision could be found in a specific federal statute, that was the end of the inquiry. If not, a determination of whether the cause of action had arisen in a province had to be made. If the cause of action had not arisen in a province, then the limitation period was six years. He then added that if the cause of action had arisen in the province of Quebec which, in his view, was the province in which the appellants' cause of action had arisen, the applicable time-bar would be three years pursuant to article 2925 of the *Civil Code of Quebec*. He concluded that part of his reasoning by saying that if section 106 of the Act did not apply, the appellants' claim was not time-barred. At paragraph 34 of his Reasons, he then stated that the foregoing gave rise to three issues:

> 34. … This gives rise to three issues:
> a) If this action had been instituted against the officers who misconstrued the Customs tariff, could they have availed themselves of the three-month limitation?
> b) If so, may the Crown likewise avail itself of the limitation?
> c) If so, when did the three months begin to run?

[21] The Judge then turned to the first of these issues, i.e. whether the three-month limitation period found in subsection 106(1) could be invoked by servants of the Crown.

[22] He began by addressing the appellants' argument that the application of section 106 was limited to acts posed by officers in the performance of duties found in Part VI of the Act, entitled Enforcement, and that consequently since the Crown's liability in the present matter arose from vicarious liability by reason of the negligent determination of the applicable tariff item under Part III of the Act, the negligent officers would have been unable to invoke, as a defence, section 106, found in Part VI of the Act.

[23] The Judge dismissed this argument, finding that section 106 was not limited to acts posed by officers in the performance of their duties under Part VI. Rather, he opined that subsection 106(1) was applicable to "anything done in the performance of his duties under this or any other Act of Parliament …" He concluded on this point by stating, at paragraph 39, that "I do not read section 106 as not applying to potential liability for negligently applying the wrong tariff item".

[24] The Judge then dealt with the second issue, i.e. whether subsection 106(1) could be invoked by the Crown. After reviewing the relevant provisions of the *Crown Liability and Proceedings Act*, R.S. 1985, c. C-50 (the "CLPA"), and the relevant case law, the Judge concluded that the defence of time-bar was available to the Crown.

[25] The Judge then turned to the question of when the three-month limitation period, found in subsection 106(1), started to run. He began his discussion at paragraph 44 with the following remarks:

> [44] The next inquiry is when the three-month period began to run. For the purposes of this case, it does not matter whether time began to run from the amended NCR or from the

> imposition of the wrong tariff. In either case the Statement of Claim would have been more than two years out of time when filed. …

[26] The Judge then dealt with the appellants' submission that one of the three elements of their claim, i.e. damages, was ongoing and that it could not be quantified prior to January 24, 2006, when they commenced their action in the Federal Court. The Judge dismissed this argument and stated at paragraph 45:

> [45] …the plaintiffs were well aware that they had suffered what they consider to be damages and had made detailed calculations in that regard long before filing suit. The damages were unliquidated and would only be determined at trial.

[27] The Judge also dealt with the appellants' argument that they were unaware that they had a cause of action until this Court dismissed the respondents' appeal from the CITT's decision and, consequently, the filing of their Statement of Claim on January 24, 2006, was premature. The Judge dismissed this argument, at paragraph 46 of his Reasons, in the following terms:

> [46] … While it may be that their chances of success in this action would have been nil had the Court of Appeal not affirmed the CITT, that process does not provide an excuse for not instituting action. Had the plaintiffs continued to import, they would have had to go through the review process on each importation, although administratively the process on those subsequent importations may well have been stayed.

ANALYSIS

[28] In my view, the Judge was correct in holding that subsection 106(1) of the Customs Act was the applicable time-bar provision and, hence, that the appellants were bound to commence their

action against the respondents within three months "after the time when the cause of action or the subject-matter of the proceeding arose".

[29] On the evidence before us, I am satisfied that all facts relevant to the commencement of the appellants' action were known to them more than three months prior to January 24, 2006. Hence, the appellants' cause of action was not commenced within the delay set out at in subsection 106(1) of the Act. I have come to this view for the following reasons.

[30] I begin my analysis by reproducing the relevant provisions of the Act, the CLPA and the *Federal Courts Act*:

Customs Act	**Loi sur les accises**
2. (1) "officer" means a person employed in the administration or enforcement of this Act, the Customs Tariff or the Special Import Measures Act and includes any member of the Royal Canadian Mounted Police; …	**2.** (1) « agent » ou « agent des douanes » Toute personne affectée à l'exécution ou au contrôle d'application de la présente loi, du Tarif des douanes ou de la Loi sur les mesures spéciales d'importation; la présente définition s'applique aux membres de la Gendarmerie royale du Canada. …
106. (1) No action or judicial proceeding shall be commenced against an officer for anything done in the performance of his duties under this or any other Act of Parliament or a person called on to assist an officer in the performance of such duties more than three months after the time when the cause of action or the subject-matter of the proceeding arose. (2) No action or judicial proceeding shall be commenced against the Crown, an	**106.** (1) Les actions contre l'agent, pour tout acte accompli dans l'exercice des fonctions que lui confère la présente loi ou toute autre loi fédérale, ou contre une personne requise de l'assister dans l'exercice de ces fonctions, se prescrivent par trois mois à compter du fait générateur du litige. (2) Les actions en recouvrement de biens saisis, retenus ou placés sous garde ou en dépôt conformément à la présente loi,

officer or any person in possession of goods under the authority of an officer for the recovery of anything seized, detained or held in custody or safe-keeping under this Act more than three months after the later of

(*a*) the time when the cause of action or the subject-matter of the proceeding arose, and

(*b*) the final determination of the outcome of any action or proceeding taken under this Act in respect of the thing seized, detained or held in custody or safe-keeping.

(3) Where, in any action or judicial proceeding taken otherwise than under this Act, substantially the same facts are at issue as those that are at issue in an action or proceeding under this Act, the Minister may file a stay of proceedings with the body before whom that action or judicial proceeding is taken, and thereupon the proceedings before that body are stayed pending final determination of the outcome of the action or proceeding under this Act.

CLPA

3. The Crown is liable for the damages for which, if it were a person, it would be liable
(a) in the Province of Quebec, in respect of
(i) the damage caused by the fault of a servant of the Crown, …

(b) in any other province, in respect of
(i) a tort committed by a servant of the Crown, …

…

10. No proceedings lie against the Crown

contre la Couronne, l'agent ou le détenteur de marchandises que l'agent lui a confiées, se prescrivent par trois mois à compter de celle des dates suivantes qui est postérieure à l'autre :

a) la date du fait générateur du litige;

b) la date du règlement définitif de toute instance introduite en vertu de la présente loi au sujet des biens en cause.

(3) Lorsque dans deux actions distinctes, l'une intentée en vertu de la présente loi, l'autre non, des faits sensiblement identiques sont en cause, il y a suspension d'instance dans la seconde action, sur demande du ministre présentée à la juridiction saisie, jusqu'au règlement définitif de la première action.

LRCECA

3. En matière de responsabilité, l'État est assimilé à une personne pour :
a) dans la province de Québec :
(i) le dommage causé par la faute de ses préposés,

b) dans les autres provinces :
(i) les délits civils commis par ses préposés,

…

10. L'État ne peut être poursuivi, sur le

by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.

…

24. In any proceedings against the Crown, the Crown may raise
(a) any defence that would be available if the proceedings were a suit or an action between persons in a competent court; and
(b) any defence that would be available if the proceedings were by way of statement of claim in the Federal Court.

…
32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

Federal Courts Act

39. (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action

fondement des sous-alinéas 3a)(i) ou b)(i), pour les actes ou omissions de ses préposés que lorsqu'il y a lieu en l'occurrence, compte non tenu de la présente loi, à une action en responsabilité contre leur auteur, ses représentants personnels ou sa succession.

…

24. Dans des poursuites exercées contre lui, l'État peut faire valoir tout moyen de défense qui pourrait être invoqué :
a) devant un tribunal compétent dans une instance entre personnes;
b) devant la Cour fédérale dans le cadre d'une demande introductive.

…

32. . Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.

Loi sur les Cours fédérales

39. (1) Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette

arising in that province.	province.
(2) A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.	(2) Le délai de prescription est de six ans à compter du fait générateur lorsque celui-ci n'est pas survenu dans une province.

[31] The Judge first determined that the relevant time-bar provision was that found in subsection 106(1) of the Act. I see no basis to disturb that conclusion.

[32] Both section 32 of the CLPA and section 39 of the Federal Courts Act provide that where the cause of action arises in a province, the laws relating to prescription and the limitation of actions in that province apply. Where the cause of action does not arise in a province, the proceedings must be commenced within six years after the cause of action has arisen. However, section 39 of the Federal Courts Act stipulates that where the applicable time-bar is found in another Act of Parliament, that provision shall apply. As to section 32 of the CLPA, it provides that where the relevant time-bar is found in that Act or "in any other Act of Parliament", those provisions shall apply.

[33] In my opinion, the relevant time-bar is the one found at subsection 106(1) of the Act. In effect, subsection 106(1) provides for the applicable limitation period in respect of actions or judicial proceedings commenced "against an officer for anything done in the performance of his duties under this or any other Act of Parliament". Consequently, where a person has a cause of action which arises by reason of acts or omissions of officers, i.e. "persons employed to administer

and enforce the Act, the Customs Tariff …", for anything done in the performance of their duties, such actions must be commenced within three months of the cause of action having arisen.

[34] The appellants' submission that the application of subsection 106(1) is limited to the enforcement activities found in Part VI of the Act is, in my respectful opinion, without merit. On a fair reading of the provision, it cannot be limited to enforcement activities as the appellants suggest.

[35] The Judge also concluded that section 106 applied to the Crown. In other words, the Judge was of the view that the Crown was entitled to invoke subsection 106(1) as a defence to the appellants' action. I also see no basis to disturb this conclusion.

[36] Paragraphs 3(a)(i) and 3(b)(i) and section 10 of the CLPA are clear. They provide that the Crown may be held vicariously liable for damages if a claimant can demonstrate that his or her damages result from, in the province of Quebec, a fault of a servant of the Crown or, in any other province, from a tort committed by a servant of the Crown. Further, section 10 of the CLPA provides that the Crown cannot be held liable from an act or omission of its servants unless the act or omission complained of would "have given rise to a cause of action for liability against that servant or the servant's personal representative or succession". Consequently, the Crown can only be held liable where there is liability of the part of one of its servants.

[37] It then necessarily follows, in my view, that in defending his or her liability, an "officer", as defined at subsection 2(1) of the Act, is entitled to avail himself of the limitation period found at

subsection 106(1) of the Act. That defence, by virtue of paragraph 24(a) of the CLPA, which provides that the Crown may raise "any defence that would be available if the proceedings were a suit or an action between persons in a competent court", is a defence that is available to the Crown.

[38] That point of view was adopted by the Federal Court in *Gregory v. Canada* (2002), 218 F.T.R. 287, a case where subsection 106(1) was at issue in an action against the Crown. At paragraph 43, the Court stated, albeit *in obiter*:

> 43. The Defendant maintained that no reasonable cause of action was disclosed in that the action was commenced outside the 90 day limitation period in s. 106 of the *Customs Act*. Notwithstanding, if I were required to determine the issue, I would have concluded that the action is barred by the limitation period which applies both to the actions of the customs officers and to the Crown defending against claims based on vicarious liability.

[39] In concluding as he did, the Judge had no difficulty finding that the Crown's servants were at all material times acting in the performance of their duties under the Act, thus, allowing the Crown to invoke section 106. More particularly, the Judge stated, at paragraph 37 of his Reasons, that "the cause of action arose from the initial decision of the Customs official in July 2003 to classify a specific importation of PROMILK 872B under C. 4 rather than C. 35. The Judge's finding at paragraph 37 should be read in conjunction with paragraph 17 of his Reasons, where he outlines the acts or omissions which the appellants say have given rise to damages. For ease of reference, I again reproduce paragraph 17 of the Judge's Reasons:

> [17] The plaintiffs allege a cornucopia of faults on the part of Crown servants, namely Customs officials. To name but some: the NCR was changed in 2003 without regard to the adopted guidelines or legislative requirements and in an exercise of bad faith; the decision was made without regard to procedural fairness and the right to be heard; discrimination in that a product from New Zealand, said to be virtually identical, was allowed to be imported under a different tariff to the benefit of the plaintiffs' commercial competitors and to their

> detriment; undue consideration was given to the position of the Dairy Farmers of Canada who were opposed to the first classification of PROMILK 872B (the Dairy Farmers were given intervener status before the CITT and the Federal Court of Appeal) and improper consideration of the position taken by the United States Customs Service.

[40] In other words, the Judge found that the cause of action was one in respect of the performance by officers of their duties relating to tariff classification found in Part III of the Act. Since the issuance of NCRs and other matters pertaining to the tariff classification of goods imported into Canada are central to CCRA's mandate, these activities clearly fall within the officers' duties. Mr. André Blais, the officer who performed the verification exercise, which resulted in a change of the NCR, gave evidence that he was performing his duties as customs compliance and verification officer when he issued the 2003 NCR.

[41] Thus, there can be no doubt, on the evidence before us, that the officers were acting within the performance of their duties, i.e. issuing and modifying NCRs and other matters relating to tariff classification. Consequently, the revocation and replacement of the 1999 and 2001 NCRs and the resulting tariff classification by the officers were clearly done in the administration and enforcement of the Act and, hence, it was within the performance of the duties of these officers.

[42] I now turn to the Judge's last conclusion. The Judge made a determination as to when time began to run. He concluded that the appellants' action was not commenced within the period provided by subsection 106(1) of the Act. In his view, time had begun to run more than three-months prior to the commencement of the appellants' action. At paragraph 44 of his Reasons, he expressed his view as follows:

> [44] … For the purposes of this case, it does not matter whether time began to run from the amended NCR or from the imposition of the wrong tariff. In either case the Statement of Claim would have been more than two years out of time when filed. …

[43] I have carefully read the appellants' Reamended Statement of Claim dated August 26, 2008 (183 paragraphs over 51 pages). My review thereof leads me to the conclusion that the Judge was correct in determining that the appellants' cause of action arose from "the initial decision of the Customs official in July 2003 to classify a specific importation of PROMILK 852B under C. 4 rather than C. 35". I agree entirely with the respondents' submission that all the facts necessary to the institution of their action against the Crown were known to the appellants by, at the very latest, the time that the CITT issued its decision on March 8, 2005. The allegations found in the Reamended Statement of Claim and the evidence before us in this appeal leave me in no doubt on this count.

[44] With respect to the appellants' arguments that their damages were ongoing and could not be quantified prior to January 24, 2006, when they commenced their action, and that they were unaware that they had a cause of action until the respondents' appeal from the CITT's decision was dismissed by this Court, I subscribe entirely to the reasons given by the Judge in dismissing these arguments.

Disposition

[45] For these reasons, I would dismiss the appeal with costs.

"M. Nadon"

J.A.

"I agree.
Gilles Létourneau J.A."

"I agree.
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	July 6, 2010

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