THE FEDERAL COURT OF CANADA

Court No.:

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LA COUR FÉDÉRALE DU CANADA

N° de la cause: T-220-88

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Motifs du Jugement

15.07.91
DATE

J.F.C.C.

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Form T-4

T-220-88

BETWEEN:

ROBLIN TEXTILES INC.,

plaintiff,

- and -

MINISTER OF NATIONAL REVENUE,

defendant.

ROULEAU J.

This case concerns a claim by Roblin Textiles Inc. against the Minister of National Revenue for reimbursement of $10,694.42, representing the penalty imposed on the plaintiff company for not reporting the true nature of goods imported into Canada.

The plaintiff is a Canadian company which imports and exports fabric between Canada and the Third World. The case at bar concerns an order from the U.S. which, when it arrived at customs at Lacolle, province of Quebec, on February 19, 1987, was described as imported goods subject to tariff No. 52205-1, taxable at 15%. The said order consisted of remainders of rolls of second-quality fabric and comprised 305 rolls of fabric in all. These 60-inch-wide rolls represented a total of 35,897 yards. The fabric, corduroy, was declared to customs as 100% cotton whereas in fact the product in question varied between 42% and 89% cotton.

The goods were therefore not subject to tariff No. 52205-1 (15% duty), but actually to tariff No. 56210-1 which provides for a customs duty calculated at 25% of value.

As the goods were falsely described to customs, they were the subject of a seizure. The seizure receipt dated February 23, 1987 and issued by Revenue Canada indicates:

> that the said goods are seized because the documents used for the accounting mentioned in s. 32 [Customs Act] give a description of the goods which does not correspond to them.

On February 24, 1987, therefore, the company paid a total of $29,791.62 in customs duties and penalties to obtain release of the goods seized. On November 24, 1987, Revenue Canada rendered a final decision that:

> a) There has been a contravention to the custom act [sic] or the regulations in respect of the goods which were seized;
>
> b) The amount of $29,791.62 received for the return of the goods be held as forfeit,

The plaintiff contended that this penalty was not due since the error made in the percentage of cotton was caused not by itself but by its wholesalers, Marcamy Sales Corporation of New York, from whom it bought the said goods. When the cargo arrived at customs at Lacolle, there was no documentation on the truck. At that time the New York wholesaler was telephoned and asked what percentage of cotton the corduroy contained. The answer was: "These goods are asst. corduroy 100 percent cotton". On closer examination, the customs officers found that the percentage of cotton was different from that indicated on the accounting form. This had the effect of altering the customs payment. The plaintiff submitted that the error was not made fraudulently or dishonestly: on the contrary, its good faith in the matter was apparent throughout the operation. Finally, at the start of the hearing,

the plaintiff admitted that it owed additional duty, but asked for reimbursement of the penalty imposed, namely $10,694.42 out of a total of $29,791.62.

Before determining whether the plaintiff is entitled to be reimbursed this penalty it is important to consider the legislation governing the matter. In this regard, it is worth reproducing part of s. 32 of the Customs Act, S.C. 1986, c. 1, which was relied on by Revenue Canada at the time of the seizure:

> Accounting and payment of duties
>
> 32. (1) Subject to subsections (2) and (4) and any regulations made under subsection (6), and to sections 33 and 34, no goods shall be released until
>
> (a) they have been accounted for by the importer or owner thereof in the prescribed manner and, where they are to be accounted for in writing, in the prescribed form containing the prescribed information; and
>
> (b) all duties thereon have been paid.

Sections 153 and 154 deal with offences against the Act when there are false statements in accountings. Under those sections, there is a very heavy burden of proof on the importer, since fraud is presumed in such offences. However, if the importer, here the plaintiff, is able to show that it had no guilty intent (mens rea) at the time of the seizure then it may be exempt from the penalty. In a recent judgment my brother Joyal J. defined the Customs Act as follows:

> In fact, the statutory measures authorizing seizure do not impose a principle of absolute liability or culpability. As can be seen from the case law, the importer may always avoid the seizure imposed on him by submitting evidence.[1]
>
> (My emphasis)

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[1] Raymond Lanctôt Ltée v. The Queen, T-1900-88, February 16, 1990, at 9.

In actual fact, the evidence must be considered to determine whether the plaintiff intended to defraud the Minister of National Revenue by erroneously declaring goods imported into Canada. To do this, let us look briefly at the evidence submitted by the importer.

Robert Guigui, president of the plaintiff company, visited the wholesaler Marcamy Sales Corporation in New York to order about 35,000 yards of corduroy at least 60 inches wide. This order was for a customer in the Dominican Republic. Mr. Guigui thus returned to Canada without seeing the goods, since the New York wholesaler only purchased the fabric throughout the U.S. on his departure and then sent a truck to pick up the goods. The truck contained a total of 305 second-quality rolls of fabric. This order, commonly known as a "job lot", was remainders of corduroy rolls among which were found 250 100% cotton corduroy rolls and 55 polyester-cotton rolls, 22 of which had at least 80% cotton.

This brief description of the facts is quite important at this point, since the plaintiff was charged with declaring 100% cotton goods when according to Revenue Canada they varied between 42% and 89% cotton. However, it should be noted that a very small quantity of the job lots had a percentage of cotton below 100%, that is 55 out of 305.

Finally, it appeared from the evidence that two customs officers were in contact with Roblin Textiles Inc. The first officer, who was on duty when the cargo arrived at Lacolle, had to telephone the company as there was no documentation on the truck to describe the goods. An employee of the company told the officer that Mr. Guigui was not in the office and she had no information about the exact contents of the said cargo. That was when she telephoned the wholesaler in New York who described the goods to her as 100% cotton corduroy. As the officer was not satisfied with

this accounting because there was nothing to confirm it, he decided to keep the truck's cargo in order to make a closer check. At that point, the first officer finished his work day and was replaced by a second customs officer.

In testimony in this Court, the first officer said that he had never had any problems with Roblin Textiles Inc. before. The second officer, on the other hand, said that there was a surveillance or alert notice against the company. In view of this inconsistent evidence, I then asked the second officer if he could show with the aid of documentation that there was such a notice regarding Roblin Textiles Inc., and he answered that there was none. I would like to note at this point that the officers' statements were made in response to questions put by counsel for Revenue Canada. The question about the alert notice was only put to the second officer, whereas he only became involved in the matter when the first officer had already decided to keep the goods. I would like to know why counsel only questioned one of the two customs officers about the alert notice, especially as that officer was less involved in the matter than his colleague. I feel that this evidence was put forward to unduly influence the Court or create doubt in my mind as to the company's credibility. Accordingly, I reject this evidence on the basis of the contradictory testimony by the two customs officers and the fact that no documentation was filed for the alert notice allegedly issued against the plaintiff company.

In my view of the evidence, I think that the whole matter was quite innocent. The plaintiff maintained that what mattered in the said order was that the rolls of fabric were corduroy at least 60 inches wide. The percentage of cotton was not important to its customer in the Dominican Republic. These explanations are quite valid and plausible. Moreover, the false statement was made by a third party, the New York wholesaler, who in any case saw no problem declaring the product as 100% cotton since in the U.S. a

small percentage of polyester is not counted for customs duty purposes.

In The Queen v. Clouston Foods Canada Ltd. (1982), 4 C.E.R. 167, at 175 and 176, Walsh J. said:

> . . . [in the present case] Defendant has explained, and the explanation is credible, both the undervaluation and the misdescription made by a third party, not its agent, for whose conduct it is not responsible, although it is of course responsible as the importer for the duties payable . . . However, on the evidence in this particular case I cannot find that there was any intent to defraud on the part of Defendant.

In his conclusion Walsh J. held that the penalty could not be claimed by the Crown since the defendant's good faith had been established.

Moreover, there are several cases to the effect that there must be an intent to defraud (mens rea) on the part of the importer if he is to be subjected to a penalty in addition to customs duties (Marun v. The Queen, [1965] 1 Ex.C.R. 280, at 294; The Queen v. Mondev Corp. Ltd. (1974), 33 C.P.R. (2d) 193, at 199; The Queen v. Canabec Trailers Inc., [1982] 1 F.C. 788, at 791; The Queen v. Gen-Lite Industries Ltd., T-818-83, dated April 17, 1986, at 8).

It is true on the other hand that there is abundant precedent holding that the Customs Act should be strictly interpreted to safeguard the public treasury. Nevertheless, persuasive evidence of reasonable diligence, good faith and credibility on the part of the importer may shift the heavy presumption of fraud which exists against him.

In the particular circumstances of the case at bar, I consider that the plaintiff has discharged the burden of proof upon it and that its good faith was established throughout this matter. For these reasons, I allow the plaintiff's claim in the amount of

$10,694.42. To this amount should be added interest incurred before the judgment at the legal rate, from the date the action at law was brought, namely February 9, 1988 (art. 1056(c) of the Civil Code). The plaintiff will further be entitled to its taxable costs in this action.

P. Rouleau
J.

OTTAWA, Ontario,
May 24, 1991.

Certified true translation

T.V. Helwig

FEDERAL COURT OF CANADA

TRIAL DIVISION

T-220-88

BETWEEN:

ROBLIN TEXTILES INC.,

plaintiff,

- and -

MINISTER OF NATIONAL REVENUE,

defendant.

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REASONS FOR JUDGMENT

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FEDERAL COURT OF CANADA

TRIAL DIVISION

Names of counsel and solicitors of record

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| Court file No.: | T-220-88 |
| Style of cause: | Roblin Textiles Inc.<br>- and -<br>Minister of National Revenue |
| Place of hearing: | Montréal, Quebec |
| Date of hearing: | May 14, 1991 |
| Reasons for Order by: | Rouleau J. |
| Dated: | May 24, 1991 |

APPEARANCES:

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|---|---|
| François Demers | for the plaintiff |
| Claude Bonneau | for the defendant |

SOLICITORS OF RECORD:

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| Spiegel, Sohmer<br>Montréal, Quebec | for the plaintiff |
| John C. Tait, Q.C.<br>Department of Justice<br>Ottawa, Ontario | for the defendant |