

T-1707-90

IN THE FEDERAL COURT OF CANADA
(TRIAL DIVISION)

BETWEEN:

TIME DATA RECORDER INTERNATIONAL LTD.

-and-

J.S.G. WOOD INDUSTRIES LTD.

Plaintiffs

AND:

THE MINISTER OF NATIONAL REVENUE

Defendant

REASONS FOR JUDGMENT

DENAULT, J.:

This action, commenced pursuant to section 135 of the *Customs Act*, R.S.C. 1985, c. C-52.6 ("the *Act*"), is an appeal from the decision of the Minister of National Revenue made under section 131 of the *Act* in relation to goods seized from the plaintiffs on March 3, 1989. As the action involving the plaintiff J.S.G. Wood Industries Limited ("J.S.G.") was settled prior to the hearing of this matter, all references to "the plaintiff" are hereinafter to be

interpreted as referring to the remaining plaintiff, Time Data Recorder International Ltd. ("Time Data").

Background:

Notwithstanding a day of confusing evidence presented by often ill-chosen witnesses, the relevant facts in this case are fairly simple and relatively uncontested, with the exception of a few details which were of little consequence to the outcome of this case. As the defendant denied the existence of a substantial portion of the facts as alleged by the plaintiff, I will now set out the events surrounding this action by reconstructing the testimony of the various witnesses who appeared before the Court at the hearing of this matter.

Time Data is a manufacturer, importer and distributor of a wide variety of time recording equipment and materials. Among the plaintiff's U.S. suppliers is a company called "*Dodge Markham*" which manufactures time recorder cards. Following several years of business dealings, Dodge Markham offered to provide the plaintiff with temporary warehouse space on its premises, to which Time Data's other U.S. suppliers could send deliveries to the plaintiff. Dodge Markham would then arrange to have its own goods and those of the plaintiff's other suppliers sent in one consolidated shipment to Time Data's offices in Montreal. According to this arrangement, Dodge Markham would collect the commercial documents relating to all of the shipments and present it to the carrier for eventual presentation at the border.

On March 3, 1989, Mr. William Herrick, a truck driver with *J.S.G. Industries Limited* ("*J.S.G.*"), the transport company hired by the plaintiff, picked up a shipment from Dodge Markham, collected some documentation and headed for the border crossing at Lansdowne, Ontario. At approximately 16:40 on March 3, 1989, Mr. Herrick presented one envelope of shipping documents to customs broker Russel A. Farrow Ltd. ("*Farrow*"), customs entry documents were prepared and Mr. Herrick proceeded to Customs.

At approximately 16:00, Mina Smallacoombe, an employee of Dodge Markham discovered that Mr. Herrick had left one of the envelopes containing shipping documents at Dodge Markham. She immediately telephoned Mr. Dopp, President and owner of Time Data, who suggested that the documents be faxed directly to the trucking company. Mr. Dopp then

called J.S.G. and spoke to the owner's wife, Mrs. Joan Bisaillon. Mr. Dopp explained the situation to Mrs. Bisaillon and informed her that the documents she would soon be receiving by fax should be forwarded to the customs broker upon receipt. Mr. Dopp then telephoned Ms. Smallacoombe with J.S.G.'s fax number and told her to fax the documents to J.S.G. The documents were apparently received by J.S.G. at approximately 17:00, at which time Mrs. Bisaillon telephoned the customs broker and was informed that the shipment had already been processed without complication. Mrs. Bisaillon then contacted Mr. Dopp to assure him that the problem had been resolved.

At the border, the Canada Customs officer sent to meet Mr. Herrick noticed a considerable discrepancy between the contents of the truck and the goods described in the customs documents presented. At that time, Mr. Herrick telephoned J.S.G. and spoke to Mrs. Bisaillon who recounted the confusing events of the day and faxed the missing documents to the Customs office at 19:21. As all the goods on the truck had not been accounted for in the documentation presented by the driver at the time of the initial inquiry, the customs officer decided to seize the undeclared goods.

In the seizure receipt, the seizing officer alleged the offence of smuggling and authorized release of the goods on payment of an amount representing duty and taxes owing on the unreported merchandise plus a penalty equal to *three times* that amount. In accordance with procedures under the *Customs Act*, the plaintiff requested a decision of the Minister. On April 20, 1989, a Notice of the Reasons for Seizure was issued to the plaintiff pursuant to section 130 of the *Act*. This notice indicated that the goods described in the attached Statement of Goods Seized were not reported to Customs in contravention of section 12 of the *Act* and that the plaintiff had 30 days within which to submit evidence to refute this charge. The adjudicating officer assigned to the matter, Mr. Peter Melvin, received several submissions made on behalf of the plaintiff. On March 14, 1990, Mr. Melvin completed a document entitled "Case Synopsis and Reasons for Decision" in which he thoroughly reviewed the facts of the case and recommended a penalty based on the duty and taxes owing on the unreported goods plus an amount equal to *three times* that amount.¹ In a ministerial decision dated

¹ An adjustment was made to reflect the fact that the duty payable at the time of entry was retroactively remitted by Order in Council P-C1989-797, 4 May, 1989 (Cad. Gazette Pt. II, Vol 123, No. 11.2677).

March 16, 1990, issued pursuant to section 131 of the *Act*, the following conclusions were reached:

- a) there has been a contravention to the Custom Act or the Regulations in respect of the goods which were seized;
- b) the seized conveyance was made use of in contravention of the Customs Act in respect of the seized goods;
- c) under the provisions of section 133 of the Customs Act, that the amount of \$2,160.67 of the security taken to effect the return of the seized goods is hereby remitted and that the remaining amount of \$18,792.21 of security taken be forfeit to Her Majesty;
- d) under section 133 of the Customs Act, that the security taken in the amount of \$10,476.44 to effect the return of the seized conveyance be forfeited to Her Majesty.

The plaintiff now appeals from the above decision, in accordance with section 135 of the *Act*, and seeks the following relief:

- (1) A Declaration quashing the decision of the Minister of National Revenue dated March 16, 1990;
- (2) A Declaration from this Court declaring that there has been no contravention of the Customs Act in respect of the goods subject to Customs Seizure No. C.S. 73168 dated March 3, 1989;
- (3) An order from this Court directing the return to Plaintiff Time Data Recording International Ltd. all sums recovered from it as a result of Customs Seizure No. C.S. 73168 dated March 3, 1989.

It should be also be noted at this point that a criminal charge, under section 160 of the *Customs Act*, was also laid against the plaintiff for having failed to report imported goods as required by section 12 of the *Act* but that this charge was dismissed on June 28, 1990.

Relevant Statutory Provisions:

Before proceeding to a discussion of the parties' arguments and the issues raised in this case, I feel it is worth reproducing the relevant sections of the *Customs Act*:

12. (1) Subject to this section, all goods that are imported shall, except in such circumstances and subject to such conditions as may be prescribed, be reported at the nearest customs office designated for that purpose that is open for business.

110. (1) An officer may, where he believes on reasonable grounds that this Act or the regulations have been contravened in respect of goods, seize as forfeit

(a) the goods; or

(b) any conveyance that the officer believes on reasonable grounds was made use of in respect of the goods, whether at or after the time of the contravention.

122. Subject to the reviews and appeals established by this Act, any goods or conveyances that are seized as forfeit under this Act within the time period set out in section 113 are forfeit

(a) from the time of the contravention of this Act or the regulations in respect of which the goods or conveyances were seized, or

(b) in the case of a conveyance made use of in respect of goods in respect of which this Act or the regulations have been contravened, from the time of such use,

and no act or proceeding subsequent to the contravention or use is necessary to effect the forfeiture of such goods or conveyances.

130. (1) Where a decision of the Minister under section 131 is requested pursuant to section 129, the Deputy Minister shall forthwith serve on the person who requested the decision written notice of the reasons for the seizure, or for the notice served under section 124, in respect of which the decision is requested.

(2) The person on whom a notice is served under subsection (1) may, within thirty days after the notice is served, furnish such evidence in the matter as he desires to furnish.

(3) Evidence may be given pursuant to subsection (2) by affidavit made before any justice of the peace, commissioner for taking oaths or notary public.

131. (1) After the expiration of the thirty days referred to in subsection 130(2), the Minister shall, as soon as is reasonably possible having regard to the circumstances, consider and weigh the circumstances of the case and decide, in respect of the goods or conveyance that was seized or with respect to which a notice was served under section 124,

(a) in the case of goods or a conveyance seized or with respect to which a notice was served on the ground that this Act or the regulations were contravened in respect thereof, whether the Act or the regulations were so contravened;

(2) The Minister shall forthwith on making a decision under subsection (1) serve on the person who requested the decision written notice thereof.

(3) The Minister's decision under subsection (1) is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 135(1).

135. (1) A person who requests a decision of the Minister under section 131 may, within ninety days after being notified of the decision, appeal the decision by way of an action to the Federal Court - Trial Division in which that person is the plaintiff and the Minister is the defendant.

160. Every person who contravenes section 12, 13, 15, 16, subsection 20(1), section 31 or 40, subsection 43(2), 95(1) or (3), 103(3) or 107(1) or section 153, 155 or 156 or commits an offence under section 159

(a) is guilty of an offence punishable on summary conviction and liable to a fine of not more than two thousand dollars and not less than two hundred dollars or to imprisonment for a term not exceeding six months or to both fine and imprisonment; or

(b) is guilty of an indictable offence and liable to a fine of not more than twenty-five thousand dollars and not less than two hundred dollars or to imprisonment for a term not exceeding five years or to both fine and imprisonment.

The Plaintiff's Position:

The plaintiff contends that the Minister's decision is ill-founded in fact and law. Specifically, the plaintiff argues that the Minister's decision based, as it was, exclusively on a finding that the plaintiff had contravened section 12 of the *Customs Act*, should be quashed since the plaintiff has been acquitted of the *criminal* charge of contravening section 12 of the *Act*. The plaintiff further maintains that *Customs Act* offences which support forfeitures are "strict liability offences" (as opposed to "absolute liability offences") and that, accordingly, the defence of due diligence is available. According to the plaintiff, the good faith and diligence demonstrated by Time Data's President, Mr. Paul Dopp, throughout all of the events leading up to the seizure should have led the Minister to conclude that Time Data had made out its defence to the civil forfeiture. Finally, the plaintiff seeks the above noted relief on the ground that the Minister's decision in this case was vitiated by the procedures following the adjudication process.

The Defendant's Position:

The defendant argues that the limits placed on this Court's jurisdiction pursuant to sections 131 and 135 of the *Customs Act* preclude it from determining any issue other than the strict question of whether the Act or the regulations were contravened. According to the Minister, by failing to properly report the goods imported into Canada on March 3, 1989, the plaintiff contravened section 12 of the *Customs Act*. The defendant contends that the plaintiff's good faith throughout the events leading up to the seizure are completely irrelevant and cannot be considered where seizure results from a failure to make a proper declaration. In addition, the defendant maintains that the plaintiff's acquittal on the criminal charge in no way affects the Minister's decision regarding the civil forfeiture under the *Act*, as the case brought before this Court must be tried *de novo* absolutely as if no criminal charge had been brought against the plaintiff. Finally, the defendant argues that the plaintiff, in attempting to challenge the Minister's decision on the basis that it may have been influenced by certain misunderstandings which occurred during the adjudication process, is attempting to have the Minister's

decision *reviewed* by this Court. According to the defendant, this argument cannot succeed as such a remedy is expressly prohibited by paragraph 131(3) of the *Act*.

Issues:

The essential issues raised by the parties may, therefore, be stated as follows:

- (1) What is the effect, in this case, of the plaintiff's acquittal of the criminal charge of contravening section 12 of the Customs Act?
- (2) Is there any defence to a civil forfeiture under the *Act* and, if so, has the plaintiff made out its defence to this forfeiture?
- (3) Was the Minister's decision vitiated by the procedures followed in the adjudication process and, if so, can this Court grant the plaintiff's relief based on such a finding?

Discussion:

- (1) *What is the effect, in this case, of the plaintiff's acquittal of the criminal charge of contravening section 12 of the Act?*

In its written submissions, the plaintiff argues that, since a competent Court, in dismissing the criminal charge, thereby concluded that there was no contravention of section 12 in this case, the civil forfeiture can no longer stand as it is based solely on a contravention of this same provision of the *Act*. The jurisprudence on this issue seems clear to me, however, that the criminal and civil consequences of contravening the *Customs Act* are two separate matters and that the results of one have no bearing on the other.

In the case of *The King v. Bureau* [1949] S.C.R. 367, the Supreme Court concluded that an acquittal on a criminal charge of unlawfully importing could not be invoked to invalidate a seizure or affect a civil right of forfeiture. Specifically, Chief Justice Rinfret, speaking for a majority of the Court, stated the following with respect to this issue: (at p. 374)

It was correctly decided in the Exchequer Court (1) that the acquittal of the respondent in the Criminal Court could not be invoked by him in the present case. That is in accordance with the judgment of this Court in *La Foncière Compagnie d'Assurance de France v. Perras et al and Daoust*, [1948] Ex. C.R. 257.

It was, therefore, necessary for the case to be tried de novo absolutely as if no criminal charge had been brought against the respondent.

In light of the Supreme Court's findings, I must reject the plaintiff's argument. I also find the plaintiff's proposed distinction, that both the criminal and civil actions in the present case were based on the identical offence under the *Act*, to be irrelevant. In my view, the Supreme Court, in remarking that the respondent had contravened several sections warranting a seizure, did not intend to make the results of the criminal court's findings binding on the court seized with the civil action. I also wish to point out that the civil and criminal consequences of a contravention of section 12 are set out in separate provisions of the *Act*² and that the *Act* itself does not state that a civil forfeiture cannot be maintained where a person has been acquitted of a criminal charge under the *Act*.

- (2) *Is there any defence to a civil forfeiture under the Act and, if so, has the plaintiff made out its defence to this forfeiture?*

The plaintiff contends that, on the basis of the considerations set out by the Supreme Court of Canada in the case of *The Queen v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, as well as the established caselaw dealing with contraventions of the *Customs Act*,³ offences under the *Act* giving rise to civil forfeiture are "strict liability" offences (as opposed to "absolute liability offences"), to which the defences of good faith, due diligence and reasonableness are available.

I cannot accept this argument. The jurisprudence on this issue now clearly establishes that such defences are not available to an importer whose

² See sections 110 and 160 of the Customs Act.

³ Specifically, the plaintiff relies on the series of cases reviewed by Mr. Justice Joyal in the case of *Raymond Lanctôt Ltée v. The Queen* (T-1900-88, February 16, 1990), and on the decision of Mr. Justice Rouleau in the case of *Roblin Textiles Inc. v. Minister of National Revenue* (T-220-88, May 24, 1991).

goods have been seized and forfeited as a result of an erroneous declaration. In the case of *The Queen v. Letarte*, [1981] 2 F.C. 76, the Federal Court of Appeal dealt with this issue in the context of truckers who failed to declare the newly acquired trailers in which they carried their cargo. Although the respondents in that case declared their *cargo* in writing to the customs officers, they failed to provide written declarations in regards to the trailers they had purchased in the U.S., as required by section 18(b) of the *Customs Act* (counterpart to the present section 12). In concluding that good faith was not a factor to be considered in determining the validity of a seizure resulting from a contravention of section 18(b) of the *Act*, Mr. Justice Pratte stated the following:

It is clear that paragraph 18(b) of the *Customs Act*, R.S.C. 1970, c. C-40, was not observed in the case at bar. The decision of the Trial Judge [[1979] 1 F.C. 605] that, despite this fact, the seizure of the undeclared goods was not legally made appears to have been based on the good faith of the truckers, who failed to comply with paragraph 18(b). This reasoning appears to the Court to be without legal validity. Under section 180, a seizure results from failure to comply with section 18, regardless of whether the individuals in question acted in good faith.

This principle has since been applied by the Trial Division of the Federal Court in the cases of *André Noël and André Noël Limitée v. The Queen* (1983), 6 C.E.R. 72, *Steve Gervais v. The Queen* (T-780-85, September 12, 1985), *Bunma Gaji, Sarik Ouk and Sarun Pech v. The Queen* (T-2560-85, September 17, 1986), *Mattu v. Canada* (1991), 45 F.T.R. 190 and most recently in the case of *H.B. Fenn and Company Ltd. v. The Queen* (T-384-89, March 3, 1992), in which Mr. Justice Strayer stated:

It appears to me that in principle it does not matter whether the importer makes an innocent mistake as to fact or as to law. The system is one of voluntary reporting and strict liability attaches to those who fail to report. The contravention of the Act occurs when an incorrect declaration is made on behalf of an importer and the source of the error is irrelevant. By the same token the importer is liable because he has failed to ensure that a correct report was made, and it matters not whether he made the incorrect report himself or whether he relied on a customs broker, a relative or an unpaid agent to make the report.

(Emphasis

added)

Accordingly, I find there to be no defence to the civil forfeiture as contemplated by the plaintiffs in this case. Furthermore, it is my belief that, even if I had accepted the plaintiff's contention that such defences were available in this case, I would not have concluded that the plaintiff had properly established any of them. Although I found Mr. Paul Dopp, the owner and President of Time Data, to be a credible witness, I was left to wonder why the plaintiff had not called certain key witnesses to the events of March 3, 1989 (for instance, the shipping clerk who first discovered the forgotten envelope containing the commercial documents relating to the seized goods and Mrs. Bisailon, the J.S.G. employee who apparently failed to follow Mr. Dopp's instruction to fax the forgotten documents to the customs broker). Consequently, I must also reject the plaintiff's arguments in relation to this issue.

- (3) *Was the Minister's decision vitiated by the procedures followed in the adjudication process and, if so, can this Court grant the plaintiff's relief based on such a finding?*

In support of its contention that the adjudication process was so fatally flawed that this Court should quash the Minister's decision, the plaintiff contends that Mr. Peter Melvin, the adjudicating officer who provided the Minister with the recommended decision, misinterpreted the seizing officer's report during the adjudication process and departed from the established penalty guidelines based on this misunderstanding. In addition, the plaintiff argues that Mr. Melvin erred in assuming that *Customs Act* offences which support a forfeiture are "absolute liability offences".

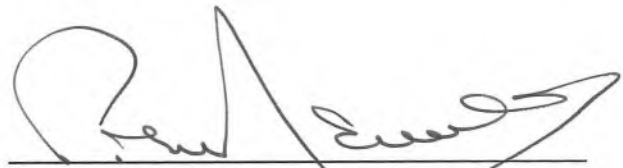
In attacking the procedures leading to the Minister's decision, the plaintiff appears to be asking this Court to undertake a "judicial review" of the Minister's decision. Such reviews are, however, expressly prohibited by section 131(3) of the *Act*. It should also be noted, that in a section 135

appeal, the Court may not interfere with the quantum of the penalty imposed by the Minister. In addition, I feel that I should also state that even if I had been authorized to review the process leading to the Minister's decision, a complete review of the evidence presented before this Court, including the document prepared by Mr. Melvin entitled "Case Synopsis and Reasons for Decision", would have lead me to conclude that the procedures followed in this case were in complete compliance with the provisions of the *Act* and that Mr. Melvin's recommendation was based on a proper interpretation of the relevant legislation and a just assessment of the circumstances surrounding this case, including the plaintiff's representations.

In conclusion, I find that there was a contravention of subsection 12(1) of the *Act* on March 3, 1989 when the plaintiff failed to provide a correct declaration of the goods at the border crossing at Lansdowne and that the goods were legally forfeited as of that time.

For the foregoing reasons, the plaintiff's action is dismissed with costs.

O T T A W A, August 3rd, 1993



Denault, J.