Time Data Recorder International Ltd. et al. v. Minister of National Revenue (Customs and Excise), (1997) 211 N.R. 229 (FCA)

Judge:	Pratte and Décary, JJ.A., and Chevalier, D.J.
Court:	Federal Court of Appeal (Canada)
Case Date:	April 21, 1997
Jurisdiction:	Canada (Federal)
Citations:	(1997), 211 N.R. 229 (FCA)

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Text

Case cited by: 16 cases, 2 other sources

Time Data Recorder Intl. Ltd. v. MNR (1997), 211 N.R. 229 (FCA)
MLB headnote and full text

Time Data Recorder International Ltd. (appellant) v.
The Minister of National Revenue (respondent)
(A-518-93)
Indexed As: Time Data Recorder International Ltd. et al. v. Minister of National Revenue (Customs and Excise)
Federal Court of Appeal
Pratte and Décary, JJ.A., and Chevalier, D.J.
April 21, 1997.

Summary:

The plaintiff's goods were seized by Canada Customs for failure to report them to Customs in contravention of s. 12 of the Customs Act. The plaintiff was fined. The plaintiff appealed.

The Federal Court of Canada, Trial Division, in a judgment reported 66 F.T.R. 253, dismissed the appeal. The plaintiff appealed on the same grounds.

The Federal Court of Appeal dismissed the appeal.

Customs - Topic 8010

Offences and penalties - General - Strict liability offences - An importer's goods were seized under s. 110 of the Customs Act for failure to report them to Canada Customs in contravention of s. 12 of the Act - The importer sought to set aside the forfeiture and a refund of the penalty imposed - He claimed that the offence was one of strict liability and that the defences of good faith and due diligence applied - The Federal Court of Appeal dismissed the appeal - Good faith of those who failed to comply with the Customs Act was not an excuse - The discussion was academic, however, where the person who failed to report the goods did not take reasonable care to comply with s. 12 of the Act - See paragraphs 16 to 19.

Customs - Topic 8066

Offences and penalties - Offences - Failure to report goods - Contravention of s. 12 of the Customs Act by failure to report imported goods could result in criminal charges or forfeiture - An importer was acquitted of criminal charges, but his goods were seized - He sought to set aside forfeiture of the goods and a refund of the penalty imposed, claiming res judicata - The Federal Court of Appeal rejected the argument since questions raised in the criminal and civil proceedings were different - The question before the Minister was not whether the importer contravened s. 12, but whether the Act or Regulations had been contravened by the importer or by anyone else - The failure of the person in charge of the conveyance (truck driver) to report the goods (s. 12(3)(b)) was sufficient to support the Minister's finding - The importer's acquittal could not affect that conclusion - See paragraphs 10 to 15.

Customs - Topic 9101

Appeals - To courts - From Minister - Nature of - An importer's goods were seized for incorrect reporting in contravention of s. 12 of the Customs Act and a penalty was imposed by the Minister - The importer appealed the Minister's decision under s. 135, alleging procedural irregularities - The Federal Court of Appeal dismissed the appeal where the alleged irregularities concerned the Minister's determination under s. 133 rather that his decision made under s. 131 - The irregularity of the process leading to a s. 133 determination could not be reviewed under s. 135(1) - See paragraphs 20 to 22.

Cases Noticed:

R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299; 21 N.R. 295; 85 D.L.R.(3d) 161; 40 C.C.C.(2d) 353; 3 C.R.(3d) 30; 7 C.E.L.R. 53, refd to. [para. 8, footnote 3].

Canada v. Bureau, [1949] S.C.R. 367, refd to. [para. 10].

Fishman v. R., [1970] Ex. C.R. 784, refd to. [para. 13, footnote 4].

Hollington v. Hewthorne & Co., [1943] K.B. 587; [1943] 2 All E.R. 35 (C.A.), refd to. [para. 13, footnote 4].

Letarte v. R., [1981] 2 F.C. 76 (F.C.A.), refd to. [para. 17].

Statutes Noticed:

Customs Act, R.S.C. 1985, c. C-52.6, sect. 2 [para. 15, footnote 5]; sect. 12 [para. 6]; sect. 129(1)(b) [para. 1]; sect. 130(1) [para. 2]; sect. 131(1)(a), sect. 131(3) [para. 1]; sect. 133(1)(a), sect. 133(1)(b) [para. 7, footnote 2]; sect. 135(1) [para. 1]; sect. 160 [para. 7, footnote 1].

Authors and Works Noticed:

Cross on Evidence (7th Ed. 1990), p. 84 [para. 13, footnote 4].

Sopinka, John, Lederman, Sydney N., and Bryant, Alan W., The Law of Evidence in Canada (1992), p. 1045 [para. 13, footnote 4].

Counsel:

Peter Kirby, for the appellant;
Jean Lavigne, for the respondent.

Solicitors of Record:

Gottlieb & Pearson, Montreal, Quebec, for the appellant;
George Thomson, Deputy Attorney General of Canada, Ottawa, Ontario, for the respondent.

This appeal was heard on March 12, 1997, at Montreal, Quebec, before Pratte and Décary, JJ.A., and Chevalier, D.J., of the Federal Court of Appeal.

On April 21, 1997, Pratte, J.A., delivered the following judgment for the court.

[1] Pratte, J.A. : This is an appeal from a judgment of the Trial Division dismissing an appeal under s. 135 of the Customs Act ("the Act ") from a decision of the Minister of National Revenue. That decision held that the Act had been contravened in respect of certain goods that were owned by the appellant and that had been seized under the Act . Sections 129, 131 and 135 of the Customs Act read, in part, as follows:

"129(1) Any person

. . . . .

(b) who owns goods or a conveyance that is seized under the Act,

may ... request a decision of the Minister under section 131 ...

"131(1) ... the Minister shall ... consider and weigh the circumstances of the case and decide, in respect of the goods or conveyance that was seized ...,

(a) in the case of goods or a conveyance seized ... whether the Act or the regulations were so contravened [in respect 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 in the Federal Court in which that person is the plaintiff and the Minister is the defendant."

[2] The appellant manufactures, imports and sells time recording equipment and materials. One of its suppliers in the United States is Dodge-Markham Company, Inc. ("Dodge-Markham"), which had agreed to provide the appellant with warehouse space in its premises where the appellant's other U.S. suppliers would send the goods that the appellant had ordered from them. At more or less regular intervals, Dodge-Markham would consolidate its own goods with those of the appellant's other suppliers into one shipment and notify the appellant which would then send a truck to pick up the shipment. Under that arrangement, Dodge-Markham would collect the commercial documents relating to all the goods and give them to the driver of the truck.

[3] On March 3, 1989, a truck of J.S.G. Industries Limited, a transport company hired by the

appellant, went to Dodge-Markham and picked up a consolidated shipment destined to the appellant. Before departing, the truck driver collected some documentation relating to the shipment and proceeded to the border crossing at Lansdowne, Ontario. At the border, he first went to the office of a customs broker whose services had been retained by the appellant and presented the documentation that he had collected from Dodge-Markham. The customs broker prepared the customs documents and gave them to the driver who proceeded to the Customs office.

[4] The customs officer immediately noticed a discrepancy between the contents of the truck and the goods described in the customs documents. He searched the truck and found that most of the goods it contained were not mentioned in the documents; he formed the opinion that the appellant had tried to smuggle these goods into Canada and seized them.

[5] Actually, the discrepancy between the contents of the truck and the customs documents was due to an oversight of the truck driver who, when he had taken delivery of the shipment at Dodge-Markham, had left behind an envelope containing most of the shipping documents that he was supposed to bring with him and give to the customs broker. An employee of Dodge-Markham had found the missing envelope at the end of the afternoon, approximately when the truck had reached the border; she had immediately alerted the president of the appellant who had done his best to have those documents faxed to the customs broker and the customs office. Due to a misunderstanding, however, the documents had reached customs more than two hours later, too late to avoid the seizure.

[6] On April 20, 1989, a Notice of Reasons for Seizure was issued to the appellant pursuant to s. 130 of the Act . That Notice indicated that the goods seized had not been reported to customs in contravention of s. 12 of the Act and that the appellant had thirty days to submit evidence to refute that allegation. Sections 130 and 12 of the Customs Act read, in part, as follows:

"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, ...

"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.

. . . . .

"(3) Goods shall be reported under subsection (1)

(a) in the case of goods in the actual possession of a person arriving in Canada, or that form part of his baggage where the person and his baggage are being carried on board the same conveyance, by that person;

(b) in the case of goods, other than goods referred to in paragraph (a), on board a conveyance arriving in Canada, by the person in charge of the conveyance; and

(c) in any other case, by the person on behalf of whom the goods are imported."

[7] On July 27, 1989, a criminal charge under s. 160 of the Customs Act [see footnote 1], was laid against the appellant alleging that the appellant had unlawfully "fail[ed] to report imported goods ... to the nearest customs of five designated for that purpose that was open for business, as required by s. 12(1) of the Customs Act ..." That charge was dismissed by the Provincial Court of Ontario on June 28, 1990. In the meantime, however, the Minister of National Revenue had made its decision under s. 131 of the Act . That decision, dated March 16, 1990, held that "there ha[d] been a contravention to the Customs Act or the Regulations in respect of the goods which [had been] seized." At the same time, the Minister had determined, pursuant to s. 133 [see footnote 2], "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."

[8] The appellant appealed to the Trial Division, pursuant to s. 135 of the Customs Act , from the decision that the Minister had made under s. 131. It raised three grounds of appeal: first, it invoked res judicata and said that, as the Minister's decision that the appellant had contravened s. 12 of the Act contradicted the judgment of the Provincial Court of Ontario acquitting the appellant of the same offence, that decision had to be set aside; second, the appellant argued that the decision of the Minister was based on the wrong view that offences under the Customs Act are "absolute liability" offences while most of them are, in effect, "strict liability" offences admitting of a defence of due diligence [see footnote 3]; third, the appellant said that procedural irregularities vitiated the Minister's decision.

[9] The judge of first instance rejected those attacks and dismissed the appeal. Before us, the appellant reiterated the same three arguments.

1. Res Judicata

[10] The trial judge dismissed the appellant's argument based on res judicata because, in his view, according to the jurisprudence, "the criminal and civil consequences of contravening the Customs Act are two separate matters and ... the results of one have no bearing on the other." In support of that opinion, the judge relied on the decision of the Supreme Court of Canada in Canada v. Bureau , [1949] S.C.R. 367.

[11] Counsel for the appellant said that the judge had misinterpreted the Bureau decision and he underlined that the passage of the reasons for judgment of Rinfret, C.J., on which the trial judge relied was a mere dictum in which the other members of the court did not concur. I agree with the appellant on this point. But this is not to say that the conclusion of the judge is bad.

[12] It is common ground that seizures and forfeitures under the Customs Act are not criminal but civil proceedings and penalties.

[13] It is also common ground that, as a rule, judgments of criminal courts are not res judicata in subsequent civil trials. [See footnote 4]. There are many reasons for that: first, in most cases, the parties in the criminal and civil trials are not the same; second, very often, the questions to be resolved in both litigations are not identical; finally, the burden of proof is not the same in criminal and civil proceedings.

[14] The appellant's argument on this point, as I understood it, is that, in this instance, the parties to both proceedings were the same since the Minister obviously acted as the representative of the Crown; that both suits raised the same question, namely whether the appellant had infringed s. 12 of the Customs Act ; and, finally, that, in this instance, the onus of proof in both proceedings was the same since, as it was obvious that s. 12 had not been complied with, the only remaining question, in both the civil and criminal proceedings, was whether it was proven on a balance of probabilities that the appellant had taken all reasonable steps to comply with s. 12. In these circumstances, said counsel for the appellant, the acquittal of the appellant by the criminal court is proof, in the civil proceedings relating to the seizure, that the appellant did not violate s. 12 of the Customs Act .

[15] The easy answer to that argument is that the questions raised in the criminal and civil proceedings were different. The question that the Minister had to answer under s. 131 and that the Trial Division had to answer on the appeal from his decision was not whether the appellant had contravened s. 12, but whether the Act or Regulations had been contravened either by the appellant or by anyone else. That distinction is not without importance in this case, even if we limit our inquiry to a possible violation of s. 12. The relevant parts of that section, the effect of which had not been modified by the regulations at the relevant time, read as follows:

"12(1) Subject to this section, all goods that are imported shall ... be reported at the nearest customs office designated for that purpose that is open for business.

. . . . .

"(3) Goods shall be reported under subsection (1)

(a) in the case of goods in the actual possession of a person arriving in Canada, or that form part of his baggage where the person and his baggage are being carried on board the same conveyance, by that person;

(b) in the case of goods, other than goods referred to in paragraph (a), on board a conveyance arriving in Canada, by the person in charge of the conveyance; and

(c) in any other case, by the person on behalf of whom the goods are imported."

The goods here in question were clearly "on board a conveyance arriving in Canada." [See footnote 5]. It was, therefore, the person in charge of the conveyance, in this instance the truck driver, who, alone, had the duty to report them. His failure to comply with s. 12 was sufficient to support the Minister's finding. The decision of the criminal court acquitting the appellant, whatever be its authority, could not affect that conclusion.

2. Strict Or Absolute Liability

[16] A violation of s. 12 of the Customs Act is sanctioned both by criminal and by civil penalties. In such a case, as the criminal and civil offences are exactly the same, it follows, according to the appellant, that the defences available in the civil proceedings should be the same as in the criminal proceedings. As most of the penal offences under the Customs

Act are strict liability offences admitting of a defence of due diligence, the same defence should be available in the civil proceedings.

[17] That argument was rejected by the trial judge who was of the view that our decision in Letarte v. R. , [1981] 2 F.C. 76 (F.C.A.), established that the defence of due diligence is not available to an importer whose goods have been seized and forfeited as a result of an erroneous declaration.

[18] Counsel for the appellant argued, not without reason, that the judge had apparently misconstrued our decision in Letarte . What was decided in that case was that the good faith of those who failed to comply with the Customs Act is not an excuse.

[19] This is, however, an academic discussion. In this case, the person who had to report the goods under s. 12 was the truck driver. He did not do it and the evidence does not show that he took reasonable care to comply with the section; if he had, he would not have forgotten to bring the documentation relating to the goods that were seized.

3. The Procedural Irregularities

[20] The appellant finally argued that the trial judge erred in dismissing his argument that the Minister's decision was vitiated by procedural irregularities allegedly committed by the departmental officer who had made a report and a recommendation to the Minister as to the decision to be made in this matter.

[21] The alleged irregularities did not relate to the decision of the Minister under s. 131. They concerned the determination he had made under s. 133. It is clear from the very wording of s. 135(1) that it is not through an appeal made under that subsection that the irregularity of the process leading to a s. 133 determination can be reviewed.

[22] I would dismiss the appeal with costs.

Appeal dismissed.

Editor: Jocelyne M. Caissie/clh

Footnotes

1. Section 160 of the Customs Act reads, in part, as follows:

"160. Every person who contravenes section 12 ...

(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 ..."

2. Section 133 reads, in part, as follows:

"133(1) When the Minister decides, pursuant to section 131, that there has been a

contravention of this Act or the Regulations in respect of the goods or conveyance referred to in that section, ..., the Minister may, subject to such terms and conditions as he may determine,

(a) return the goods or conveyance on receipt of an amount of money of a value equal to an amount determined under subsection (2) or (3), as the case may be;

(b) remit any portion of any money or security taken; and ..."

3. See R. v. Sault Ste. Marie (City) , [1978] 2 S.C.R. 1299; 21 N.R. 295; 85 D.L.R.(3d) 161; 40 C.C.C.(2d) 353; 3 C.R.(3d) 30; 7 C.E.L.R. 53.

4. See: Fishman v. R. , [1970] Ex. C.R. 784, at 826; Hollington v. Hewthorne & Co. , [1943] K.B. 587; [1943] 2 All E.R. 35 (C.A.), at 601; Sopinka, Lederman, Bryant, The Law of Evidence in Canada , Butterworths, 1992, p. 1045; Cross on Evidence (7th Ed.), Butterworths, 1990, p. 84.

5. Section 2(1) of the Customs Act gives the following definition of the term "conveyance":

"2(1) In this Act,

. . . . .

'conveyance' means any vehicle, aircraft or water-borne craft or any other contrivance that is used to move persons or goods."

[End of document]