Federal Court, Trial Division

Citation: ACL Canada Inc. v. M.N.R.
Court File: T-1548-88
Date: 1993-10-08[*]

MacKay J.

Counsel:
James Gould, Q.C., and William Laurence, for plaintiff.
John Ashley, for defendants.

[1] MACKAY J.:—This is an appeal by the plaintiff, ACL Canada Inc. ("ACLC") of decisions of the Minister of National Revenue with respect to two forfeitures ordered by the Minister in relation to two seizures made by Customs and Excise. The first forfeiture concerns goods seized pursuant to ss. 110 and 122 of the Act and the second forfeiture is an "ascertained forfeiture" ordered pursuant to s. 124 of the *Customs Act,* R.S.C. 1985, c. 1 (2nd Supp.) (now included in loose-leaf edition R.S.C. 1985, c. C-52.6), as amended ("the *Act"*).

[2] The appeal is commenced as an action in accord with s. 135 of the *Act* and certain relief is claimed. By its amended statement of claim filed August 15, 1988, the plaintiff seeks declaratory relief, that its rights under the *Canadian Charter of Rights and Freedoms* have been unlawfully violated (a claim not pursued at trial), and that it is entitled to repayment of sums determined to be forfeited, and paid under protest, in relation to the two seizures in question or such lesser sums as the court may allow. Also sought is an order quashing the decisions of the defendant Minister, dated May 6, 1988, in so far as they relate to forfeiture of the sums therein provided, an order or declaration that no administrative penalty is payable by the plaintiff, and interest on any amounts found to be overpaid to the Minister. The nature of the relief sought in light of the role of the court is one of the issues on which the parties do not agree.

Background

[3] ACLC is a shipping company and shipping agency, operating generally on behalf of Atlantic Container Lines, an international transatlantic ocean container shipping consortium. In fulfilment of part of its obligations to Atlantic Container Lines, the plaintiff sees to the repair of temperature-controlled containers, "reefers", used in international shipping and entered into Canada on a post-audit control system.

[4] A post-audit control system was explained in oral testimony by Mr. Michael Boyne who was, at the time the incidents giving rise to this action took place, general traffic manager for the Canadian operations of ACLC:

> A post-audit system meant that you reported the containers' numbers to the government

[*] Received December 1, 1993.

when you carried the cargo into the country. And you had a bond so that if a container went astray, it wound up in domestic use so that you had to pay the duty and taxes on the value of the piece of equipment itself. And then what you were required to do is show when it left the country and do it within a certain period of time — six months was the regulation — as well as provide to Customs auditors in Ottawa, who would come in and do random inspections and see what happened to this container, "When did it come in the country? When did it leave? We'd like to see your records for your audit control".

[5] He further explained that this process was carried out in accord with a Customs memorandum and without this system, the duty and taxes would have to be paid on entry of the goods, *i.e.,* containers, into Canada and a drawback applied for when they were exported.

[6] To effect the repairs on the containers, for some years ACLC imported into Canada from Port Elizabeth, New Jersey, the necessary and specialized spare parts, mainly electrical, which included heater coils, evaporator coils, condenser coils, relays, switches, control systems, thermoguard temperature control settings and diesel engine parts.

[7] At all times material in this matter Mr. William Crone was head of the technical department in Halifax, though he reported for his work to ACLC's Southampton head office through the Montreal office of ACLC. When he joined ACLC in 1976, and prior to his being employed there, parts were imported using a Customs form E29B. In his statutory declaration sworn November 19, 1987, Mr. Crone describes the procedure used in connection with Form E29B as follows:

Initially, in 1976, I would report directly to ACL's offices in Southampton, England. If spare parts were required for the containers or refrigeration units, I would order them from Port Elizabeth, New Jersey, which was responsible for the obtaining and forwarding of the parts for us. They would provide to the Southampton office copies of all parts lists supplied and invoice Southampton directly.

From the time I started, and before that, ACLC in Halifax had brought in reefer and container spare parts pursuant to a Customs E29B form. Any part or parts arriving from Port Elizabeth would be listed either in a telex advice, packing slip or otherwise, and such lists I would take to the Customs office on the waterfront and one copy would be stamped and retained by them and another stamped and returned to me. By agreement with the local Customs office this form was good for six months. At the end of that time if parts were still remaining in storage I would discuss it with the Customs officers and they would invariably extend the time under the E29B for me. The stamped copies of the parts lists imported were then kept attached to a copy of the E29B form in our office.

Additionally we maintained a stock list and the various parts upon receipt or use were added to or deleted from this list. We also had work slips for all work carried out which would show which container the part was applied to, and upon such application the stock list was amended by crossing out or reducing the quantity of that particular part.

To document the exportation we used the ACL Form 1010 "Vessel's Reefer Log" which would show the container (to which these replacement parts were attached) exported

> onboard a particular vessel. Under this arrangement, Customs officers would call and come around from time to time to do spot checks on our inventory.
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> At that time Frank Power was the Supervisor of Marine Operations for Revenue Canada, Customs & Excise, at Halifax, and I believe he had another man with him called Joe Arsenault. They had set up the system and discussed it with me from time to time. They were both in agreement that if I were to follow another route there was a significant amount of paper work required for no productive end use whatsoever as the parts which were imported and documented and upon which duty and tax would be paid would be subject to full drawback upon exportation with no financial benefit to anyone. Such an alternative system would place a most inconvenient burden on both Customs & Excise and ACLC. This was Mr. Power's stated view and that of his superior, and explained the system we used. I believe that our original system, which operated on the basis of mutual trust, agreement and understanding, operated successfully right into 1984.

[8] Mr. Crone testified at trial, confirming his statement above, that this procedure was a co-operative effort between ACLC and Customs and Excise, specifically between Mr. Crone himself and Mr. Power and Mr. Arsenault of Customs and Excise, to reduce the paperwork involved in the importing and exporting of the spare parts. Under this arrangement it was not necessary for ACLC to pay the taxes and duty at the time the parts were imported and then apply for a drawback, when parts, having been used in repair of a container, were shipped out of Canada.

[9] This arrangement continued until June, 1984, after Mr. Power and Mr. Arsenault had retired. ACLC was advised that the system previously relied upon was unauthorized and was to be changed. It was no longer acceptable to document the spare parts inventory as had been done since 1976. From June, 1984, Mr. Crone and others concerned in the plaintiff's operations understood that ACLC would either have to set up within ACLC a system for payment of duties, control and duty drawback, or retain a repair company, to purchase and supply the repair parts and assume responsibility for all customs processes, payments and drawbacks.

[10] At this time, ACLC decided to take the latter route and it retained a company, Canadian Container Care ("CCC"), to purchase the spare parts required for ACLC, to effect repairs, and to deal with Customs and Excise, including paying duty and taxes on the parts imported, documenting their exportation and applying for the drawback. Under this arrangement, ACLC avoided the paperwork involved in paying the duty and tax upon importation and applying for the drawback upon exportation. These matters were the responsibility of CCC.

[11] CCC soon suffered financial problems and it went into receivership in 1986. In an effort to maintain the operations, some of the principals of that company regrouped as a new company, Container Trailer Services (CTS). Despite the efforts of those involved, CTS also experienced financial problems which affected its ability to properly meet ACLC repair needs. Mr. Crone then found it imperative, from his viewpoint, to bring in the required spare parts for ACLC, which he did on his own initiative.

[12] Mr. Crone indicated in a statutory declaration that because of the demands of regular technical department responsibilities and the fact that the department was understaffed, it proved to be impossible for the technical department to fulfil its other duties and do the paperwork which was required to document the spare parts according to the requirements of Customs and Excise. He therefore ordered the necessary parts and the parts were imported into Canada without the proper Customs documentation being completed. This decision to do so was made by Mr. Crone himself, without consultation with the management of ACLC or even the Halifax office of ACLC, but there was no argument, and there is no basis for finding, that he was acting otherwise than in the course of his employment for ACLC, which was ultimately responsible for his activities.

[13] Mr. Crone testified that, in his opinion, he was not doing anything "radically wrong" because all parts imported would ultimately be duty and tax-free if, after paying the duty and the tax, the parts were applied to containers which were exported and then application was made for a drawback. His statutory declaration indicates that there was never at any time an attempt or an intention by him to deprive Revenue Canada, Customs and Excise, of any duty or taxes to which it was ultimately entitled.

[14] Prior to the forfeitures and seizures that are the subject of the case before me, in April, 1986, Mr. Crone was advised by a Customs officer that Customs and Excise had made a seizure of some parts found in storage at the Halifax terminal of ACLC. These parts were two small gauges and a probe which, when imported, apparently had not been reported to Customs. Mr. Crone testified that he had no knowledge of the parts until they were discovered by Customs officers, but he believed that they were parts ordered by ACLC's Montreal office that had been misdirected to ACLC's Halifax terminal. Mr. Crone had not ordered the parts. This seizure resulted in a $100 fine being imposed on ACLC by Customs and Excise, which fine was duly paid by the local office. Upon payment of the fine, the parts were released. This incident was not reported by Mr. Crone to his superiors and was not known by Mr. Boyne, the senior ACLC officer in Montreal responsible for Customs matters, before the forfeitures and seizures in 1987.

[15] According to the amended statement of claim, the first seizure in this case took place on August 17, 1987. On that day eight compressors and spare parts for ACL reefers were seized by representatives of Customs and Excise on the allegation that ACLC had smuggled or attempted to smuggle these goods into Canada or that the goods were not reported to Customs in contravention of s. 12. Under s. 122 goods seized as forfeit as a result of a contravention of the *Act* or regulations become subject to forfeiture from the time of the contravention. Goods may be seized pursuant to s. 110 which provides, in part:

> 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
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> (*a*) the goods . . .
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> Section 12 of the *Act* requires, in part, that
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> 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.

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(6) Where goods are required by the regulations to be reported under subsection (1) in writing, they shall be reported in the prescribed form containing the prescribed information, or in such form containing such information as is satisfactory to the Minister.

[16] A seizure receipt was issued to ACLC in Halifax dated August 17, 1987, specifying that the goods were seized "because they smuggled or attempted to smuggle them into Canada, whether clandestinely or not, thereby evading the duties lawfully payable". That receipt also specified the goods would be released on deposit of $41,424.80. Under s. 117 seized goods may be returned upon payment of an amount equal to the value for duty of the goods and duties, including taxes and penalties, levied thereon, or such lesser amount as the Minister may direct. In this case the amount calculated for release of the goods was less than the maximum that might have been applicable under that section. The $41,424.80 payment requested from ACLC for release of the parts was paid under protest in order to obtain their release, pursuant to s. 117(*a*)(ii). As indicated on Revenue Canada, Customs and Excise form "Statement of Goods Seized", the payment amount represents $4,274.49 in duty, $6,081.71 in sales tax and a penalty amounting to three times the total of the duty and tax allegedly evaded, the penalty figure being $31,068.60. That penalty is apparently determined by reference to a chart appearing in the Customs Enforcement Manual, Part 3, the "Customs Seizure Process", c. 1, "Terms of Release, Offences and Allegations", App. A, which indicates that where there is a repeat offence of smuggling by a commercial enterprise, release of seized goods is to be made on payment of duty and taxes owing, plus an amount equal to three times the duty and taxes evaded, not to exceed the duty paid value. While this is not specified, I assume that, in considering this as a repeat offence, Customs and Excise in Halifax considered the 1986 infraction resulting in the $100 fine, mentioned earlier, as a prior offence.

[17] Presumably, after payment, under protest, of the deposit amount required for release of the goods, counsel for ACLC wrote on September 14, 1987, to Customs and Excise in Halifax requesting a decision of the Minister in relation to the seizure of August 17, 1987, pursuant to s. 129 of the *Act*. Section 129 provides:

129(1) Any person

(*a*) from whom goods or a conveyance is seized under this Act,

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

(*c*) from whom money or security is received pursuant to section 117, 118 or 119 in respect of goods or a conveyance seized under this Act, or

(*d*) on whom a notice is served under section 124

may, within thirty days after the date of the seizure or the service of the notice under section 124, request a decision of the Minister under section 131 by giving notice in writing to the officer who seized the goods or conveyance or served the notice or caused it to be served, or to an officer at the customs office closest to the place where the seizure took place or the notice was served.

I return to a review of the outcome of the plaintiff's request for a decision of the Minister, after describing the second forfeiture at issue in this case.

[18] Following the August 17, 1987 seizure, representatives of Customs and Excise in Halifax questioned ACLC about other unreported reefer spare parts which had been previously imported into Canada, used for repair of containers and subsequently exported. Mr. Crone, who had arranged to import the parts, had not kept full records and ACLC sought information and ultimately obtained it from ACL in Port Elizabeth, New Jersey. On the basis of the information obtained from ACLC, Customs and Excise served on ACLC, a notice of seizure and/or ascertained forfeiture, dated September 17, 1987, claiming that between February 2, 1986 and August 17, 1987, ACLC smuggled into Canada, on 44 occasions, parts for refrigeration units, and the duties and taxes lawfully payable were not paid in contravention of the *Customs Act.* Of course, seizure of the goods was impossible since they had gone into consumption and presumably had been exported. The notice stated that the goods in question had a duty paid value of $149,214.56 and that a deposit in the amount of $112,306.60 was required as payment to be forfeited. This process was carried out pursuant to s. 124 of the *Act* which states:

124(1) Where an officer believes on reasonable grounds that a person has contravened any of the provisions of this Act or the regulations in respect of any goods or conveyance, the officer may, if the goods or conveyance is not found or if the seizure thereof would be impractical, serve a written notice on that person demanding payment of

(*a*) an amount of money determined under subsection (2) or (3), as the case may be; or

(*b*) such lesser amount as the Minister may direct.

(2) For the purpose of paragraph (1)(*a*), an officer may demand payment in respect of

goods of an amount of money of a value equal to the aggregate of the value for duty of the goods and the amount of duties levied thereon, if any, calculated at the rates applicable thereto

(a) at the time the notice is served, where the goods have not been accounted for under subsection 32(1), (2) or (5) or where duties or additional duties have become due thereon under sections 88 to 92; or

(*b*) at the time the goods were accounted for under subsection 32(1), (2) or (5), in any other case.

[19] As in the case of other seizures, ACLC paid the amount stipulated by Customs and Excise in Halifax, $112,306.60, under protest. That amount represents $12,089.48 in duty, $15,987.17 in sales tax and a penalty amounting to three times the total of the duty and tax allegedly evaded, the penalty figure being $84,229.95. As in the case of the goods seized on August 17th, the amount here charged was said to be less than the maximum possible under the statute. The amount and the penalty were presumably determined in the same way as for the August 17, 1987 seizure, by reference to the same chart in the Customs Enforcement Manual. Again, this incident was seemingly treated by Customs and Excise in Halifax as a "repeat offence" of "smuggling" by a commercial enterprise and the deposit required for a seizure so classified is duty and taxes owing plus an amount equal to three times the duty and taxes evaded, not to exceed the duty paid value.

[20] ACLC again requested a decision from the Minister of National Revenue in relation to the ascertained forfeiture, pursuant to s. 129 of the *Act,* requesting that the deposit assessed and paid be set aside, and removing any penalty for what ACLC submitted was a "technical violation" of s. 12 of the *Act.*

[21] Under s. 130, where a request is made for a decision of the Minister pursuant to s. 129, the Deputy Minister is required to serve on the person who made the request written notice of the reasons for the seizure or for the notice served under s. 124. In this case, the Adjudications Division of Customs and Excise issued a notice to ACLC, for the Deputy Minister, dated October 6, 1987, with respect to the seizure made on August 17th, advising that the reasons were that "the said goods were not reported to Customs, in contravention of section 12 of the Customs Act". A second notice, issued in the same way on December 14, 1987, with respect to the ascertained forfeiture, advised that it was made for the reason that "the said goods were smuggled into Canada in contravention of the Customs Act".

[22] The request of the plaintiff for a decision of the Minister, under s. 129, in relation to each of the seizures was dealt with by the Adjudications Division of Customs and Excise on behalf of the Minister. ACLC was provided opportunity to make submissions in writing, which it did through counsel. Those representations were responded to by Mr. Bellefeuille of the Adjudications Division, who referred in a letter of December, 1987, to certain statutory provisions and certain facts alleged in relation to the seizures. ACLC responded to this in early 1988 but essentially relied on representations originally made by letter in November, 1987. Subsequently, by notice dated May 6, 1988, the Minister rendered the following decision in regard to the August 17, 1987 seizure (CS 68212/009-1627):

> Having considered the evidence, the circumstances, and the report submitted by the Deputy Minister in the above matter, it is my decision that: —
>
> (a) there has been a contravention of the *Customs Act* or the regulations in respect of the goods under seizure;
>
> (b) pursuant to section 133 of the *Customs Act,* the amount of $10,356.20 be remitted to Atlantic Container Lines and that the amount of $31,068.60 be held as forfeit.

[23] In effect the Minister reduced the amount of the penalty to two times the duty and tax evaded in addition to the amount of duty and tax payable and ordered $10,356.20 remitted to ACLC. In his case synopsis and reasons for decision, the senior adjudicator of the Adjudications Division, Mr. Bellefeuille, indicated that this was a case of "non-report at the time" and a "repeat offence" by a commercial enterprise which, in accord with the chart in the Customs and Excise Enforcement Manual mentioned above, carries with it a penalty of two times the total amount of duty and taxes owing plus the amount of duty and tax owing. That was the decision of Mr. Bellefeuille, subsequently accepted and implemented by the decision made on behalf of the Minister.

[24] By notice on behalf of the Minister, also dated May 6, 1988, ACLC was advised that the Minister's decision in relation to the ascertained forfeiture (CS 68337/1-AT-993) was that

> (a) the *Customs Act* or the regulations were contravened with respect to which the Notice was served under section 124;
>
> (b) pursuant to section 133 of the *Customs Act,* the amount of $28,076.65 be remitted and the amount of $84,229.95 be held as forfeit.

In effect, the Minister's decision reflects that of the Adjudications Division, that the penalty to be imposed was twice the amount of duty and taxes unpaid plus the duty and taxes for an infraction considered to be smuggling but not a repeat offence by a commercial enterprise. That is the basis set out in the case synopsis and reasons of Mr. Bellefeuille, and the penalty is that set out for such an infraction in the Customs Enforcement Manual.

[25] The determinations, made the same day, that the August 17th seizure was for not reporting but was a repeat offence and that the ascertained forfeiture was smuggling but not a repeat offence, is an aspect of the Minister's decisions that seems to have caused some confusion. Counsel for the plaintiff referred to this in his final argument in these terms:

> And here, incredibly, on the same day he says that the one hundred dollar ($100) infraction which he used to turn Mr. Landry's [*i.e.* the August 17] seizure into a second offense was one which would not be expected. As he says on page 3 here:
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> > "The fact that the offense was a hundred dollar ($100) infraction, it would not be expected by the Department that this would constitute a repeat offense of this nature."
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> So he seems to — well, he does. He contradicts what he said in his other document of

the same date.

[26] The record does not assist in clarifying the circumstances or the references that the adjudicator had in mind in his two decisions, which were implemented by decisions on behalf of the Minister. It may simply be that since, in accord with the reasons provided by the Deputy Minister, the August, 1987 seizure of goods was considered as arising for not reporting their importation, the April, 1986 seizure was considered a prior contravention of the same sort. For the ascertained forfeiture, the reason specified in the notice of the Deputy Minister was smuggling, for which there was no prior contravention of the same kind, and the case synopsis of Mr. Bellefeuille suggests that the April, 1986 seizure was not considered to be significant enough to be treated as a prior contravention in relation to the smuggling alleged. "Smuggling" is not defined in the *Act* though it is constituted an offence for which criminal prosecution may lie (s. 159), a step not initiated in relation to this matter.

[27] There is little in the case synopses and nothing in the Minister's decisions to support the distinction drawn, that the ascertained forfeiture was smuggling but the August 17, 1987 seizure was a case of non-report. In the case of both seizures, the Customs officers in Halifax had originally categorized the actions as smuggling and the amounts originally required to be paid by ACLC were apparently based upon Enforcement Manual guidelines for a repeat offence of smuggling by a commercial enterprise.

[28] In the background of this case there was said to be an inconsistency in the practices of Revenue Canada, Customs and Excise, referred to by counsel for ACLC, as indicated by evidence heard and in the written record. It concerns the reporting requirements at various Customs offices. Mr. Boyne explained that technical departments were maintained by ACLC in Toronto, Montreal and Halifax, with the latter being the main base for technical services at times here relevant. In 1983, ACL was apparently interested in establishing in Canada a major repair centre facility for arranging most ACL container repairs, at least for reefers, for all North America operations. Mr. Boyne was requested to investigate the procedure with respect to importation of spare parts, by discussion with Customs and Excise representatives in the various regions and in Ottawa, and then to report to his Canadian management.

[29] It seems that Customs and Excise and ACLC were unable to agree on one procedure satisfactory to ACLC for importing and exporting spare parts at all ports of entry. Three options were available to ACLC, the details of which appear in Mr. Boyne's statutory declaration and which I will not set out here. Suffice it to say that, according to Mr. Boyne, a procedure acceptable to Customs in Montreal that would permit minimal administrative work in relation to Customs procedures was not acceptable to Customs in Halifax. It is argued this demonstrates the inconsistent application of the Customs legislation and regulations. I note that ultimately, ACL decided not to use Canada as its major repair centre when it was not possible to arrange with Customs and Excise for a single satisfactory system, applicable for all regions in Canada, for dealing with Customs requirements.

[30] The different arrangements said to be applicable for Customs and Excise processes in different regions in Canada may well complicate operations, or indeed may frustrate them, for companies engaged in transportation or other activities that are carried on in more than one region. Even assuming that is the situation, those difficulties do not assist the plaintiff for such

difficulties are irrelevant to the issues here.

[31] I turn to a final aspect of the background of this case which concerns the timing of the plaintiff's action against the defendants in this case. Following the Minister's decisions dated May 6, 1988, which counsel for ACLC advised were received on May 13th, the plaintiff considered the matter and instructed counsel to appeal the decisions of the Minister in accord with the *Customs Act.* Under *the Act,* s. 135 provides:

> 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.
>
> (2) The *Federal Court Act* and the *Federal Court Rules* applicable to ordinary actions apply in respect of actions instituted under subsection (1) except as varied by special rules made in respect of such actions.

[32] Advice from the plaintiff's overseas head office to counsel was received in the office of counsel but in his absence early in August, 1988. Thereupon an associate in the office filed in the court a statement of claim on August 5, 1988, including as defendant "Her Majesty the Queen in Right of Canada, as represented by Her Minister of National Revenue", but that statement related only to the Minister's decision concerning the seizure of August 17, 1987. When counsel for the plaintiff returned to this office on August 10th he discovered the omission from the statement of claim of any reference to the ascertained forfeiture, and that day he advised the court and counsel of the Department of Justice, which ultimately acted for the defendants in this case, of the failure of the statement of claim to refer to the two matters the plaintiff intended to appeal and which had been dealt with more or less simultaneously by Revenue Canada. It was indicated that an amended pleading would be filed within a few days.

[33] On August 15, 1988, an amended statement of claim was filed. It joined the Minister of National Revenue as a defendant, in view of the specific wording of s. 135(1), retaining Her Majesty the Queen as described in the original statement of claim, as a defendant. It also sought relief, in somewhat different terms than were set out in the original statement, and it contested both decisions of the Minister, that in relation to the seizure of August 17, 1987, and that in relation to the ascertained forfeiture. Counsel for the defendants did not consent to filing the amended statement of claim, and in the defence filed September 20, 1988, it is pleaded that the plaintiff was notified of the decisions of the Minister on May 12, 1988, but did not appeal the decision with respect to the ascertained forfeiture within 90 days of notice. Thus it is said this court has no jurisdiction to determine an appeal in relation to that decision.

The issues

[34] There are three principal issues raised for determination in this case. The first is the jurisdiction of the court to consider the plaintiff's claim in relation to the Minister's decision concerning the ascertained forfeiture in light of the limitation period for commencing an action established by s. 135(1). The second is the jurisdiction of the court pursuant to that same

provision. The third concerns the plaintiff's claim to certain relief, particularly an order quashing the Minister's decisions concerning the terms of forfeiture. Under this last issue I deal with the plaintiff's concern about unfairness in the adjudicative process of National Revenue, Customs and Excise, which led to decisions made on behalf of the Minister. I propose to deal with and dispose of each of the issues in turn.

The limitation period and the action concerning the ascertained forfeiture decision

[35] I have referred to the defendants' pleading in response to the plaintiff's amended statement of claim, based upon s. 135(1), that the plaintiff's claim in relation to the decision concerning the ascertained forfeiture was not raised within the 90 days provided by that subsection. Both counsel referred to s. 149 of the *Act* which provides:

> 149. For the purposes of this Act, the date on which a notice is given pursuant to this Act or the regulations shall, where it is given by mail, be deemed to be the date of mailing of the notice, and the date of mailing shall, in the absence of any evidence to the contrary, be deemed to be the day appearing from such notice to be the date thereof unless called into question by the Minister or by some person acting for him or Her Majesty.

The exhibits filed by agreement of the parties include a letter from counsel for the defendants to counsel for the plaintiff indicating, following investigation, that the decision of the Minister dated May 6, 1988, was sent by registered mail addressed to ACLC with a copy to counsel, and was received by ACLC in Halifax on May 12, 1988. Thus, notice was effective under s. 149 on May 9th, but even if one were to take the date of reception of the Minister's decision as the date when it might better be considered to be effective, the filing of the amended statement of claim on August 15th was later than the 90 days, after being notified of the Minister's decision, specified by s. 135(1).

[36] The plaintiff urged that under the *Federal Court Rules,* C.R.C. 1978, c. 663, the amended statement of claim should be allowed, and implicitly that the defence pleaded in light of the limitation period should not be accepted. Counsel for the defendants urged that in accord with s. 135(2), the *Federal Court Rules* have no application unless the action is "instituted under subsection (1)", that is, by commencing an action within 90 days after the plaintiff is notified of the decision. In my view, the defendants' argument does not resolve the issue, for s. 135(2) provides that the court's Rules "applicable to ordinary actions apply in respect of actions instituted under subsection (1)". This action was instituted by the statement of claim filed on August 5th, however defective the original statement of claim might be perceived. The issue before the court is really whether the plaintiff's amended statement of claim filed August 15th should be accepted for purposes of the action and, if so, what the effect of that is in relation to the defence raised concerning the action as it relates to the decision concerning the ascertained forfeiture.

[37] The plaintiff's argument about the application of the court's Rules is essentially this. First, it was entitled under Rule 421(1) to amend its statement of claim without leave since, at the time it did so, the defendants had not pleaded to the original statement. Indeed, I note from

the record that the original statement of claim was only transmitted by the court registry on August 16, 1987, to the Deputy Attorney-General of Canada, effecting service upon Her Majesty the Queen, and the amended statement of claim was similarly served on August 22nd. Secondly, the defendants did not apply to the court pursuant to Rule 422 to disallow any part of the amended statement of claim, nor did they apply under Rule 419 to have any part of the amended statement of claim struck out. Thirdly, Rules 424 and 427 give the court discretion to allow amendments in appropriate cases. These Rules provide as follows:

> 424. Where an application to the Court for leave to make an amendment mentioned in Rule 425, 426 or 427 is made after any relevant period of limitation current at the date of commencement of the action has expired, the Court may, nevertheless, grant such leave in the circumstances mentioned in that Rule if it seems just to do so.
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> 427. An amendment may be allowed under Rule 424 notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

[38] Plaintiff's counsel cited cases in support of recognizing the amendments to the plaintiff's statement of claim, but none of them deals directly with the circumstances of this case. Rather, all three cases deal with the application of Rule 424, and Rule 425 concerning the joining of parties: see *Hijos de Romulo Torrents Albert S.A. v. The Ship "Star Blackford"* (1979), 98 D.L.R. (3d) 341, [1979] 2 P.C. 109, 26 N.R. 84 (C.A.); *Waterside Ocean Navigation Co. Inc. v. International Navigation Ltd.,* [1977] 2 F.C. 257 (T.D.); *M.N.R. v. Bobbie Brooks* (*Canada*) *Ltd.,* [1972] F.C. 1208, [1972] C.T.C. 519, 72 D.T.C. 6419 (T.D.).

[39] More apt to this case are the comments of Collier J. in *Canadian Motor Sales Corp. Ltd. v. The Ship "Madonna"* (1972), 24 D.L.R. (3d) 573 at pp. 578-9, [1972] F.C. 25 (T.D.):

> . . . under Rule 424 there is a wide discretionary power to allow an amendment, in the interests of justice, even after a statutory limitation period has intervened. In this case the plaintiff's solicitors were furnished with the wrong bills of lading, and in my view the error was understandable. There were two voyages, a short period apart, covering the same kind of automobiles, consigned to the same plaintiff, carried by the same vessel, under charter by the same defendant.

Collier J. allowed an amendment to a statement of claim which, if it were construed as permitting a new cause of action, allowed that cause to be pleaded even though it was time-barred under the Hague Rules.

[40] In *Domco Industries Ltd. v. Mannington Mills, Inc.* (1990), 29 C.F.R. (3d) 481 at p. 496, 107 N.R. 198, 35 F.T.R. 240*n* (C.A.), then Chief Justice Iacobucci, for the court, said:

> The Federal Court Rules permit an amendment to a statement of claim adding a new

cause of action, even though the limitation period for that cause of action has expired since the original statement of claim was filed, if:

(1) the new cause of action is based on the same or substantially the same facts as the cause of action originally pleaded (Rule 427), and

(2) it seems just to allow the amendment (Rule 424).

In that case the Court of Appeal upheld the decision of Strayer J. at trial and refused to allow an amendment to a statement of claim, not because that course was beyond the jurisdiction of the court, or that the cause of action was beyond the jurisdiction of the court as the defendant in this case pleads, but because the circumstances of the case did not meet the requirements of Rule 427 and because it would not be just to permit the amendment.

[41] In this case there is no motion before me to permit an amendment, adding to the original action reference to action in relation to the Minister's decision in regard to the ascertained forfeiture, so Rules 424 and 427 are not directly in play. The plaintiff, having filed the amended statement of claim in accord with Rule 421(1), before any pleading by the defendants, indeed before the defendants were served with the original statement of claim, has complied with the Rules. No motion to question the amendment was made pursuant to Rule 422 or 419. The amended statement of claim must be accepted as framing the action. Indeed, the defendants' statement of defence implicitly accepts this and pleads in response to the amended statement filed August 15th.

[42] In the ordinary course amendments to pleadings are deemed to have effect from the date of the original pleading, here August 5th: see *Fredericton Housing Ltd. v. The Queen,* [1973] F.C. 196 at pp. 204-5, [1973] C.T.C. 160, 73 D.T.C. 5145 (T.D.); appeal dismissed without discussion of this point 40 D.L.R. (3d) 392, [1973] F.C. 681, [1973] C.T.C. 400 (C.A.). Thus, the amended statement of claim is effective from that date, unless, in my view, the amendment relating to the Minister's decision in relation to the ascertained seizure is not one that the court would accept if it were the subject of a motion to amend the original statement of claim pursuant to Rules 424 and 427. If the latter should be the case, then I believe permitting an amended statement of claim to be effective from the date of filing of the original and to have the effect of barring an otherwise valid defence to a new cause of action would prejudice the defendants' position and would not be in the interests of justice between the parties. In those circumstances, an amendment adding a new cause of action, made by the party under Rule 421 without order of the court, should be considered to have effect from the date of filing the amendment.

[43] I am persuaded that the cause of action concerning the decision in regard to the ascertained forfeiture does fall within the scope of amendments contemplated under Rule 427 as a new cause of action relating to a second decision of the Minister and one that is new in the sense it was not included in the original statement of claim. Yet it arises out of substantially the same facts as the other seizure, the cause of action in respect of which relief had already been claimed by the plaintiff. The two causes of action differ only in the times of the infractions alleged and in the fact that the seizure on August 17th resulted in the seizure of goods while none were seized in the ascertained forfeiture. The latter arose from the former seizure on

August 17th, and on the basis of information provided by the plaintiff. The basic actions of the plaintiff were the same in each case; the penalties applicable to actual and ascertained forfeitures in accord with the Enforcement Manual are the same. The defendant could here claim no surprise or prejudice because of the amendment for even before service of the original statement of claim upon the defendant, counsel for the plaintiff called and wrote to advise that an amended statement of claim would be filed as soon as possible, and it was so filed even before the original pleading was served. In my view, were there a motion before the court to permit an amendment of the sort the plaintiff here filed, as it was entitled to do without leave, it would be in the interests of justice to permit such an amendment under Rules 424 and 427 in the circumstances of this case.

[44] I conclude that the plaintiff's amended statement of claim must be accepted as framing its full claim in this action, and that, as is the usual course, the amendments are effective as of the date of filing of the original statement of claim, August 5, 1987, a date within the limitation period under s. 135(1). The plaintiff's amended statement of claim, though it was filed more than 90 days after the plaintiff had notice of the Minister's decisions, effectively brought its claims in relation to both decisions of the Minister within the court's jurisdiction under s. 135(1) by reason of s. 135(2) and the *Federal Court Rules.* In these circumstances, I find there is no merit to the defence that the claim in relation to the decision regarding the ascertained forfeiture is beyond the jurisdiction of the court.

The jurisdiction of the court pursuant to s. 135

[45] The parties differ on the scope of authority vested in the court under s. 135(1), in relation to both the matters that are relevant for the court to consider and the nature of relief that may be considered. For the plaintiff it is urged that the court should review the evidence of the adjudication and decision process of Revenue Canada, Customs and Excise, and if that is found to be unfair and not consistent with principles of natural justice as the plaintiff claims, that may provide a basis for the court to quash or overrule the decisions of the Minister. Further, it is urged the court, even if it finds the plaintiff did not comply with the Act, may vary the penalties imposed, which the plaintiff submitted are extraordinary and unwarranted in the circumstances of this case. Those circumstances are said to involve a "technical violation" of the *Act,* where no profit resulted, no sales were made, the spare parts imported were exported when affixed to reefers, containers, that were subject to a post-audit system, and there was no intent to deprive government of revenue since, had the *Act* and regulations been followed and duty paid on import of the parts, the plaintiff, upon application when the parts were exported, would have been entitled to a drawback of duty and taxes paid. The plaintiff urges that this court may order that the whole or part of the moneys forfeited as a result of the Minister's decision be remitted to ACLC.

[46] For the defendants it is submitted that the court's jurisdiction under s. 135(1), accepting that the appeal of the Minister's decision is a trial *de novo,* is limited to reviewing whether the Minister's decision, that a violation of the *Act* or regulations has occurred, is supported by the evidence presented to the court. The underlying reasons for his decisions are not matters for consideration of the court and the court may not review the departmental adjudication process that led to those decisions. Moreover, if the court finds, as the Minister

did, that there has been a violation of the *Act* or regulations, it may not review the penalties imposed, in particular, it may not order remission of moneys determined by the Minister to be forfeited since the discretion to consider remission is a matter vested exclusively in the Minister under s. 118(*a*)(ii) and 133 of the *Act* up to the time of his decisions under ss. 131 and 133, and thereafter it is a matter exclusively within the discretion of the Governor in Council by virtue of s. 23 of the *Financial Administration Act,* R.S.C. 1985, c. F-11. In light of that limited jurisdiction of the court, it is submitted that none of the declaratory or other particular relief requested by the plaintiff may be considered by this court if it finds the *Act* was contravened.

[47] In regard to the jurisdiction of the court under s. 135(1), counsel referred to a number of cases which deal with the issue of forfeiture or which refer to the jurisdiction of the court under the former statute which was repealed and replaced with substantial revision by S.C. 1986, c. 1 (*i.e.,* R.S.C. 1985, c. 1 (2nd Supp)). Only two of the cases cited deal with appeals under s. 135 of the current *Act.* Both cases, *Podgurski v. M.N.R.* (1991), 44 F.T.R. 102, 26 A.C.W.S. (3d) 54, and *Mattu v. M.N.R* (1991), 45 F.T.R. 190, 28 A.C.WS. (3d) 49, deal with the issue of forfeiture. In reasons for judgment in the latter case, I said, as *obiter* [at pp. 197-8]:

> Section 135 of the *Customs Act* does not set out in any detail the requirements or the nature of the appeal that is provided from the decision of the Minister, and those matters were not argued in this appeal. My interpretation of the section is that it provides for trial de novo in the sense that the court is not limited to consideration of evidence that was before the Minister. At the same time, as in the case of appeals from other administrative decisions or decisions of quasi-judicial bodies established by statute this court will not readily vary the decision appealed from unless it is persuaded that the Minister or his agents failed to observe a principle of natural justice or failed to act within his or her statutory discretion, or that the decision is based on an error in law, or is based on a finding of fact that is perverse or capricious or without regard to the evidence before the Minister.

[48] The issue of the court's jurisdiction now having been raised directly in this case, I turn to the statute itself as a basis for determining the court's role under s. 135(1).

[49] Under s. 123 the forfeiture of goods seized or any money or security held as forfeit in lieu thereof, and under s. 127 the debt due to Her Majesty as a result of a demand for payment in regard to an ascertained forfeiture, are "final and 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 section 129".

[50] The last section, s. 129, as we have seen, provides for persons affected by a seizure or an ascertained forfeiture to "request a decision of the Minister under section 131". The latter provides by s. 131(1)(*a*), in essence, that "the Minister shall . . . having regard to the circumstances, consider and weigh the circumstances of the case and decide", in a case such as this, "whether the Act or the regulations were . . . contravened".

[51] Where the Minister decides under s. 131 that there has been a contravention of the *Act* or the regulations, then s. 133(1) provides that he may return the goods seized on payment of an amount of money as determined under s. 133(2) or remit any portion of any money or

security taken.

[52] In this case, each of the two decisions of the Minister dated May 6, 1988, contained a decision pursuant to s. 131 that the *Act* had been contravened, and a decision pursuant to s. 133 that a portion of the amount previously paid by ACLC should be remitted and the balance held as forfeit. Does s. 135, providing an appeal from the decision of the Minister by one who requested a decision under s. 131, preclude appeal of the determination under s. 133, as the defendants here contend? In my opinion, the answer to this question is yes, for the following reasons. In s. 135 Parliament has provided for an appeal in relation to the decision of the Minister made under s. 131, a section which provides for a decision only with respect to the issue of whether there has been a contravention of the *Act* or the regulations. Moreover, Parliament has provided by ss. 123 and 127 a privative clause precluding review of the forfeiture of goods seized or any money held as forfeit "except to the extent and in the manner provided by section 129" and that provision, s. 129, provides opportunity to request a decision of the Minister under s. 131. These provisions, in my view, clearly limit any appeal, both within the department under s. 129 by requesting a decision of the Minister, and by appeal to the court under s. 135 from a decision by the Minister, to review of the decision specified under s. 131, that is, whether there has been a contravention of the *Act* or regulations.

[53] In my view, Parliament has insulated from appeal the penalty imposed in the event there is found to be a contravention of the *Act.* That may seem surprising since the penalty will often be the primary concern of the person whose goods are seized under the *Act* or who is served with a notice and demand for payment under s. 124. Yet that simply carries on a long-standing regime under Customs Acts of the past, at least in relation to goods seized, for the goods are forfeited to Her Majesty at the time of the contravention of the *Act* (s. 122), and terms of any remission, where the *Act* or regulations are contravened, have been considered beyond the role of the court to review. *Lawson v. The Queen,* [1980] 1 F.C. 767 (T.D.), *per* Mahoney J. at p. 772.

[54] This does not mean that the discretion vested in the Minister in relation to penalties is unlimited. The *Act* and regulations specify maximum penalties, and the determination of a penalty will not be beyond the jurisdiction of the court in terms of remedies for judicial review of administrative decisions, primarily in regard to the duty of fairness. In the result, I am persuaded that, while the court has no jurisdiction under s. 135 to review the penalty imposed where there is an infraction of the *Act,* it does have jurisdiction, under ss. 18 and 18.1 of the *Federal Court Act,* R.S.C. 1985, c. F-7, as amended by 1990, c. 8, ss. 4 and 5, to consider whether the discretion to impose penalties, consequent upon a contravention of the *Act,* has been exercised in accordance with the law.

[55] I note in passing that, if my interpretation of the *Act* is correct, there is an anomalous situation presented for anyone seeking to question the Minister's decisions in relation to seizures and forfeitures. The *Act* provides for an appeal of a decision of the Minister on the issue of whether there has been a contravention of the *Act* or regulations and such an appeal may be made by way of an action in this court within 90 days of notice of the decision. The exercise of discretion in imposing the penalty, like any other administrative discretion, even where there is a privative clause, is subject to judicial review in this court, but since amendments to the *Federal Court Act* effective February 1, 1992, relief must be sought by an

application for judicial review, not by an action, to be commenced within 30 days of the decision sought to be reviewed, unless the court grants an extension of time to apply. The person affected by Customs seizures and penalties can only be confused by the two remedial processes Parliament has now provided under the two statutes. Parliament might well consider whether both decisions of the Minister, under ss. 131 and 133, should be subject to review in a single proceeding, by way of an appeal or on application for judicial review.

Fairness in the process of determining the terms of forfeiture

[56] In this case the plaintiff's action was commenced prior to the recent amendments to the *Federal Court Act* and the plaintiff sought declaratory relief, and an order quashing the decisions of the Minister in relation to the amounts to be forfeited in the respective seizures. The latter order is in the nature of *certiorari,* and, at the time this action commenced, was available under s. 18 of the *Federal Court Act,* by way of action or by way of originating motion without time limited for commencing proceedings, though the court might refuse to exercise discretion where there was unwarranted delay in seeking relief. Perhaps, I should note for the record, that, in my view, relief under s. 18 of the *Federal Court Act* rather than s. 28, prior to the amendments effective in 1992, was available in this case since the decision here questioned under s. 133 of the *Customs Act,* whatever the process established by the Minister might be for advice about his decision, was not a decision required by law to be made on a judicial or *quasi*-judicial basis.

[57] The plaintiff's case for relief is related to perceived unfairness in the process followed by the Adjudications Division acting for the Minister, in assessing the amounts to be forfeited. Basically, the unfairness alleged concerns certain aspects of the process followed. Reports and correspondence from Customs officers responsible for both seizures were not made available by the Adjudications Division to ACLC prior to the determinations, and it is said these contained statements prejudicial to ACLC. These statements were only provided to the plaintiff through pre-trial discovery procedures in this case after the statement of claim was filed. Customs enforcement procedures under the Department's manual were similarly provided only after this action commenced. On the other hand, the representations of ACLC in support of its requests for decisions of the Minister were made available for comment, and were commented upon, by the officers responsible for the seizures in Halifax. There were telephone conversations between the senior adjudicator responsible, Mr. Bellefeuille, and one of the responsible officers in Halifax, the contents of which were not divulged to the plaintiff. It would appear that it was on the basis of information in the original reports and some information subsequently provided by the officers in Halifax, that Mr. Bellefeuille wrote in December, 1987, to counsel for ACLC, responding in part to representations counsel had submitted in November.

[58] The Customs Enforcement Manual, Part 3, c. 5 deals with the Adjudications Division in the following terms, in part:

> 2. Once a seizure is made by a Customs office, the R.C.M. Police or Investigations Division and an appeal has been made, it becomes the responsibility of Adjudications Division and is the start of legal proceedings pursuant to sections 128 to 141 of the

Customs Act. The Division will follow the steps closely and conduct what is, in effect, a "hearing" by mail.

3. When a Notice of Claim is received, Adjudications Division will forward by registered mail, the formal Notice of Seizure pursuant to section 130 and usually, accompanying correspondence outlining the Department's position on the matter. Upon receiving all information and evidence available, Adjudications Division will prepare a recommendation and forward the formal Notice of Ministerial Decision pursuant to section 131.

4. The seizing Customs office will be kept advised of all developments as the case progresses, by means of copies of all correspondence and documentation received. One copy is intended for the official office file and it is requested that the second copy be brought to the attention of the seizing officer, assisting officer, and primary officer concerned, for any comments, observations, or further information they may wish to provide. The adjudicator will often ask for a further report on a case for clarification on certain points which are not clear, or are questionable from a legal point of view. These requests should not be considered as criticism, as the only evidence the adjudicator has to support the seizure is obtained from the information provided by the seizing agency. It should also be emphasized that when further reports have not been requested and the officer feels additional comments or information are appropriate, after reviewing the correspondence from the claimant, he should not hesitate to submit a supplementary report.

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The conduct of the adjudication process, which is essentially a "hearing" by mail, is extremely important to ensure that a sensible and supportable decision is rendered, as the only appeal from such decision is an appeal to the Federal Court of Canada which is without power of remission, that is, it can only decide whether or not a forfeiture has been incurred as alleged, without power to change or adjust penalties if a forfeiture has been incurred.

There is no provision in the *Act,* and I was not referred to any regulations concerning the work of the Adjudications Division. The Manual appears designed to provide guidance within Customs and Excise for consistency in discharge of responsibilities in a major department with many local offices each dealing with many members of the public at large. In that context, within statutory or regulatory restrictions, it is open to the Minister to make whatever arrangements he deems appropriate for administrative decisions, though those arrangements must ensure that decisions are made in a manner consistent with the duty of fairness owed to persons affected.

[59] I am persuaded that the process here followed in making decisions on behalf of the Minister under s. 133 in relation to the terms of both forfeitures, the penalties to be applied, in the two seizures did not comply with the Minister's duty of fairness owed to ACLC, the party affected by the decisions. The Adjudications Division, in its "hearing by mail" did not, in my view, provide to ACLC information or evidence upon which it relied in reaching its decisions, and thus the plaintiff was not in the position to fully know the case it had to meet, or the

allegations or charges against it. That case and those allegations were not, in my view, adequately identified by the notices of seizure issued in August and September or in the later written notices of reasons for the seizures issued by the Adjudications Division on behalf of the Deputy Minister. The evidence on which those notices were based, consisting of the reports on the seizures and correspondence or other communications with the officers responsible in Halifax, was not provided for information or comment by ACLC. At the very least, the original reports of Customs officers relating to the seizures, and any subsequent comments from them, particularly comments relating to submissions made by ACLC ought to have been provided to the plaintiff, with an opportunity to respond before the decisions were made. Only then could it be said that ACLC had a fair opportunity to comprehend and to respond to the concerns of the seizing officers about the significance, if any, of the April, 1986 seizure and for both seizures in 1987, about the serious view of the infractions taken by the officers responsible in Halifax, and the allegations of smuggling, a term not defined by the *Act* or regulations and for which in testimony at trial the officers responsible for the 1987 seizures were able to provide only their personal definitions.

[60] On the evidence adduced before me, I am of the view that this is an appropriate case for the Minister's determinations under s. 133 to be set aside and the matter sent back for reconsideration. Another adjudicator should reconsider the appropriate terms of forfeitures and remissions, if any, in the two cases, utilizing the record of reports, correspondence, and submissions already compiled, after having provided opportunity for ACLC to respond to or comment upon any reports or correspondence from the Customs officers responsible in Halifax. That reconsideration should, of course, be without any reference to or regard for the determinations previously made.

Conclusion

[61] By its amended statement of claim the plaintiff appeals, pursuant to s. 135 of the *Act,* the decisions of the Minister which relate to the forfeiture only of the sums of $31,068.60 and $84,229.95 respectively for the two seizures. In so limiting its appeals, ACLC concedes that in each case the *Act* was contravened, and indeed it has so admitted throughout. Thus the Minister's decisions, in each case, that the *Act* or the regulations were contravened by ACLC must stand. Since, as I read the statute, that is the only matter for consideration of the court under s. 135, the plaintiff's action in this regard must be dismissed. The appeal of the decisions in relation to the amounts declared as forfeit is also dismissed since, as I read the statute, those are not matters within the court's jurisdiction to review under s. 135.

[62] By its amended statement of claim the plaintiff also claimed, and pursued at trial, a declaration that it is entitled to repayment and return of the sums forfeited, or such lesser sums as the court may allow. It also sought an order or a declaration that no administrative penalties are payable by the plaintiff in the circumstances of this case. Both sorts of relief claimed relate to the determinations of the Minister concerning the amount forfeited or to be remitted, under s. 133. Neither is a matter within the courts jurisdiction in relation to appeals under s. 135, or otherwise under the *Act* or the general jurisdiction of the court.

[63] Finally, in this action commenced in August, 1988, the plaintiff also claimed an order quashing the decisions of the Minister in so far as they relate to forfeiture of the sums therein

provided. For reasons already set out, in essence because the process followed by the Adjudications Division, acting on behalf of the Minister, did not comply with the Minister's duty of fairness owed to ACLC, I conclude that an order should go setting aside the Minister's determinations made under s. 133 and referring both matters back for reconsideration by another adjudicator in a manner consistent with these reasons and the law.

[64] The plaintiff, having been partially successful, shall have costs of this action.

[65] Judgment accordingly.