Fenn (H.B.) and Co. v. Minister of National Revenue (Customs and Excise), (1992) 53 F.T.R. 7 (TD)

Judge:	Strayer, J.
Court:	Federal Court (Canada)
Case Date:	December 17, 1991
Jurisdiction:	Canada (Federal)
Citations:	(1992), 53 F.T.R. 7 (TD)

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Text

Fenn and Co. v. MNR (1992), 53 F.T.R. 7 (TD)
MLB headnote and full text

H.B. Fenn and Company Ltd. (plaintiff) v. Her Majesty the Queen (defendant)
(T-384-89)
Indexed As: Fenn (H.B.) and Co. v. Minister of National Revenue (Customs and Excise)
Federal Court of Canada
Trial Division
Strayer, J.
March 3, 1992.

Summary:

An importer deposited with the Minister of National Revenue money for the release of seized goods. The Minister held that the importer had contravened the Customs Act and that a portion of the deposit would be forfeited. The importer appealed under s. 135 of the Customs Act.

The Federal Court of Canada, Trial Division, dismissed the appeal.

Customs - Topic 2845

Report and entry inwards - Declarations - Requirement of accuracy - [See **Customs - Topic 8010**].

Customs - Topic 2846

Report and entry inwards - Declarations - Interim accounting - Section 32(2) of the Customs Act required an "interim accounting" prior to the release of imported goods - The Federal Court of Canada, Trial Division, stated that an "interim accounting" represented " ... the

report initially required under s. 12. ... by s. 9(1) of the Accounting for Imported Goods and Payment of Duties Regulations the interim accounting must, inter alia, provide such information as will enable an officer to make an estimate of the value for duty of the goods, and indicate their quantity" - See paragraph 12.

Customs - Topic 8003

Offences and penalties - General - Liability of importer for acts of agent - [See **Customs - Topic 8010**].

Customs - Topic 8010

Offences and penalties - General - Strict liability offences - The Federal Court of Canada, Trial Division, 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 ... 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" - See paragraph 19.

Customs - Topic 8066

Offences and penalties - Offences - General - Failure to report goods - An importer deposited money with the Minister of National Revenue for the release of seized goods - The Minister held that the importer had contravened the Customs Act and that a portion of the deposit would be forfeited - The shipper had failed to send all relevant documents - The importer's representative assumed that the manifest was in error and made an erroneous declaration - The Federal Court of Canada, Trial Division, concluded that the importer had contravened s. 12(1) of the Customs Act by failing to provide a correct declaration and that the goods were legally forfeited at that time.

Customs - Topic 8066

Offences and penalties - Offences - General - Failure to report goods - The Federal Court of Canada, Trial Division stated that by s. 110 of the Customs Act, custom officers are entitled "... to seize the goods not declared and by s. 122 those goods would be deemed forfeited to the Crown from the time of the contravention of the Act ... There is ample authority to the effect that a failure to comply with reporting sections such as the present s. 12 gives rise to instant forfeiture. Such forfeiture is not dependent upon any act of the customs officials but is the legal consequence of unlawful importation through failure to make a proper report" - See paragraph 14.

Customs - Topic 8066

Offences and penalties - Offences - General - Failure to report goods - The Federal Court of Canada, Trial Division, stated that "good faith on the part of the importer is not enough to prevent goods from being seized and forfeited because of an erroneous declaration" - See paragraph 17.

Customs - Topic 8066

Offences and penalties - Offences - General - Failure to report goods - [See **Customs - Topic 8010**].

Customs - Topic 8208

Offences and penalties - Penalties - Forfeiture - [See first and second **Customs - Topic 8066**].

Cases Noticed:

Marun et al. v. R., [1965] 1 Ex. Cr. 280, refd to. [para. 14].

R. v. Sun Parlor Advertising Co. et al., [1973] F.C. 1055 (F.C.T.D.), refd to. [para. 14].

Ladakis v. R. (1985), 10 C.E.R. 95 (F.C.T.D.), refd to. [para. 14].
R. v. Letarte, [1981] 2 F.C. 76, refd to. [para. 17].
Noel et al. v. R. (1983), 6 C.E.R. 72 (F.C.T.D.), refd to. [para. 17].
Gagi et al. v. R. (1986), 12 C.E.R. 197 (F.C.T.D.), refd to. [para. 17].

Statutes Noticed:

Accounting for Imported Goods and Payment of Duties Regulations - see Customs Act Regulations.
Customs Act, R.S.C. 1985 (2nd Supp.), c. 1, sect. 12 [paras. 12, 14]; sect. 12(1) [paras. 12, 20]; sect. 32(2) [paras. 3, 12]; sect. 110, sect. 122 [para. 14]; sect. 130 [para. 10]; sect. 135 [para. 1].
Customs Act Regulations, Accounting for Imported Goods and Payment of Duties Regulations, sect. 9 [para. 4]; sect. 9(1) [para. 12]; sect. 10 [para. 4].
Customs Act Regulations, Revenue Canada Memorandum D17-1-0, November 7, 1988 [para. 4].

Counsel:

Vernon I. Balaban, for the plaintiff;
Claire A.H. Le Riche, for the defendant.

Solicitors of Record:

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John C. Tait, Q.C., Deputy Attorney General of Canada, Ottawa, Ontario, for the defendant.

This application was heard on December 17, 1991, at Toronto, Ontario, before Strayer, J., of the Federal Court of Canada, Trial Division, who delivered the following judgment dated March 3, 1992.

Relief Requested

[1] Strayer, J. : This is an appeal under s. 135 of the Customs Act (R.S.C. 1985, c. 1 (2nd Supp.) as amended). In it the plaintiff seeks recovery of $8,983.53 being part of the money withheld by the Minister of National Revenue after return of part of a penalty paid by the plaintiff to obtain the release of certain goods seized by customs officers in July, 1988. The plaintiff concedes that the defendant is entitled to retain the amount of duty and sales tax owing on the goods in question and it is not disputed that the total of such duty and sales tax is $7,045.98. The amount withheld by the defendant was $14,091.96 and the maximum refundable would therefore be $14,091.96 minus $7,045.98, or $7,045.98. The calculation of the sum claimed by the plaintiff is unexplained.

Facts

[2] Notwithstanding a day of confusing and repetitious evidence, the relevant facts are fairly simple. On or about July 11, 1988, a shipment of books, colouring books, calendars, catalogues, etc. arrived by rail at Welland, Ontario packed in a sealed container having been shipped by Price, Stern Sloan Inc., of Los Angeles, California to the plaintiff in Mississauga, Ontario, the purchaser of this shipment. The carrier was the Norfolk and Western Railway Company which contacted Donna MacCullouch, Office Manager in Welland of Livingston International (a subagent for the plaintiff's customs broker, the latter being Hemisphere Freight & Brokerage Services Inc. of Toronto). The only documentation which Donna MacCullouch had on July 11th was a manifest provided to her by the carrier.

This manifest showed the shipment to consist of 897 packages of books with a total weight of 15,800 pounds. Ms. MacCullouch that day contacted Hemisphere and Hemisphere contacted its principal, the plaintiff. The plaintiff in turn contacted the shipper in Los Angeles. On July 12th the shipper faxed to the plaintiff a Canada Customs invoice and a bill of lading in respect of the shipment indicating that it contained 472 cartons on five pallets and 16 loose cartons. Also sent that day was a commercial invoice which appears to refer only to 472 cartons on five pallets. The Canada Customs invoice, at least, was communicated to Ms. MacCullouch of Livingston International in Welland.

[3] At this point there is some divergence in the evidence. According to Jacqueline Beaudoin, a customs inspector called as a witness for the defendant, Ms. MacCullouch then presented the manifest and the Canada Customs invoice as a form of declaration for release of the shipment under a process known as Release on Minimal Documentation ("R.M.D."). This procedure is authorized by s. 32(2) of the Customs Act and applied to the import of commercial goods. The Act requires an "interim accounting" prior to release which, by the Regulations as they apply to this case, would involve the presentation by the importer of "a customs invoice or any other document that enables an officer to make an estimate of the value for duty of the goods ..." which identifies the exporter and importer, describes the goods and indicates the unit of measurement and quantity of the goods.

[4] With respect to such goods as were involved here, the importer then has five days after release of the goods to provide a further accounting in accordance with the Act (These procedures are prescribed in the Accounting for Imported Goods and Payment of Duties Regulations , ss. 9 and 10, Revenue Canada Memorandum D17-1-0, November 7, 1988). Ms. Beaudoin says that Ms. MacCullouch presented to her on July 11th, or possibly on July 12th, the manifest showing 897 packages in the shipment, and the Canada Customs invoice showing 472 cartons on five pallets plus 16 other pieces, the latter showing the weight to be 15,800 pounds which was the same weight as shown in the manifest for 897 packages. According to Ms. Beaudoin she rejected the documents because of this discrepancy. Ms. MacCullouch denies that this happened, says that she herself noticed the discrepancy and on her own initiative contacted the carrier. While much time was spent at the trial on this issue, counsel did not explain to me the legal significance as to whether there was or was not an initial presentation of an R.M.D. with these discordant documents. At best, counsel for the defendant suggested that the fact that Ms. Beaudoin had given Ms. MacCullouch an opportunity to take the documents away and present correct documents showed the fairness and good faith of the customs officers. As far as I can see that is not relevant to any issue I have to decide.

[5] What seems undisputed is that Ms. MacCullouch, with or without prior presentation of the discordant documents to Ms. Beaudoin, contacted the railway carrier and asked it to correct its manifest. This the carrier did, altering the manifest for the shipment to indicate only 472 cartons of books (instead of the original 897) but still showing the weight at 15,800 pounds. A notation was added: "Rewritten to agree with correct number of pieces." There is some inconsistency in the plaintiff's case as to whether Ms. MacCullouch received the Canada Customs invoice and other documents in respect of the 472 boxes on pallets plus 16 loose boxes on July 12th or July 13th (Cf. transcript pages 52, 247.) In any event the plaintiff concedes - and this appears to be most consistent with all the evidence - that Ms. MacCullouch presented "a declaration, an RMD ..." on July 13th (Transcript page 380.) I so

find. This "declaration" consisted of a presentation of the Canada Customs declaration showing 472 cartons on five pallets plus 16 loose cartons, and the "rewritten manifest" showing 472 cartons to which was attached the original version of the manifest showing 897 cartons.

[6] Ms. Beaudoin testified, and I accept, that because of the discrepancy between the original manifest and the Canada Customs invoice she decided that the shipment should be opened for inspection, and this was done the next day.

[7] There is no real dispute over most of what happened on July 14th. At about 8:00 a.m. customs inspectors opened the container containing the shipment. They found in it 897 cartons. They also found in it envelopes containing complete documentation for the shipment. This included bills of lading for 379 cartons weighing 12,808 pounds, for 30 cartons weighing 1,750 pounds, and for 472 cartons of calendars plus 16 cartons of display fixtures, weighing 15,808 pounds, for a total weight of 30,366 pounds. Also included was a Canada Customs invoice for the 379 cartons on ten pallets as well as a Canada Customs invoice for the 472 cartons on five pallets plus 16 loose cartons. It will be noted that the bill of lading and the Canada Customs invoice for 472 cartons on five pallets plus 16 loose cartons covered the same items that Livingston had declared on behalf of the plaintiff on July 13th, whereas the other documentation covered the rest of the shipment. Thus during the morning of July 14th the true situation became apparent to customs officers, namely that there were some 409 cartons in the shipment which had not been declared; and further, that the total weight of the shipment was not 15,800 pounds as shown on the documents presented for the RMD on July 13th, but was instead 30,366 pounds. The total value of the shipment shown on these documents was $76,437.16 instead of the $42,137.20 shown on the single Canada Customs invoice presented with the RMD package on July 13th.

[8] It is also clear that at about 12:15 p.m. Los Angeles time on July 14th, the shipper, Price, Stern and Sloan, faxed to the plaintiff additional documentation covering the rest of the shipment, completing the documentation which it should have sent on July 12th which only covered 472 cartons on five pallets plus 16 loose cartons for a total weight of 15,800 pounds and a total value of $4,370.20. These additional documents were faxed by the plaintiff to Hemisphere that day.

[9] The only question of fact seriously in dispute in respect of the events of July 14th is as to whether this additional documentation from the shipper, which would have been received by the plaintiff in Toronto after 3:00 p.m. that day and retransmitted to Hemisphere, was further transmitted to customs officers in Welland later in the day. The only evidence that the plaintiff could produce that such might have happened arose out of the cross-examination of Paul Smyth, a customs inspector from Port Colbourne. He had been asked to go to Welland on July 14th to take over the paperwork for the seizure that was being done by Jacqueline Beaudoin as she had to leave on other business. While he did not specify what time he arrived in Welland on July 14th, it is clear that Ms. Beaudoin had already carried out the inspection of the container, had listed its contents, and had found the documentation in the container as described earlier. Ms. Beaudoin showed Mr. Smyth various documents after his arrival including her own work sheets on the inventory of the contents of the container. When asked on cross-examination as to whether Ms. Beaudoin showed him documents "which had fax marks on them", he replied that "some of them did".

(Transcript pages 216-217.) He had no recollection of the fax dates indicated on such documents. Counsel for the plaintiff was apparently trying to demonstrate that the correct documentation had arrived by fax from Los Angeles via the offices of the plaintiff and of Hemisphere and had been presented on July 14th to Ms. Beaudoin. Ms. Beaudoin categorically denies this, and she had kept notes of events commencing the morning of July 14th to which she referred in her testimony. In the absence of any more precise evidence on behalf of the plaintiff I do not consider that it has established that it had provided the correct documentation voluntarily on July 14th through faxed documents. It is clear, in any event, that those documents could not have arrived in Welland before the container was opened and the contents inspected.

[10] The evidence is clear that upon the inspection being made and the discrepancies being found between the actual contents of the shipment and the RMD presented on July 13th, that portion of the goods which had not been declared in the RMD were treated as seized. A Seizure Receipt was issued on July 18th indicating that those goods could be released on deposit of $20,882.55. Subsequently a Corrected Statement of Goods Seized was issued on July 25th showing the total amount owing to be $21,137.94 representing the total duty and sales tax owing on the undeclared goods plus a penalty of twice that amount. The goods were released, however, on July 28th by payment of $20,882.55 on behalf of the plaintiff. On August 31, 1988 a formal notice of seizure was issued under s. 130 of the Customs Act . The reason stated for the seizure was:

"That the said goods were not reported to Customs, in contravention of s. 12 of the Customs Act ."

Although there was no evidence on the point, it appears that the plaintiff then made submissions to the Minister as contemplated by s. 130. On November 18, 1988 a decision was issued on behalf of the Minister that there had been a contravention of the Customs Act in respect of the goods which were seized, that the amount of $14,091.96 should be held as forfeit and that the amount of $6,790.59 should be returned. It is that decision which is under appeal.

Issues

[11] It appears to me that the essential issues raised by the parties are:

(1) When did the siezure take place?

(2) Did the plaintiff comply with the Customs Act in time?

(3) If not, did the plaintiff act in good faith?

(4) If so, does good faith of the importer render illegal the seizure of goods and the imposition of penalties by the Minister of National Revenue? and

(5) If so, what amount is the plaintiff entitled to recover?

Conclusions

(i) When Did The Seizure Take Place?

[12] Section 12(1) of the Customs Act provides as follows:

"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."

While s. 32(2), referred to above, provides for the procedure used by the plaintiff here of only an "interim accounting" prior to release of the goods, with a more complete accounting and payment of duty to follow later, the "interim accounting" as I understand it represents the report initially required under s. 12. As noted earlier, by s. 9(1) of the Accounting for Imported Goods and Payment of Duties Regulations the interim accounting must, inter alia, provide such information as will enable an officer to make an estimate of the value for duty of the goods, describe the goods, and indicate their quantity.

[13] I find that the plaintiff acting through the person relied on by it for the purpose, Donna MacCullouch of Livingston International, purported to provide an "interim accounting" on July 13th and this "interim accounting" did not comply with the Act and Regulations . It misdescribed the shipment so as to make it impossible for the customs officers either to know the total quantity of the goods in the shipment or form any accurate estimate of their total value. Indeed the inspection of the shipment later revealed additional goods beyond those declared having a value almost equal to the amount actually declared.

[14] By s. 110 the customs officers were entitled, upon making this discovery, to seize the goods not declared and by s. 122 those goods would be deemed forfeited to the Crown from the time of the contravention of the Act , that is from the time of the incorrect declaration made in respect of this shipment on July 13th. There is ample authority to the effect that a failure to comply with reporting sections such as the present s. 12 gives rise to instant forfeiture. Such forfeiture is not dependent upon any act of the customs officials but is the legal consequence of unlawful importation through failure to make a proper report. (See e.g. Marun et al. v. Her Majesty , [1965] 1 Ex. Cr. 280, at 295; The Queen v. Sun Parlor Advertising Company et al. , [1973] F.C. 1055 at 1065 (F.C.T.D.); Ladakis v. Her Majesty (1985), 10 C.E.R. 95, at 103 (F.C.T.D.)

ii) Did The Plaintiff Comply In Time?

[15] Therefore the events of July 14th, in particular the question of whether the additional documentation sent from Los Angeles was seen by customs officer Smyth that day, are completely irrelevant as to the legality of the seizure and forfeiture because the erroneous declaration had already been made on July 13th.

iii) Did The Plaintiff Act In Good Faith?

[16] The main contention of the plaintiff, as I understand it, is that it had acted in good faith without either wrongful intent or negligence. There is certainly no evidence that the plaintiff had an intent to deceive customs authorities by misdescribing the shipment. Problems arose for the plaintiff, as I see it, because the shipper failed to send all relevant documents on July 12th when asked to do so and then because the plaintiff's representative in

Welland, Ms. MacCullouch of Livingston, jumped to the conclusion that the manifest was in error when she was provided with the Canada Customs invoice for only 472 cartons on five pallets plus 16 loose cartons. While I find it surprising that neither the plaintiff's employees nor those of Hemisphere and Livingston took greater pains to confirm the accuracy of the information to be provided to Canada Customs I do not think that anything turns on that in this action. The plaintiff may have remedies against those responsible for this serious misreporting of the shipment. Suffice it to say for the purposes of this proceeding that no evidence has been presented to suggest that the plaintiff was guilty of either deliberate deception or of gross negligence in causing the erroneous declaration to be made on July 13th.

iv) Does The Good Faith Of The

Importer Make The Seizure

Illegal?

[17] The jurisprudence seems clear to me, however, that good faith on the part of the importer is not enough to prevent goods from being seized and forfeited because of an erroneous declaration. This has been held in numerous cases, one of the most authoritative being The Queen v. Letarte , [1981] 2 F.C. 76. In that case certain truckers accustomed to hauling loads from the United States to Canada on one occasion acquired new trailers while in the United States and carried cargo in them into Canada. At the border the truckers declared their cargo in writing as usual and there was evidence that they mentioned orally to customs officers that they had "picked up" new trailers in the United States. They made no written declarations in respect of the trailers as they were required to do under s. 18(b) of the Act (the counterpart of present s. 12). The trailers were seized before they could make such declarations. This seizure was nullified by the trial judge. This decision was reversed on appeal, Pratte, J., for the Court of Appeal stating as follows:

"It is clear that s. 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 s. 18(b). This reasoning appears to the court to be without legal validity. Under s. 180, a seizure results from failure to comply with s. 18, regardless of whether the individuals in question acted in good faith ." (Ibid. at 76) (Emphasis added)"

This principle has been applied many times since by the Trial Division (See e.g. Noel et al. v. The Queen (1983), 6 C.E.R. 72, at 76; Gervais v. The Queen , September 12, 1985, T-780-85, unreported, at page 4; Gagi et al. v. The Queen (1986), 12 C.E.R. 197, at 198).

[18] Counsel for the plaintiff contends that all these cases are distinguishable in that there the importers were aware of the existence of the goods but failed to report them. In fact in the Gervais case decided by Rouleau, J., in 1985 the importer made an error, not as to his obligation to report, but as the value of the items being imported. Even accepting the importer's allegation that this was an innocent mistake Rouleau, J., struck out his action on the grounds that good faith was irrelevant to the validity of the seizure.

[19] 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. Therefore arguments by counsel for the plaintiff that Livingston was not expressly authorized to act as its agent are not pertinent to the plaintiff's liability, even if they had any intrinsic validity.

[20] The result is that there was a contravention of s. 12(1) on July 13th when the plaintiff failed to provide a correct declaration through the RMD process. The goods were legally forfeited as of that time.

v) Quantum Of Recovery, If Any

[21] As the plaintiff is not entitled to any recovery it is not necessary to consider the quantum. However, should the matter go any farther I find that if the forfeiture were invalid the plaintiff would be entitled to recover $7,045.98, the amount of penalty still being withheld by the defendant.

Costs

[22] At the end of the trial counsel for the defendant not only asked for costs but asked that they be payable on a solicitor and client basis for any extra trial time resulting from the fact that counsel for the plaintiff had not cooperated in establishing an agreed statement of facts notwithstanding the defendant's efforts to obtain such an agreement. As there was no evidence as to those efforts I gave her the opportunity to file affidavit evidence as to her communications to counsel for the plaintiff in this respect. She subsequently filed such an affidavit. I gave counsel for the plaintiff an opportunity to file an affidavit in reply but he has not done so.

[23] I am satisfied that there could and should have been an agreement on most of the facts and on the authenticity of the documents (even if there were a dispute to be resolved at trial as to which copies of the documents were in the hands of the parties at any particular time). As noted above, there were really only two facts in dispute and both of them were legally irrelevant to liability. Further, I find that counsel for the plaintiff was mainly responsible for this situation by not making any serious effort to achieve such an agreement. As counsel for the plaintiff he had a particular responsibility, and opportunity, in this respect, because he had the burden of proof. Nor do I accept his explanation that he was too busy in other courts. This case was set down on June 5, 1991, for a trial on December 17th and 18th and he had ample time to see that the case was ready for a trial which could be held with a minimum of wastage of time for the parties and the Court.

[24] I am not prepared to place an additional burden on the plaintiff by a special order as to solicitor-client costs, however. Considering all the circumstances the plaintiff has, through the operation of the Customs Act , been subjected to a penalty in the absence of any bad

faith on its part and I do not intend to add to its burden by reason of counsel's conduct of the case.

Disposition

[25] The action will therefore be dismissed with costs.

Application dismissed.

Editor: Gary W. McLaughlin/slm

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