T-75-97

MONTRÉAL, QUEBEC, FEBRUARY 5, 1997

PRESENT: RICHARD MORNEAU, PROTHONOTARY

BETWEEN:

PAUL CRESSATY

Plaintiff

AND

THE MINISTER OF NATIONAL REVENUE

Defendant

ORDER

The motion to strike out the plaintiff's statement of claim is dismissed. Costs to follow.

"Richard Morneau"

Prothonotary

Certified true translation

Christiane Delon

T-75-97

BETWEEN:

PAUL CRESSATY

Plaintiff

AND

THE MINISTER OF NATIONAL REVENUE

Defendant

REASONS FOR ORDER

RICHARD MORNEAU,
PROTHONOTARY:

Introduction

This is a motion by the defendant to strike out the plaintiff's statement of claim on the ground that the statement of claim discloses no reasonable cause of action since it was filed, the defendant alleges, outside the mandatory statutory limitation period of ninety days laid down in section 135 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).[1]

The plaintiff does not see the situation in the same way and, having reviewed the matter, I share his position.

In the circumstances, he says, we should, under section 39 of the *Federal Court Act*[2] and an article that since January 1, 1994 has been found in the Book on

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[1]Although the title of the defendant's notice of motion refers to Rules 419(1)(*a*), (*c*) and (*f*) of the *Federal Court Rules* (the Rules), I note, following all the submissions by counsel for the defendant, that the motion falls under paragraph 419(1)(*a*) of the Rules — on the ground of the limitation period — and that the other paragraphs of Rule 419 were primarily relied on when the same motion was initially presented in another case in the Court, T-1134-96.

It will, however, be noted that Rule 419 refers to striking out pleadings while the defendant, in his motion, asks that the statement of claim be dismissed. There is no need to quibble over the use of different terms since I am of the opinion, and we will have occasion to return to this, that both terms mean the same thing in the context of a preliminary proceeding.

[2]R.S.C., c. 10 (2nd Supp.). Section 39 reads as follows:

39. (1) Except as expressly provided by any other Act, the laws relating to prescription and the

Prescription in the *Civil Code of Québec*[3] (the Code), find that he was always legally entitled to file the statement of claim contemplated by the defendant's motion to strike.

The issue, then, involves the possible interrelationship between section 135 of the *Customs Act*, section 39 of the *Federal Court Act* and article 2895 of the Code.

To clearly understand the parties' positions, it is necessary to review the relevant facts from the beginning.

Facts

On May 16, 1996 the plaintiff filed in Court file number T-1134-96[4] a statement of claim which, on its face, appears to be an appeal under section 135 of the *Customs Act* from a decision of the Minister of National Revenue rendered on March 12, 1996.

Section 135 states:

> 135. (1) A person who requests a decision of the Minister under section 131 may, within ninety days after being notified of the decision, appeal the decision by way of an action in the Federal Court in which that person is the plaintiff and the Minister is the defendant.
>
> (2) The *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.

On July 10, 1996 the defendant presented under Rules 324 and 419(1)(*a*) and (*c*) a motion to strike out the plaintiff's statement of claim on the ground, judging

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limitation of actions in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in that province.

(2) A proceeding in the Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

[3]This is article 2895 of the Code, to which we shall have occasion to return. Let us note, as a point of interest, that this article reads as follows:

Art. 2895. Where the application of a party is dismissed without a decision having been made on the merits of the action and where, on the date of the judgment, the prescriptive period has expired or will expire in less than three months, the plaintiff has an additional period of three months from service of the judgment in which to claim his right.

The same applies to arbitration; the three-month period then runs from the time the award is made, from the end of the arbitrators' mandate, or from the service of the judgment annulling the award.

[4]The plaintiff paid at the time the necessary fees under the tariff for such filing

from the written representations of the defendant, that this statement of claim did not, when all is said and done, disclose any essential fact on which it might be based. The plaintiff, who at the time was not represented by counsel, did not make any representations of his own in defence of the formulation of his statement of claim.

On September 13, 1996 I allowed the defendant's motion, and issued the following order:

ORDER

As presently drafted, one must agree that Plaintiff's statement of claim dated May 16, 1996 does not disclose any reasonable cause of action as it is not drafted in accordance with the principles governing pleading in this Court, and especially with rule 408 of the *Federal Court Rules*, which reads:

> 408. (1) Every pleading must contain a precise statement of the material facts on which the party pleading relies.
>
> (2) Without limiting the generality of paragraph (1), the effect of any document or the purport of any conversation referred to in the pleading must, to the extent that it is material, be briefly stated, and the precise words of the document or conversation should not be stated, except in so far as those words are themselves material.
>
> (3) A party need not plead any fact if it is presumed by law to be true or as to which the burden of proof lies on the other party (e.g. consideration for a bill of exchange), unless the other party has specifically denied it in his pleading.
>
> (4) A statement that a thing has been done or that an event has occurred, being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party, is to be implied in his pleading.
>
> (5) Whenever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact unless the form or precise terms of such notice be material.

Plaintiff's statement of claim dated May 16, 1996 is therefore struck out.

The Court reserves, however, Plaintiff's right to file a new and proper statement of claim — one which would comply with rule 408 — if the limitation period to do so has not elapsed on the date of the new filing.[5]

On December 12, 1996 the plaintiff filed in case T-1134-96 the text of the

[5]In regard to the final paragraph of this order, we will eventually see that, according to the plaintiff's reasoning, the absence of this paragraph in the order would have had no effect on his submissions of law since the plaintiff is relying strictly on statutory provisions in support of his statement of claim in this case.

statement of claim contemplated by the motion before me. However, it is in the form of an amended statement of claim that he filed the whole thing.

On January 13, 1997 the defendant sought in an oral hearing to have this proceeding struck out on the ground that a proceeding that had already been struck out could not be amended. Defendant's counsel was amenable to the idea that at best this amended proceeding should be regarded as a new statement of claim filed by the plaintiff on December 12, 1996.

This position of the defendant had some merit, in my opinion. However, since it was my view that the plaintiff, who was now acting through counsel, had added to the text of his statement of claim (amended statement of claim, as it then read), and since he disputed that it was common ground that the said statement of claim of December 12 was surely out of time, I dismissed the defendant's motion to strike, while ordering on January 15, 1997 as follows:

> [*Translation*]
>
> **ORDER**
>
> This motion is dismissed. However, in view of my order dated September 13, 1996, the "Amended Statement of Claim" filed by the plaintiff on December 12, 1996 shall be regarded instead as a new statement of claim filed by the plaintiff on December 12, 1996. It will in that capacity and through this order be transferred by the Registry to a new file of this Court without the need for repeat service by anyone.
>
> As stated at the hearing, the Court reserves the right to the defendant to raise in opposition to this statement of claim the allegation that on December 12, 1996 the plaintiff was now precluded from bringing an action in this Court based on section 135 of the *Customs Act*.
>
> Costs to follow, in the file that is to be opened.

That is how we now find in this Court file a statement of claim by the plaintiff with December 12, 1996 as the date of filing.

As anyone might have expected, the defendant presented on January 27, 1997 the motion now before me on the ground, as stated earlier, that this statement of claim of December 12, 1996 was on its face filed outside the mandatory limitation period of ninety (90) days prescribed in section 135 of the *Customs Act*.

Analysis

If we begin our analysis solely in terms of the date of filing of the impugned statement of claim, it is certainly clear that more than ninety days have elapsed between the date of the decision, March 12, 1996, and the date of filing of the statement of claim, December 12, 1996. There are in fact more than ninety days

between the filing of the statement of claim of May 16, 1996 in file no. T-1134-96 and the December 12, 1996 filing in this case.

If we refer only to these dates — and no statutory provisions other than section 135 of the *Customs Act* — it is clear that the defendant's motion must be allowed and the plaintiff's statement of claim in this case must be ordered struck out. It is clear law that neither the Court nor the Rules of this Court can *per se* extend the limitation period prescribed in section 135 of the *Customs Act*. That is the clear effect of the following cases, to which I was referred by counsel for the defendant: *Giovanni Miucci v. Her Majesty the Queen and the Minister of National Revenue*, a judgment rendered on November 1, 1991 by Pinard J., Court file no. T-348-91, upheld by the Federal Court of Appeal, file no. A-1148-91, December 7, 1993; and *Donald Richard Dawe v. Her Majesty the Queen*, a judgment of the Federal Court of Appeal rendered September 13, 1994, file no. A-359-93.

The plaintiff says he is aware of the limitation period in section 135 and that he complied with it when, on May 16, 1996, he filed[6] a statement of claim in opposition to the Minister's decision of March 12, 1996.[7] We should, it is urged, acknowledge that a period of only a little over sixty (60) days elapsed between these two dates.

It is on the strength of this initial filing within the section 135 limitation period and based on my order of September 13, 1996 striking out his statement of claim[8] that

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[6]A filing, I repeat, which was done in file T-1134-96.

[7]The date of receipt of this decision by the plaintiff is not at issue.

[8]One might be tempted to cut short the entire debate at this point by stating that the pleading that was struck out on September 13, 1996 was, when all is said and done, a nullity and cannot therefore be considered a statement of claim within the meaning of section 135 of the *Customs Act*, the filing of which would have interrupted the limitation period. I would not agree with this submission.

In *Dawe, supra*, Létourneau J.A. rejected the argument that sending the Minister of National Revenue a mere notice of intention to appeal met the requirements of section 135. The Court stated:

... a mere notice of an intention to eventually bring an action is not tantamount to, and is no valid substitute for, the actual bringing of an action.

Subsection 135(1) of the Act requires, for an action to be validly brought under the law, that a Statement of Claim against the decision of the Minister be filed within the time limit.

In the case at bar, the plaintiff filed in case T-1134-96 (while paying the necessary fees) a pleading entitled "statement of claim". Although it was struck out, it contained four allegations and one conclusion. I think, to borrow the words of Létourneau J.A., that the plaintiff acted validly under the *Customs Act*. Furthermore, in my order of September 13, I refer to the plaintiff's proceeding as a "statement of claim".

Nor do I believe that one can, within the framework of this analysis, hold against the plaintiff the fact that two Court files were opened. If, on January 15, 1997, I ordered the opening of a second file, it was because I felt that administratively it would be clearer that way.

the plaintiff now refers to article 2895 of the Code via section 39 of the *Federal Court Act* — which refers to the rules in provincial law relating to prescription and the limitation of actions except as expressly provided otherwise in some federal Act — to argue that the filing of December 12, 1996 was performed less than three months after my order of September 13 and that accordingly the interruption of the prescription brought about by the filing of May 16, 1996 continued, through the effect of article 2895, to December 12, 1996, when the plaintiff again asserted his right.

Let us recall that section 39 of the *Federal Court Act* provides:

> 39. (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in that province.
>
> (2) A proceeding in the Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.
>
> [emphasis added]

Article 2895 of the Code provides:

> **Art. 2895.** Where the application of a party is dismissed without a decision having been made on the merits of the action and where, on the date of the judgment, the prescriptive period has expired or will expire in less than three months, the plaintiff has an additional period of three months from service of the judgment in which to claim his right.
>
> The same applies to arbitration; the three-month period then runs from the time the award is made, from the end of the arbitrators' mandate, or from the service of the judgment annulling the award.
>
> [emphasis added]

It is obvious that the expression "Except as expressly provided by any other Act" at the beginning of section 39 means that a law relating to prescription in a province that contravenes a provision of a federal Act cannot be relied on. That is, when it comes to a prescriptive period, it is the limitation period in section 135 that governs and not some other time limit that might be found in Book Eight of the Code.[9]

However, to my way of thinking the words "the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply..." cover more than mere limitation periods and must include all the rules in Book Eight of the Code that are not contrary to a federal statutory provision.

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[9]The Book in which article 2895 is located. On the other hand, it appears to be common ground — since no one has raised it so far — that the cause of action in this case originated in Quebec and that it is the provincial law of that province that applies, under section 39.

This would therefore include article 2895 of the Code, which contains a rule dealing with an interruption in the prescriptive period, since there is apparently no federal provision dealing with an interruption in the prescriptive or limitation period and contrary to article 2895.[10]

In regard to the constituent elements of article 2895, it should be noted that the article contemplates that an application be "dismissed". As stated earlier,[11] this is the remedy that the defendant was and still is seeking, and the fact that Rule 419 speaks of "striking out" does not rule out the application of article 2895. A statement of claim that is struck out is necessarily "dismissed".

Furthermore, the striking out under Rule 419 in this case falls precisely within the scenario contemplated by article 2895: that an action is dismissed without a decision having been made on the merits of the action.

When, at the end of the day, we look at the result for the plaintiff in this case, i.e. that on December 12, 1996 he again attacks a decision dating from March 12, 1996, is there not reason to think that we are substituting for the limitation period in section 135 a new limitation period, contrary to the mandatory period in section 135 and the provisions *in limine* of section 39 of the *Federal Court Act*? I do not think so.

Article 2895 of the Code does not create a new prescriptive period. Its scheme necessarily contemplates that an application that is eventually dismissed was commenced in the first place within the applicable prescriptive period. In this case, the plaintiff acted on May 16, 1996 within the applicable prescriptive period, i.e. within the ninety (90) day limitation period in section 135 of the *Customs Act*.

What article 2895 does is to extend the effect of the interruption of the prescriptive period, an effect initially accomplished by the filing on May 16, 1996.[12]

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[10]No party has raised the existence of any such provision, which, if it exists, should be an express provision, to judge from the French and English versions of the opening words of section 39, read in combination.

[11]*Supra*, note 1.

[12]It is article 2892 of the Code, let us note, which prescribes in the first place the civil interruption of the prescription through the filing of a judicial demand.

The parties referred me to no cases or authorities dealing with the interpretation of article 2895. At page 1817 of volume II of the *Commentaires du ministre de la Justice* on the Code, published by Les Publications du Québec, the then Minister of Justice of Quebec issued the following comments on how to construe article 2895:

[*Translation*]
This article, which is new law, limits the consequences of a decision that does not bear on the merits of the litigation but rather results, for example, from a mere defect in form or want of jurisdiction of the court.

It does not create any prescriptive period. It therefore does not contravene section 135 as it is barred from doing by section 39 of the *Federal Court Act*. It acts at the level of the institution of the interruption of the prescription by prolonging its effect, provided that the limitation period in section 135 is initially complied with.

This situation is not contemplated by the judgments submitted by the defendant, cited earlier.[13]

The courts clearly seem to make a distinction between provisions in federal Acts dealing with limitation or prescriptive periods and the provisions that can be found in a provincial Act that deal with prescription or limitation of actions without necessarily creating time limits.

Indeed, in *Tait v. Canadian National Railways* (1985), 11 D.L.R. (4th) 460, the Nova Scotia Supreme Court allowed a statement of claim to stand although it had been filed outside the two-year limitation period stipulated in the applicable federal Act (in that case, subsection 342(1) of the *Railway Act*), by allowing a provincial statutory provision to apply to the plaintiff's statement of claim. The provincial provision was section 2A of Nova Scotia's *Statute of Limitations*.

As the Supreme Court states at page 464:

> The section was obviously designed to provide the court with specific authority to provide equitable relief in certain cases from the rigidity of statutory limitation periods.

In the Court's view, section 2A could coexist with section 342(1):

> Section 2A does not create another limitation period in conflict with the one set out in s. 342(1) of the *Railway Act.* It merely confers upon the court a discretion in certain instances to provide relief from the rigidities of fixed limitation periods found in statutes which have force and effect in Nova Scotia. It is an extension of an equitable jurisdiction to the court in procedural matters and is not in conflict with the *Railway Act*'s limitation period itself.
>
> [emphasis added]

In *Tait*, the Court had to reconcile a provincial statute and a federal statute when, in contrast to the situation in the case at bar, it did not have the benefit of a

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Whether or not the prescription is acquired, article 2895 extends the effect of the interruption through an additional three-month period, to enable the plaintiff to again claim his right.

[emphasis added]

[13] See page 5, *supra*.

provision such as section 39 of the *Federal Court Act*, which invites such a reconciliation. As can be seen, the Court nevertheless managed to achieve this reconciliation.

Furthermore, in that case the Court allowed the action to proceed notwithstanding that at all relevant times the limitation period in the federal Act has expired. Such is not the case here.

Finally, in *Tait*, it was the Court's use of its own discretionary authority under section 2A that saved the action. In the case at bar, it is the automatic effect of the law, in this case article 2895 of the Code, that plays this role.

Given the lack of conflict, the coexistence in this case is all the more permissible.

For these reasons, I am of the opinion that the motion to strike out the plaintiff's statement of claim should be dismissed.

"Richard Morneau"

Prothonotary

Montréal, Quebec
February 5, 1997

Certified true translation

Christiane Delon

Federal Court of Canada

Court file no. T-75-97

BETWEEN:

PAUL CRESSATY

Plaintiff

AND

THE MINISTER OF NATIONAL REVENUE

Defendant

REASONS FOR ORDER

FEDERAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

FILE NO. T-75-97

STYLE:PAUL CRESSATY

Plaintiff

AND

THE MINISTER OF NATIONAL REVENUE

Defendant

PLACE OF HEARING:Montréal, Quebec

DATE OF HEARING:January 27, 1997

REASONS FOR ORDER BY:Richard Morneau, Prothonotary

DATED:February 5, 1997

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