Date: 20030403

Docket: A71-02

Neutral Citation: 2003 FCA 176

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

NORMAND MARTINEAU

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Hearing held at Montréal, Quebec, April 2 and 3, 2003.

Judgment delivered from the bench at Montréal, Quebec, April 3, 2003.

REASONS FOR JUDGMENT OF THE COURT: LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Pronounced from the bench at Montréal, Quebec
April 3, 2003.)

LÉTOURNEAU J.A.

[1] This is an appeal from a decision of Mr. Justice Blais of the Trial Division on a motion to have a decision of Prothonotary Morneau set aside.

[2] Blais J. dismissed with costs the motion by the appellant who, pursuant to section 124 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) (the "Act"), was subjected to an ascertained

forfeiture. The notice was issued as a result of allegations of false statements made against the appellant in connection with an exportation or attempted exportation of goods contrary to subsection 95(1) and paragraphs 153(*a*) and (*c*) of the Act.

[3] The motions judge dismissed the motion for two reasons. First, the affidavit signed by the appellant's counsel was contrary to Rule 82 of the *Federal Court Rules, 1998*, which provides that, failing leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit. During the hearing, the solicitor who had signed the affidavit asked Mr. Justice Blais (who refused the request) for leave to derogate from Rule 82. At no time did the respondent raise any objection based on Rule 82. Nor did he make any submissions on the question on appeal.

[4] Second, the motions judge refused to accede to the appellant's contention that he was a person charged with an offence, was entitled to the protection of paragraph 11(*c*) of the *Canadian Charter of Rights and Freedoms* (the "Charter"), and consequently was exempt from the obligation to submit to an examination for discovery in the context of the action brought to dispute the decision of the Minister of National Revenue (the "Minister") upholding the notice of ascertained forfeiture.

[5] The appellant attacks both of these conclusions of the judge. After sending a Notice of Constitutional Question pursuant to section 57 of the *Federal Court Act* and Rule 69 of our Rules, he challenges the constitutional applicability of Rule 236(2), which sets out the right of a defendant to examine a plaintiff at any time after the statement of claim is filed. At the hearing it

was agreed between the parties and us that the applicability of Rule 236 depended on whether or not the appellant's status as a "person charged with an offence" was recognized, and that there was no need for the parties to make representations peculiar to Rule 236 and different from those that were made in regard to paragraph 11(*c*) of the Charter.

[6] Appellant's counsel placed little emphasis on the aspect of the motion judge's decision bearing on the affidavit filed in support of the motion. We are satisfied with the explanations he gave us concerning its content and the reasons why he had signed it himself. We were able to discuss with him the scope and purpose of Rule 82 and the limits posed by Rule 81, which likewise was not followed. We then agreed to examine the substantive issue concerning the application of paragraph 11(*c*) of the Charter.

[7] Notwithstanding the excellent submissions by counsel for the appellant, we are persuaded, as were the motions judge and the prothonotary, that the appellant is not a person charged with an offence in the action he has commenced, pursuant to section 135 of the Act, to dispute the Minister's decision. This section reads:

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.	**135.** (1) Toute personne qui a demandé que soit rendue une décision en vertu de l'article 131 peut, dans les quatre-vingt-dix jours suivant la communication de cette décision, en appeler par voie d'action devant la Cour fédérale, à titre de demandeur, le ministre étant le défendeur.
Ordinary Action	Action ordinaire
(2) The *Federal Court Act* and the *Federal Court Rules* applicable to ordinary actions apply in respect of	(2) La *Loi sur la Cour fédérale* et les *Règles de la Cour fédérale* applicables aux actions ordinaires

actions instituted under subsection (1) except as varied by special rules made in respect of such actions.	s'appliquent aux actions intentées en vertu du paragraphe (1), sous réserve des adaptations occasionnées par les règles particulières à ces actions.

[8] This section provides that a person who has requested a decision of the Minister concerning the notice of ascertained forfeiture may appeal the decision by way of an action and that the Federal Court rules in relation to ordinary actions apply. It is surprising, not to say puzzling, to note that an appeal of a ministerial decision is made by way of an action, but that is the procedure chosen by Parliament. It is the procedure adhered to by the appellant. It is also the procedure that binds him and which, as long as it has not been declared unconstitutional, dictates the appropriate approach we must follow while of course making the necessary adaptations where required.

[9] After a period of uncertainty following the enactment of the Charter concerning the nature of seizure and forfeiture proceedings under tax legislation, a period that produced the decision of this Court in *Canada v. Amway of Canada Ltd.*, [1987] 2 F.C. 131 (F.C.A.), the case law crystallized. It is now accepted that these proceedings, including those under the Act, and the administrative penalties imposed, are civil, not criminal, proceedings and penalties: *Time Data Recorder International Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [1997] F.C.J. No. 475 (F.C.A.), *Lavers v. British Columbia (Minister of Finance)*, [1989] B.C.J. No. 2239 (B.C.C.A.), *R. v. Yes Holdings Ltd.*, [1987] A.J. No. 1040 (Alta C.A.). Similarly, the forfeiture of property seized under the Act does not amount to an indictment that would attract the application of section 11 of the Charter: *R. v. Luchuk*, [1987] B.C.J. No. 2021

(B.C.C.A.). The reason is that these penalties imposed in fiscal matters, including customs, and the seizure and forfeiture proceedings resulting therefrom, are, in a system of voluntary reporting, designed to govern the conduct of taxpayers with a view to preventively ensuring compliance with the tax legislation. These proceedings are administrative in nature. And to use the words of Madam Justice Wilson in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at page 560, paragraph 23, “Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are ... not the sort of ‘offence’ proceedings to which s. 11 is applicable.”

[10] In this case, the appellant is a plaintiff in an action in which, as section 135 requires, the Minister is the defendant. He is not a person charged with an offence in this proceeding. Nor is he being prosecuted or sued. In fact, he is the prosecutor in the civil law sense of the word. The proceeding he has initiated himself cannot result in any conviction, fine or penal consequence in the criminal or penal sense of the word, making him a person charged with an offence under the Charter’s paragraph 11(*c*). The decision to carry out an ascertained forfeiture is already made and upheld by the Minister. The proceeding brought by the appellant to challenge the Minister’s decision is, when all is said and done, a proceeding to have the respondent’s claim and the action to collect this claim, the ascertained forfeiture, vacated.

[11] The appellant made a valiant attempt, relying on *Wigglesworth*, *supra*, to persuade us that the procedure in this case involves the imposition of true penal consequences attracting the application of section 11 of the Charter. Like the British Columbia Court of Appeal in the *Lavers*

case, *supra*, which considered the impact of this decision on the imposition of 25 to 50 percent penalties for tax evasion, we are of the opinion that in this case, while recognizing the seriousness of the administrative penalty under the Act, the forfeiture of the concealed or undeclared property, or of an amount equal to or less than the value of such property, does not constitute a “true penal consequence” within the meaning required by section 11 of the Charter.

[12] For these reasons, the appeal will be dismissed, without prejudice to the appellant’s right to challenge, as he does in this case, the constitutional validity of the process for disputing the Minister’s decision.

“Gilles Létourneau”
J.A.

Certified true translation

Suzanne Gauthier, C. Tr., LL.L.

FEDERAL COURT OF CANADA
APPEAL DIVISION

Date: 20030403

Docket: A-71-02

Between:

NORMAND MARTINEAU

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT OF THE COURT

FEDERAL COURT OF CANADA
APPEAL DIVISION

SOLICITORS OF RECORD

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REASONS FOR JUDGMENT OF THE COURT (LÉTOURNEAU, NADON, PELLETIER JJ.A.)

DELIVERED AT THE HEARING BY: LÉTOURNEAU J.A.

DATED: April 3, 2003

APPEARANCES:

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