

PRESENT: THE HONOURABLE MR. JUSTICE DENAULT

IN RE subsections 88(2) and 240(2) of the *Excise Act*, R.S.C. 1985,
c. E-14

-and-

IN RE a 1986 Ford Tempo motor vehicle having serial number
2FABP22R96B264778 and Quebec licence number TGB 656

BETWEEN: LUCIA DUCHESNE,

Plaintiff,

-and-

HER MAJESTY THE QUEEN,

Defendant.

REASONS FOR ORDER and ORDER

DENAULT J.:

The plaintiff, who was unaware that contraband cigarettes were in her vehicle when it was seized by the RCMP, had her vehicle returned after she deposited \$1,500, which represented its full value and which she is now attempting to recover. The defendant objects to this, since she has already filed an information seeking to have the forfeiture of the sum in lieu of the vehicle declared final.

In the case at bar, the Court must decide whether the plaintiff can counter an action *in rem* by arguing that she was in good faith because she had no knowledge that cigarettes and tobacco that were not put up in packages and stamped in accordance with the *Excise Act*, R.S.C. 1985, c. E-14 (the Act), had been placed in her vehicle.

A summary of the facts, which are admitted, is necessary. On September 15, 1993 in Sept-Îles, police officers stopped a 1986 Ford Tempo owned by the plaintiff; the vehicle contained, *inter alia*, 101 cartons of cigarettes marked "Only for sale outside Canada". The plaintiff was unaware that André Desrosiers had

placed illegal tobacco in her vehicle. The cigarettes and tobacco were forfeited to the Crown under subsection 240(2)¹ of the Act and the vehicle was seized as forfeited under subsection 88(2) of the Act. A charge of possession of illegal tobacco was laid against the plaintiff but was later withdrawn.² On September 20, 1993, the plaintiff had her vehicle returned after depositing \$1,500, which represented its full value, as authorized by subsection 112(2) of the Act.

On October 13, 1993, the plaintiff filed a motion under section 164 of the Act with the Superior Court, district of Mingan, seeking to have her interest in the \$1,500 declared. The Superior Court judge, who noted that [TRANSLATION] ". . . section 164 is not available to the [plaintiff], who was driving her vehicle when it was stopped on September 15, 1993, since she was the person in whose possession the vehicle was seized",³ concluded that "she therefore cannot seek an order declaring her interest in the vehicle" and allowed the motion to amend ". . . in order to convert her motion under section 164 of the *Excise Act* into a written notice that she is making a claim under section 117(1) of the said Act".

The Minister of National Revenue, Customs and Excise, agreed to treat the motion to the Superior Court as a written notice that the plaintiff was claiming the vehicle under section 117 of the Act and, on July 4, 1994, an information under section 116 of the Act was filed with the Federal Court by the Deputy Attorney General of Canada on behalf of Her Majesty the Queen. The notice and posting requirements set out in section 116 of the Act and Rule 602 of the *Federal Court Rules* were met.

The plaintiff claims to be entitled to have the \$1,500 reimbursed because, according to her, she was completely unaware of these illegal activities and, in any event, she was cleared of the charge of possession of illegal tobacco laid against her.

According to the defendant, the purpose of the proceeding on which this action is based, namely the information, is to have the forfeiture of the \$1,500 in lieu of the vehicle declared final; it

¹The relevant sections of the Act are reproduced in the appendix.

²According to Exhibit 8, which was filed with the admissions, it appears that André Desrosiers, who was also charged in connection with this case, pleaded guilty and was sentenced, *inter alia*, to pay \$5,164.88. The court also ordered the forfeiture of the cartons and packages of cigarettes that had been seized.

³Exhibit 15, which was filed with the admissions, at pp. 4-5.

is therefore an action *in rem* against a thing seized as forfeited, which is deemed and taken to be condemned under subsection 117(1) of the Act. She therefore argued that the plaintiff has no right to make a claim. She further argued that the plaintiff cannot rely on her ignorance of the facts and thus raise a defence of good faith, since only persons other than the person accused of an offence resulting in the seizure or the person in whose possession the vehicle was seized can claim an interest in the thing seized under section 164 of the Act. The defendant therefore argued that in the case at bar the Court has no jurisdiction to rule on such a question.

A brief description of how the proceedings have unfolded is necessary. On July 4, 1994, an information was filed in the Registry of the Court by the Deputy Attorney General of Canada in order to have the forfeiture of the vehicle, and hence the forfeiture of the \$1,500 in lieu of the vehicle, declared final. On August 5, 1994, the plaintiff filed a statement of claim in which she admitted the paragraphs in the information and claimed the \$1,500 she had paid to recover the Ford Tempo. The plaintiff's action is thus clearly part of an action *in rem* seeking the final forfeiture of the vehicle.

The courts have already set out the rules of interpretation applicable to the sections providing for the forfeiture of vehicles used for illegal trafficking in cigarettes, tobacco and spirits. In *The King v. Krakowec et al.*, [1932] 1 D.L.R. 316, the Supreme Court of Canada stated the following about a vehicle seized under the *Excise Act*:

It is sufficient to say that in the provision respecting forfeiture, the object in view is the connection between the vehicles and the spirits unlawfully manufactured or imported. The point is that the vehicles "have been used or are being used for the purpose of removing the same;" and it is immaterial to whom the vehicles belong. In the words of Sedgwick, J., in "*Frederick Gerring, Jr.*" v. *The Queen* (1896), 27 S.C.R. 271, at p. 285, "In the enforcement of fiscal law, of statutes passed for the protection of the revenue or of public property, such provisions are as necessary as they are universal, and neither ignorance of law, nor, as a general rule, ignorance of fact, will prevent a forfeiture when the proceeding is against the thing offending, whether it be the smuggled goods or the purloined fish, or the vehicle or vessel, the instrument or abettor of the offence."

That the proceeding is, under the Excise Act, "a proceeding against the thing," that is in the nature of a proceeding *in rem*, is apparent throughout the Act (Ss. 79, 83, 121, 124, 125, 131, etc.), but is nowhere more evident than in s. 125 [NOW 117(1)], under which "All vehicles, vessels, goods and other things seized as forfeited . . . shall be deemed and taken to be condemned, and may be dealt with accordingly, unless the person from whom they were seized, or the owner thereof . . . gives notice . . . that he claims or intends to claim the same."

(Emphasis added)

The Exchequer Court of Canada went further by limiting the judge's discretion in such a case. In *Mayberry v. His Majesty the King*, [1950] Ex. C.R. 402, the Court decided the following:

The facts of the matter in my opinion are those stated by the claimant, but unfortunately that finding does not entitle him to the relief which he now claims. This matter is in the nature of a proceeding *in rem* and, if it be established—as I think has been done in the instant case—that the vehicle "had been or was being used for the purpose of transporting spirits unlawfully manufactured" the court is vested with no discretion in the matter, but must declare the vehicle condemned as forfeited, and that is so even when the owner had no knowledge that such spirits were carried in his vehicle. The only exception to that statement is the partial relief afforded under the provisions of section 169(A) [NOW 164(1)], which section is not available to the claimant herein, inasmuch as the vehicle was seized in his possession.

(Emphasis added)

A number of recent decisions by this Court have applied these criteria and dismissed such actions.⁴

In short, the Act provides those seeking to recover a vehicle used in the commission of an offence with different remedies, depending on their status.

Basically, while third parties can claim an interest in the thing seized provided that they meet the conditions set out in subsection 164(2) of the Act, the same is not true of the person in whose possession the vehicle was seized: according to subsection 164(1), that person cannot claim his or her interest as an owner of the vehicle. If the person wishes to claim the seized property, this must be done under subsections 116(2) and (3) and section 117. In the case at bar, one requirement with which the plaintiff had to comply before the Court would even determine whether she was entitled to make a claim was the giving of security by bond for double the value of the seized property in case of condemnation (subsection 117(2)). The plaintiff did not comply with the mandatory provisions of section 117 of the Act and

⁴In re a Toyota vehicle, Federal Court No. T-129-90, Pinard J., November 16, 1990; *Lacourse v. The Queen*, Federal Court No. T-2602-91, Pinard J., June 1, 1993; *Becta Transport Ltée v. The Queen*, Federal Court No. T-757-91, Pinard J., March 13, 1995.

the Superior Court's decision to convert her motion under section 164 into a notice under section 117 did not have the effect of fulfilling her obligations, *inter alia* those relating to the giving of security by bond for double the value of the vehicle seized as forfeited.

The plaintiff's action cannot be allowed.

For these reasons, the Court:

- CONDEMNNS the sum of \$1,500 paid to the Royal Canadian Mounted Police as a deposit representing the full value of the 1986 Ford Tempo having serial number 2FABP22R96B264778;
- DISMISSES the plaintiff's action with costs.

OTTAWA, October 3, 1996.

PIERRE DENAULT

JUDGE

Certified true translation

A. Poirier

APPENDIX

88. (1) . . .

(2) All horses, vehicles, vessels and other appliances that have been or are being used for the purpose of transporting in contravention of this Act or the regulations, or in or on which are found any goods subject to excise, or any materials or apparatus used or to be used in contravention of this Act or the regulations in the production of any goods subject to excise and all such goods, materials or apparatus shall likewise be seized as forfeited by the seizing officer and may be dealt with in the manner described in subsection (1). R.S., c. E-12, s. 86.

112. (1) . . .

(2) The Minister may authorize the collector or superior officer referred to in subsection (1) to deliver up to any claimant any article seized as described in that subsection on the claimant depositing in the hands of the collector or superior officer such sum of money as will represent the full value thereof, or giving security to the satisfaction of the collector or superior officer that the value of the article and all costs shall be paid to the use of Her Majesty, if the article is condemned. R.S., c. E-12, s. 110.

116. (1) As soon as an information has been filed in any court for the condemnation of any goods or thing seized under this Act, notice thereof shall be posted in the office of the registrar, clerk or prothonotary of the court, and in the office of the collector or chief officer in the excise division in which the goods or thing has been seized.

(2) Where the owner or person claiming the goods or thing referred to in subsection (1) presents a claim to the court, gives security and complies with all the requirements of this Act in that behalf, the court at its sitting immediately after the notice referred to in that subsection has been posted during one month may hear and determine any claim that has been duly made and filed in the meantime and release or condemn the goods or thing, as the case requires, otherwise the goods or thing shall, after the expiration of that month, be deemed to be condemned and may be sold without any formal condemnation thereof.

(3) No claim on behalf of any person who has given notice of intention to claim before the posting of the notice referred to in subsection (1) shall be admitted unless it is made within one week after the posting thereof, nor shall any claim be admitted unless notice thereof has been given in writing to the collector or superior officer within one month from the seizure of the goods or things. R.S., c. E-12, s. 114.

117. (1) All vehicles, vessels, goods and other things seized as forfeited under this Act or any other Act relating to excise, trade or navigation, shall be deemed and taken to be condemned, and may be dealt with accordingly, unless the person from whom they were seized, or the owner thereof, within one month from the day of seizure, gives notice in writing to the seizing officer, or to the collector in the excise division in which the goods were seized, that he claims or intends to claim them.

(2) The collector at the place where the goods are secured, or any superior officer, may order the delivery of the goods to the owner thereof on receiving security by bond with two sufficient sureties, to be first

approved by the collector or superior officer, for double the value in case of condemnation.

(3) If the seized goods are condemned, the value thereof shall be forthwith paid to the collector and the bond cancelled, otherwise the penalty of the bond shall be enforced and recovered.

(4) The bond shall be taken to Her Majesty's use in the name of the collector and shall be delivered to and kept by the collector. R.S., c. E-12, s. 115.

164. (1) Whenever any horses, vehicles, vessels or other appliances have been seized as forfeited under this Act, any person, other than the person accused of an offence resulting in the seizure or person in whose possession the horses, vehicles, vessels or other appliances were seized who claims an interest in the horses, vehicles, vessels or other appliances as owner, mortgagee, lien-holder or holder of any like interest may within thirty days after the seizure apply to any judge of any superior court of a province or to a judge of the Federal Court for an order declaring his interest.

(2) Where, after such notice to the Minister as the judge referred to in subsection (1) may require, it is made to appear to the satisfaction of the judge

- (a) that the claimant is innocent of any complicity in the offence resulting in the seizure or of any collusion with the offender in relation thereto, and
- (b) that the claimant exercised all reasonable care in respect of the person permitted to obtain the possession of the horses, vehicles, vessels or other appliances to satisfy himself that they were not likely to be used contrary to this Act or, if a mortgagee or lien-holder, that before becoming the mortgagee or lien-holder he exercised such care with respect to the mortgagor or lien-giver,

the claimant is entitled to an order that his interest is not affected by the seizure. R.S., c. E-12, s. 164; R.S., c. 10 (2nd Supp.), s. 64.

240. (1) Except as specially provided in this Act, every person who sells or offers for sale or, not being a licensed tobacco or cigar manufacturer, has in the person's possession any kind of manufactured tobacco or cigars, not put up in packages and stamped in accordance with this Act, is guilty of an indictable offence and shall incur a fine of not less than an amount equal to double the amount of the duties of excise imposed on the tobacco or cigars and not more than an amount equal to triple the amount of those duties.

(2) Any tobacco or cigars found that are not put up in packages and stamped in accordance with this Act shall be forfeited to the Crown and shall be seized by any officer and dealt with accordingly.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT NO.: T-1567-94

STYLE OF CAUSE:Excise Act v. 1986 Ford Tempo motor vehicle

PLACE OF HEARING:Sept-Îles, Quebec

DATE OF HEARING:September 19, 1996

REASONS FOR ORDER

and ORDER BY: Denault J.

DATED:October 3, 1996

APPEARANCES:

Robert Lemieux for the Plaintiff

Rosemarie Millar for the Defendant

SOLICITORS OF RECORD:

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