Date: 20080605

Docket: T-1484-07

Citation: 2008 FC 703

Ottawa, Ontario, June 5, 2008

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

FRITZ MARKETING INC.

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant Fritz Marketing Inc. is in the business of importing into Canada goods manufactured abroad, including woven plastic bags made in China and India. Under the provisions of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), the Applicant is obliged to provide to the Canada Border Services Agency copies of the relevant invoices and payment of appropriate duties in respect of the imported goods. That Act provides that an Officer of the Agency may enter businesses premises and search for relevant documents and records that relate to any amount payable. The Act also provides for determination, re-determination and further re-determination of duties said to be owing. Under subsection 59(1) of that Act, an Officer of the Agency may make a re-determination of duties said to be owing and, under subsection 59(2) a notice of the determination or re-

determination must be sent without delay to the relevant persons. Such notices are called Detailed Adjustment Statements or DAS for short. In the present case the Applicant seeks to quash twenty-one such DASs. The parties are agreed that this Court, in the circumstances of this case, has the jurisdiction to do so.

[2] For the Reasons that follow, I find that the application is allowed with costs and the 21 DASs are to be quashed.

[3] The facts of this case are unusual:

1. The Applicant is in the business of importing goods made abroad. Between October 2002 and June 2003, the Applicant imported woven plastic bags from China and India.
2. In that time period, a person employed by the Applicant was enrolled in a college course called Customs Investigations and Enforcement. For unexplained motivations this person provided to the course instructor, who was also a Canada Border Services Agency employee, certain information respecting the Applicant's activities including a number of documents described later by Justice Cowan of the Ontario Court of Justice as "probably illegally obtained".
3. An employee of the Canada Border Services Agency, Mr. Vieyra, prepared an Information based on this information and these documents which was provided to a Justice of the Peace who issued a warrant (dated June 16, 2003) to search the Applicant's premises for a large number of listed documents and data stored

electronically. Based on similar information, a second Justice of the Peace later issued a Production Order (dated February 10, 2006), requiring the Applicant to provide documents, which is the subject of Justice Corbett's Order discussed later. The details of this Production Order are not relevant to the present proceedings.

4. A search was conducted pursuant to the warrant on June 17, 2003 and a number of documents and electronically stored data were seized.

5. On September 7, 2004 an Information was sworn charging the Applicant and another with eighty-six counts contrary to the *Customs Act*.

6. The Applicant brought an application to Justice Cowan of the Ontario Court of Justice alleging a violation of section 8 of the *Charter of Rights and Freedoms* requesting remedies including setting aside the warrant and return of the materials seized and destruction of any copies made. The matter was heard for five days commencing August 1, 2006.

7. Justice Cowan released a Ruling and Reasons on August 31, 2006 (reported at 2006 ONCJ 430) in which he determined that there had been a violation of section 8 of the *Charter*, that he was doubtful that he had jurisdiction to quash the warrant and that the items seized should be returned forthwith to the Applicants. He made a number of findings in his Reasons including:

> ***Analysis***
>
> ***51*** *In this case, I find that Mr. Vieyra failed to substantially disclose a fair and balanced set of facts to the Justice of the Peace in order for that Justice to determine whether there were reasonable and probable grounds that an offence had been committed under the Customs Act.*

52 *The starting point for Mr. Vieyra's information to obtain was his meeting with the informant who was a student Customs officer, who had probably illegally obtained documents from Fritz Marketing while working for them.*

53 *Mr. Vieyra failed to disclose this probable illegality to the Justice of the Peace. He also failed to disclose that he did not have copies of the documents but only sparse notes of them and was working from his recollection of the documents in the meeting from about a year previously.*

54 *In his Information to Obtain Mr. Vieyra refers in paragraph 8(k) to the sale of the mansion owned by Mr. Chawla for "a record price", a fact which is totally irrelevant to the investigation but which implies hidden wealth.*

55 *He also refers in paragraph 8(p) to an allegation that Mr. Chawla's wife and brother are paid by Fritz Marketing but don't work for the company, again an issue totally irrelevant to the investigation but implying other tax criminality.*

56 *A key part of the Information to Obtain is the opinion contained in a letter from Fred Sipchenko and a subsequent conversation with Mr. Sipchenko, of which Mr. Vieyra has no notes, about the motive of Fritz Marketing and Chawla for committing these offences. While the Crown is correct that motive is not an essential element of the charges, the letter certainly was another starting point for Mr. Vieyra's investigation and undoubtedly would have an influence on the issuing Justice of the Peace in making sense of the allegations of criminality.*

57 *The reference to January 21, 2002 not being the date of the Sipchenko letter, but being significant in that it was the date of the response from Fritz Marketing and likely would have been in the same file from the company, satisfies me on the balance of probabilities that Mr. Vieyra saw the*

response letter when he met with the informant. That should have left him in the position of knowing that Sipchenko's opinion was not clear-cut, and being disputed by the company and that he should have made further inquiries about its status, especially a year later when he drafted the Information.

58 *Again, failure to do so presented an unbalanced picture to the Justice of the Peace for her consideration.*

59 *While Mr. Vieyra did not need to explore all of the possible reasons why the values for duty changed after March 21, he did not have the expertise in tariffs to come to only one conclusion, that is, that the products were the same both before and after that date. He acknowledged that this was a very specialized area and that there were persons within his agency that he could have contacted or that he could have contacted the customs broker for further details on the product.*

60 *By not disclosing his lack of expertise in the area he left the Justice of the Peace with the perception that his conclusion was the only reasonable one, again presenting an unbalanced picture for the Justice's consideration.*

61 *While I am able to excise from the preamble of the warrant the illegal portion dealing with evidence of future offences, I am not able to excise from the Information to Obtain those paragraphs which present the inadequate, unbalanced background that Mr. Vieyra presented and leave sufficient information which satisfies me that the Justice of the Peace would have had grounds to issue the warrant.*

62 As a result, I find that there is a section 8 violation of the Charter Rights *of the Applicants. I am in doubt as to whether I have the jurisdiction to quash the warrant but can fashion a remedy under section 24(2) that the evidence seized pursuant to*

> *the warrant is excluded and the items seized be returned forthwith to the Applicants.*

No appeal was taken from this decision.

8. It appears that the Crown was reluctant to return the documents seized or to destroy copies made which caused the Applicant to go back to Justice Cowan requesting that he Order that this be done. Justice Cowan made such an Order and in his Reasons released October 11, 2006 (reported at [2006] O.J. No. 4094 (Ct. Just.)) he said, in part:

> ***5*** *The parties agree that sections 490(13) and 490(14) of the Criminal Code do not apply to this case.*
>
> ***6*** *The Crown relies on section 115(1) to argue that even if the Court has found an unconstitutional search and ordered the return of documents seized, thus ending the criminal proceedings, the civil proceedings have not finished. As Customs is a regulatory agency, they can obtain the same documents by serving a notice to produce on the company and individual. So since they can get them by such simple legal means, it makes no sense for them not to retain copies of them now.*
>
> ***7*** *The Crown submits that the case of R. v. Spindloe (2001), 154 C.C.C. (3d) 8 stands for the proposition that return of items seized does not automatically flow from the finding of a Charter violation in their seizure.*
>
> ***8*** *The Defence argues that for Customs to retain the copies of documents ordered returned, defeats the intent of the Order that Customs not benefit from the fruit of a unconstitutional search. Mr. Gold submits that if it so easy for them to obtain copies of the documents by serving a notice to produce then they should follow this procedure and allow the*

applicants to argue whatever legal remedies they have.

Analysis

9 *It seems almost contemptuous for Customs to argue, in effect that "we are going to get them anyways, so why put us to all the trouble by making us return the copies now." [my phrase]*

10 *The intent of the Order I made was to deprive Customs of the benefits of an illegal search. The end result in these proceedings is that the charges have been dismissed.*

11 *If they intend to initiate and investigate civil proceedings then they should comply with the procedures under the appropriate statutes. In my view section 115(1) of the Customs Act should be interpreted to assume that documents have been obtained and detained legally. In this case they have not and the section does not apply.*

12 *The case of R. v. Spindloe (supra) deals with seized items that were tainted with criminality by their nature. That is not the case here.*

13 *So as to give full effect to my Order of August 31, 2006, I am further ordering that the Attorney General of Canada and all government agencies instructing them in this case return to the applicants all copies of documents seized from the applicants in whatever form, or in the alternative destroy all copies of records in whatever form. In the case of computer files where destruction is not possible, they are to be overwritten until they cannot be read or recovered.*

14 *Then these agencies shall provide the Attorney General and the Attorney General shall file with the Applicants' counsel an undertaking that this has been done.*

No appeal was taken from this decision.

9. At the same time as the proceedings in the Ontario Court of Justice were going on, the parties were involved in discussions in respect of duties owing.

10. According to the Supplementary Affidavit of the Applicant's civil counsel in the customs matter, Mr. Kanargelidis, filed in this Court, the Applicant received from the Respondent four Notices of Penalty Assessment and a Notice of Ascertained Forfeiture dated June 15 and 16, 2005. Mr. Kanargelidis states that these notices prompted the Applicant to file what is called a "*self correction*" pursuant to section 32.2 of the *Customs Act*.

11. The self correction was sought by way of letter dated August 8, 2005, sent to the Agency by Mr. Kanargelidis. Attached to the letter were 19 documents entitled "B2 Adjustment Requests". The "Explanation" for the correction provided in the B2 Adjustment requests is as follows:

> *VOLUNTARY AMEND. ERROR IN DETERMINING VALUE FOR DUTY. SHOULD BE BASED ON SELLING PRICE PLUS ADDED COST LESS OCEAN FREIGHT. REFER TO REVISED CCI, ADDITIONAL INV. LETTER OF EXPLANATION FROM SUPPLIER ENCLOSED. ORIGINAL INVOICE ENCLOSED FOR GUIDANCE.*

12. In response to the Applicant's filing of the self-correction, the Agency reassessed the duty owing by the Applicant and on August 24, 2005, issued the 21 DASs at issue in these proceedings. In so doing, it apparently relied on the information obtained by Mr. Vieyra. The gist of the Agency's position is that the Applicant received two invoices from its foreign suppliers for goods shipped and paid them both while

submitting only one invoice to the Agency for purposes of assessing duties payable. The Agency appears to have rejected the Applicant's explanation concerning the portion of the goods' value attributable to "ocean freight" charges.

13. The Applicant sought a further redetermination. After this redetermination was denied on May 31, 2006, the Applicant instituted an appeal before the Canadian International Trade Tribunal pursuant to section 60 of the *Customs Act*. Those proceedings have been stayed.

14. At the same time, the Applicant brought an application to the Ontario Superior Court of Justice to set aside both the Production Order issued by the Justice of the Peace and the 21 DASs issued by the Agency. In Reasons issued July 11, 2007 (reported at 160 C.R.R. (2d) 162), Justice Corbett of the Superior Court of Justice set aside the Production Order but held that the Superior Court did not have jurisdiction to set aside the 21 DASs. He said, in part:

> ***12*** *On February 10, 2006, Justice of the Peace Chong Alloy issued a production order pursuant to s. 487.012(3) of the Criminal Code. This order was made on substantially the same basis that the search warrant had been issued previously.*
>
> ***13*** *On August 31, 2006, Justice Ian Cowan of the Ontario Court of Justice rendered his ruling on the search conducted by customs officials on June 17, 2003. Justice Cowan ruled that the search violated Fritz's rights under s. 8 of the Canadian Charter of Rights and Freedoms. Justice Cowan ordered that the evidence seized during the search be excluded at trial, and that the items seized be returned to Fritz.*[2]
>
> ***14*** *Customs officials then took a rather extraordinary position. The Customs Act contains a regulatory component. Under the regulatory*

> *processes, customs officials are entitled to obtain documents by serving a notice to produce on the person who has the documents. Thus, Customs officials said, they should be able to keep copies of the seized documents, since they could obtain them anyway by issuing an order to produce.*
>
> …
>
> ***26*** *I agree that, where there is a Charter breach and no "trial court", this court will have inherent jurisdiction to consider any claim for a remedy. However, "trial court" must be broadly construed. First, there was a trial court: Justice Cowan was the trial judge, and he provided a remedy for the Charter breach. If there has been a breach of Justice Cowan's order, that may be a basis for contempt proceedings. Second, there is administrative action. Customs officials acting under ss. 59 and 60 of the Customs Act are not "courts of competent jurisdiction" and cannot grant Charter remedies. I am told by counsel that the CITT is likewise not a "court of competent jurisdiction".*[10] *However, just because the current proceedings are before administrative bodies does not mean that there is no "court of competent jurisdiction" to decide Charter issues. The Federal Court is such a court.*
>
> ***27*** *If there was truly no place for the applicant to go to make this application, the logic in Ciarniello would apply. But there are administrative proceedings, and there is a court to which the applicant can turn. There is no lacuna in jurisdiction. And so the doctrine of inherent jurisdiction cannot be invoked to overcome the clear allocation of jurisdiction prescribed in the Crown Liability and Proceedings Act and the Federal Courts Act.*

15. Hence the present application to this Court.

JURISDICTION OF THE FEDERAL COURT

[4] The parties are agreed and I so find that the Federal Court has jurisdiction to hear and determine this application. A refusal of the Agency to cancel DASs based on their derivation from seized materials is not a decision that falls under section 60 of the *Customs Act*; it is a decision of a federal board or tribunal reviewable under sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

ISSUES

[5] There is one issue, should this Court quash the 21 Detailed Adjustment Statements (DAS) issued by the Canada Border Services Agency with the provisions of the *Customs Act*, *supra*, as against the Applicant.

ANALYSIS

[6] There is no doubt that, in the circumstances of this case, the 21 DASs at issue came about as a direct result of documents seized by the Canada Border Services Agency pursuant to an Information sworn by one of its officials, Mr. Vieyra, and the warrant thereby obtained. That warrant was set aside by Justice Cowan of the Ontario Court of Justice on the basis that there was a violation of the Applicant's rights under section 8 of the *Charter of Rights and Freedoms*. When the Crown did not return the documents wrongfully seized, Justice Cowan was again asked to intervene and did so stating that it was "*almost contemptuous*" for the Agency to argue that it could obtain the documents anyway holding that it was the intent of his earlier Order to deprive the Agency of "*all benefits*" of an illegal search.

[7] Justice Corbett of the Ontario Superior Court ordered that the Production Order be quashed and that the matter of the 21 DASs laid within the jurisdiction of the Federal Court not the Ontario Superior Court. In his Reasons, the Judge remarked that the position taken by the Agency, that since they could obtain documents under the regulatory process, they should be able to keep the illegally seized documents, was "*extraordinary*".

[8] I am satisfied, on the evidence, that but for the illegal search and seizure of documents, the Agency would not have made any inquiry into or re-assessment of the Applicant's situation in respect of duties owing. The Respondent has submitted no evidence that would suggest that the Agency had any other reason or information that would prompt it to make inquiries as to the Applicant's activities.

[9] I agree that the affidavit of Burell submitted by the Respondent states that once the Agency has determined to make an investigation it has broad powers, without Court Order, to enter business premises and search for and seize relevant documents. That is not the issue. The issue here is directed to what would inspire the initial determination to make an investigation. Here the only evidence is that such inspiration was founded on a violation of the Applicant's section 8 *Charter* rights.

[10] In the criminal context the law is well defined, a leading case being *R. v. Stillman*, [1997] 1 S.C.R. 607 where the Supreme Court of Canada considered conscriptive evidence (that which a person was compelled to produce by a breach of his or her *Charter* rights) and non-conscriptive

evidence (that existed independently of the *Charter* breach) and how such evidence could be used in criminal proceedings. Justice Cory for the majority summarized the Court's position at paragraph 107 of his Reasons:

> ***107*** *In summary, where it is established that either a non-conscriptive means existed through which the evidence would have been discovered or that its discovery was inevitable, then the evidence was discoverable; it would have been discovered in the absence of the unlawful conscription of the accused. The Crown must bear the onus of establishing discoverability on a balance of probabilities. Where the evidence was "discoverable", even though it may be conscriptive, its admission will not, as a general rule, render the trial unfair. The Court should therefore proceed to consider the seriousness of the violation.*

[11] Thus, in a criminal law context, the Crown bears the onus, on a balance of probabilities, to demonstrate that the evidence would have been discovered through non-conscriptive means or that its discovery was inevitable. If that onus is met, the evidence may be admitted at trial.

[12] In the context of taxation law, the Federal Court of Appeal has provided guidance summarized by Sexton J.A. for the majority in *Jurchison v. Canada*, 2001 FCA 126 at paragraph 11:

> ***11*** *It is necessary in deciding whether the evidence obtained in breach of the taxpayers' Charter rights in the present case is admissible, to consider the different standards for search and seizure for the purposes of criminal prosecution and for the purpose of civil enforcement of the Income Tax Act as set forth by the Supreme Court of Canada in R. v. McKinlay Transport, [1990] 1 S.C.R. 627. It is conceivable that the evidence might be inadmissible for purposes of a criminal prosecution, but admissible for purposes of a civil trial. See Donovan v. The Queen, [2000] 4 F.C. 373 (C.A.). Such a determination would require an examination of the impugned evidence and the method by which it was obtained, an inquiry into the seriousness of any Charter*

> *breach and a consideration of whether the evidence was already in possession of the Crown or would have been discovered in any event. See R. v. Stillman, [1997] 1 S.C.R. 607 at 664. It would appear impossible to make such a determination in the absence of a factual base. In the present case, there is no agreement between the parties as to the relevant facts.*

[13] Preceding this decision are two decisions of Linden J.A. for the Court first in *O'Neill Motors Ltd. v. Canada*, [1998] 4 F.C. 180 (C.A.) and two years later in *Donovan v. Canada*, [2000] 4 F.C. 373 (C.A.).

[14] In *O'Neill*, the Court held at paragraph 6 that evidence obtained in violation of a taxpayer's *Charter* rights, which evidence was fundamental to the successful enforcement of a reassessment, could not be used. At paragraph 10 the Court held that not only can it exclude the evidence but also that it may grant such remedy as is appropriate and just.

[15] In *Donovan*, the Court drew a distinction between the circumstances in that case and those in *O'Neill*. *O'Neill* was an example of an "*extreme remedy*" reserved for "*serious violations where other remedies are insufficient*". Linden J.A. said at paragraphs 18 and 19:

> ***18*** *The second important distinguishing feature of O'Neill Motors is that in that case the exclusion of the tainted evidence would have been tantamount to vacating the assessments, because there was nothing left upon which to base the case. That was so because the reassessments in O'Neill Motors were issued beyond the normal reassessment period and, as a result, the onus shifted to the Crown to show fraud or negligence on the part of the taxpayer to permit the reassessments. In this case, the reassessments were done in a timely fashion and the tainted evidence is not required to overcome any procedural bar. Further, much of the material and information obtained through the various activities complained about in this case had already been secured legally. From the*

> *start, it was acknowledged by the appellant that certain income had not been reported. Hence, unlike the O'Neill Motors case, where it would have been "most unlikely" that the Minister would have been able to discharge the onus resting on him and where it would have been wrong to "put the taxpayer through the trouble of proceeding to the Tax Court to see whether the Minister would be able to discharge the onus" (O'Neill Motors, F.C.A. supra at para. 8), in this case much of the evidence necessary to make out the case had already been legally obtained. Contrary to the situation in O'Neill Motors, it is not clear in this case that, without the tainted evidence, the reassessments would not be upheld at trial.*
>
> ***19*** *It was made clear in O'Neill Motors that vacating a reassessment, though a possible remedy in certain circumstances, was not an automatic one. The conduct must be "a flagrant and egregious violation of the appellant's rights" (see Collins, supra). Moreover, at least in the civil context, O'Neill Motors suggests that a further remedy will be appropriate only when limiting the remedy to the mere exclusion of evidence would "render nugatory the very rights the Charter guarantees." (O'Neill Motors, supra, at 1493 T.C.C.). In other words, before a reassessment can be vacated, it must be shown that the lesser remedy of the exclusion of evidence was inadequate to vindicate the Charter violation. In addition, for it to be "appropriate and just" to vacate a reassessment, it should be clear that the evidence illegally obtained was so "fundamental" to the reassessments that they could not be sustained without it (O'Neill Motors, supra, at 1493 T.C.C.). In short, this type of "extreme remedy", as I wrote in O'Neill Motors, is reserved only for "serious violations where other remedies are insufficient" (O'Neill Motors, F.C.A., supra, at para. 12).*

[16] In the present case, I view the matter as being close to that discussed by the Court in *O'Neill*. The evidence which prompted the whole inquiry into the affairs of the Applicant Fritz was obtained in violation of that party's section 8 *Charter* rights and was so found by an unappealed judgment of the Ontario Court of Justice. When the parties returned a second time to that Court, the Judge made it abundantly clear that the Agency was "*almost contemptuous*" and that the intent of the previous Order was to "*deprive Customs of the benefits of an illegal search*". No appeal was

taken. One of those benefits was the launch of an investigation into the Applicant's affairs which resulted in, among other things, the 21 DASs at issue here. I am satisfied that the Agency would never have made such an investigation in the absence of its illegal activity.

[17] Therefore I will allow this application with costs and quash the 21 DASs at issue. Having discussed the level of costs with Counsel for the parties at the end of the hearing, I will award the Applicant costs at the usual level, the middle of Column III.

JUDGMENT

FOR THE REASONS GIVEN:

THIS COURT ADJUDGES that:

1. This application is allowed;
2. The twenty-one Detailed Adjustment Statements issued on August 24, 2005 are set aside;
3. Costs are awarded to the Applicant to be taxed at the middle of Column III.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1484-07
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PLACE OF HEARING:	Toronto, Ontario
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APPEARANCES:

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