Federal Court of Appeal  Cour d'appel fédérale

Date: 20190212

Docket: A-106-18

Citation: 2019 FCA 30

CORAM: **GAUTHIER J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

RYAN FLARO, GABRIELLE BERGERON and MAURICE FLARO

Appellants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Heard at Ottawa, Ontario, on January 8, 2019.

Judgment delivered at Ottawa, Ontario, on February 12, 2019.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: GAUTHIER J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] This is an appeal from a judgment of the Federal Court (2018 FC 229, per McDonald J.), dismissing the appellants' motion for summary judgment and granting the Crown's cross-motion for summary judgment dismissing the appellants' action. For the reasons that follow, I would allow the appeal in part and set aside the judgement of the Federal Court. Under the authority of section 52 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, I would grant the appellant's motion for summary judgment only to declare that the 90-day period for seeking ministerial review

under section 271 of the *Excise Act, 2001*, S.C. 2002, c. 22 (*Excise Act, 2001*) of the seizure of the funds that are at the heart of the dispute between the parties commences with the date of this judgment.

[2] The facts giving rise to the appellants' action in the Federal Court and the ensuing cross-motions for summary judgment are critical to the disposition of this appeal.

[3] On July 7, 2010, the Royal Canadian Mounted Police (RCMP) executed a search warrant of the appellants' properties. The warrant was obtained under section 487 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 (*Criminal Code*) on the basis of suspected violations of section 32 of the *Excise Act, 2001*. Among the articles seized were 7000 clear plastic bags each containing 200 cigarettes, $181,183.00 in cash, firearms and ammunition, debt records, a money counting machine and a pick-up truck and trailer.

[4] On the same day, charges were laid for the possession of unstamped tobacco contrary to section 32 of the *Excise Act, 2001* (*Criminal Code*, paragraph 465(1)(*c*)), breach of an undertaking in respect of possession of a firearm (*Criminal Code*, subsection 145(5.1)), possession of property or proceeds of property obtained or derived directly or indirectly by the commission of an indictable offence (*Criminal Code*, paragraph 354(1)(*a*)), together with offences related to the possession and storage of firearms and ammunition (*Criminal Code*, sections 86 and 88). The list of all items seized was set forth in the Report to a Justice as required under section 489.1 *Criminal Code* (Section 489.1 Report). The list included the money seized during the execution of the search.

[5] Two days later, on July 9, 2010, the RCMP sent a notice by registered mail titled "Canada Revenue Agency RCMP Seizure Report Excise Act, 2001" (the Seizure Report) to the appellants. The Seizure Report listed those items seized on the basis of a contravention of section 32 of the *Excise Act, 2001*. The Seizure Report replicated, in the main, the items listed in the Section 489.1 Report, including the money. However, some items seized and listed in the Section 489.1 Report did not appear in the Seizure Report, including a money counting machine, debt sheets, contraband cigarette order sheets, and score sheets.

[6] The Seizure Report contained the following paragraphs:

> If you wish to file an objection to this seizure and request a decision of the Minister of National Revenue, you must give notice in writing to the officer who seized the thing. This request must be filed within ninety days after the date of the seizure.
>
> If you are past the ninety days for requesting a decision of the Minister, the Minister may, in exceptional circumstances, extend this time limit up to an additional year pursuant to section 272. In this respect, you must apply in writing to the Minister, outlining the reasons why your request for a decision was not filed within the ninety days set out in subsection 271.

[7] In accordance with the foregoing, the appellants could object to the seizure within 90 days of the seizure, which took place on July 7, 2010. The appellants did not avail themselves of the objection provisions within the 90-days nor did they request an extension of time within the following year.

[8] Three and a half years later, on January 20, 2014, the Crown stayed the charges under both the *Excise Act, 2001* and *Criminal Code*. One month later, the appellants' counsel made a series of applications to the Ontario Superior Court under section 490 of the *Criminal Code* for

an order returning the items seized under the warrant. Some property, including documentary evidence, a long gun, and the money counting machine, was returned to the appellants. Other property, pursuant to the same provision, was forfeited to the Crown, including rifle rounds and shotgun shells, a shotgun, and other documentary evidence. The money was not returned. According to the Crown, the money had been forfeited at the time of seizure and was therefore not subject to the section 490 *Criminal Code* application.

[9] The basis of the Crown's refusal to return the money was explained in a letter from Crown counsel to appellants' counsel on March 5, 2014. Crown counsel indicated that the seized property fell into two categories: property governed by subsection 490(9) of the *Criminal Code* and property governed by section 267 of the *Excise Act, 2001*. The letter indicated that the *Criminal Code* procedure for the return of seized items was to be followed in relation to "all property not related to the firearms and ammunitions." However "[i]n regard to the monies seized by police following the execution of a search warrant against the above-named accused…custody of the seized monies was transferred to Canada Revenue Agency for forfeiture in accordance with section 267 and related provisions of the Excise Act, 2001." The letter concluded:

> "Notice of seizure….was provided…shortly after your clients' arrests…any discussions about the return of the monies is now separate from the criminal matters and will need to be [done] independently with officials from the Canada Revenue Agency."

[10] In response, the appellants commenced an action in the Federal Court seeking a declaration that the money rightfully belonged to them and sought an order for its return.

[11] The focus of the argument in the Federal Court was whether the *Criminal Code* warrant was sufficient authority to authorize the search under the Inspection provisions of the *Excise Act, 2001*, and, if so, whether the return of seized evidence was subject to the procedures in the *Criminal Code* or subject to those in the *Excise Act, 2001*. In the Federal Court, the appellants contended that the *Criminal Code* applied to all of the seized evidence, and that all of it should have therefore been returned or forfeited pursuant to section 490 of the *Criminal Code*. As a result, the appellants sought a declaration that given the applicability of the *Criminal Code*, the defendant was unlawfully detaining the funds.

[12] The Crown opposed. Section 267 of the *Excise Act, 2001* deems the seized property forfeit at the time of the contravention, and therefore the Crown submitted that the appellants' property was forfeited on the day it was seized. According to the Crown, no return of the money was possible because sections 267, 269, 271 and 272 of the *Excise Act, 2001* together constituted an absolute bar on judicial recourse. Apart from the ministerial review procedure, section 269 of the *Excise Act, 2001* is clear that "the forfeiture of a thing under section 267…is final and not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided under this Act". As the time for ministerial review outlined in sections 271 and 272 of the *Excise Act, 2001* had expired, the Crown argued that no further recourse was possible.

[13] Relying on the privative clause in section 269 of the *Excise Act, 2001*, the Crown moved for summary judgment dismissing the action.

[14] Applying established jurisprudence, the Federal Court held that the *Criminal Code* permits search warrants to be issued for violations of other Acts of Parliament, as was the case here. The funds were seized under the authority of a *Criminal Code* warrant that had been obtained on the basis of suspected violations of the *Excise Act, 2001*. Neither the search under the *Criminal Code* nor the seizures could be impugned. The Federal Court also concluded that the Court had no jurisdiction to review the forfeiture under the *Excise Act, 2001* without having first sought recourse under the ministerial review process provided in section 271.

[15] However, the argument before this Court took on a different character.

[16] The parties made a number of alternative arguments that may be said to have narrowed the issue to whether the Seizure Report, which the appellants received on July 9, 2010 shortly after the execution of the warrant, was effective in triggering the 90-day ministerial review period outlined in section 271 of the *Excise Act, 2001*. Put another way, did the Seizure Report validly notify the appellants that their property listed in the Seizure Report would be subject to the *Excise Act, 2001*, while unlisted property would continue to be subject to the *Criminal Code*? The Federal Court made no determination on this point.

[17] I have concluded that in the unique circumstances of this particular case, and in respect of the money only, the Seizure Report did not trigger the 90-day period. While the intent of the Seizure Report may have been to have the money wholly governed by the *Excise Act, 2001*, I have come to the conclusion that the money retained a dual character. The money was at the heart of the section 354 *Criminal Code* charges relating to property obtained by crime, was

included in the Section 489.1 Report, and was referred to in the Information that was laid. It was also central to the *Excise Act, 2001* prosecution.

[18] This also appears to have been the understanding of defence counsel for the appellants (who was not counsel in these proceedings). Less than one month after the criminal charges were stayed, counsel wrote to the federal Crown, stating:

> "I act for the above-noted parties, who recently had their charges stayed pursuant to an order of the Court in Cornwall. The period for appealing the said Order has now expired. I would appreciate if you could advise of the arrangements for the return of the items that were seized in the police raid that resulted in the charges that had been laid against my clients. All items in the raid are returnable ... Cash: According to the inventory of items seized, over $183,000.00 was seized."

[19] As I have described earlier, Crown counsel responded that it was his "understanding that custody of the seized monies was transferred to the [CRA] for forfeiture in accordance with section 267 and related provisions of the Excise Act" and that "any discussions about the return of the monies is now separate from the criminal matters and will need to be done independently with officials from the Canada Revenue Agency."

[20] What may reasonably be inferred from the letter, based on its plain language, is that the segregation of the funds was only "now separate" and became such as a consequence of the stay of the criminal proceedings. Counsel for the Crown contends that the letter should not be read so literally and should be understood to say that the funds "became separate" upon seizure, in a manner consistent with the statute.

[21] The uncertainty between the parties surrounding the mechanism to be applied to recover the seized goods was reinforced by the fact that some items directly relevant to the *Excise Act, 2001* charges, such as the debt lists and the money counting machine, were either forfeited or returned to the appellants under a subsection 490(9) *Criminal Code* process. If the goods were forfeit upon seizure, all of the evidence, with the exception of the weapons and ammunition, should have been subject to the ministerial review. Yet some was returned, four years after seizure, via the section 490 *Criminal Code* process.

[22] On these facts, the ministerial review period under section 271 of the *Excise Act, 2001* only began to run at the point that the criminal charges, whether under the *Criminal Code* or the *Excise Act, 2001*, were stayed. To conclude otherwise in these circumstances would effectively deny the appellants any right to contest the legitimacy of the forfeiture. While speaking in the context of access to a section 489.1 *Criminal Code* review, the Ontario Court of Appeal wrote in *R. v. Garcia-Machado* 2015 ONCA 569 at paragraph 55, 126 O.R. (3d) 737 and recently cited by Côté J. in her concurring reasons in *R v Reeves*, 2018 SCC 56 at paragraph 134:

> "[55] The recording of the items seized, the right to notice and the right to apply for return of things seized confer important protections on people whose items the state holds in detention. Compliance with s. 489.1(1) is the gateway to all of these protections."

[23] The disposition of this appeal is consistent with what might occur in practice. In argument before this Court, Crown counsel conceded that if asked, the Minister of National Revenue would likely have stayed the ministerial review process pending disposition of the charges under the *Criminal Code*.

[24] Before concluding, however, it is important to be clear about two matters. First, as a matter of law, goods seized in the execution of a search for suspected violations of the *Excise Act, 2001*, are forfeit on seizure. Second, the 90-day ministerial review period to challenge seized goods runs concurrently with criminal proceedings in respect of the same seized goods. However, what is required is clarity as to what seized goods are subject to the ministerial review when there are parallel *Criminal Code* charges in respect of the same goods. This case turns on the sufficiency of the notice triggering of the ministerial review period.

[25] I would therefore allow the appeal in part and set aside the judgement of the Federal Court granting the respondent's motion for summary judgment. Under the authority of section 52 of the *Federal Courts Act*, I would grant the appellant's motion for summary judgment only to declare that the 90-day period for seeking ministerial review under section 271 of the *Excise Act, 2001* commences with the date of this judgment. The remainder of the appellants' motion for summary judgment and the action are dismissed.

[26] Costs in this Court and the Federal Court are awarded to the appellant in the agreed upon all-inclusive amount of $5,500.

"Donald J. Rennie"

J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF JUSTICE MCDONALD OF THE FEDERAL COURT (2018 FC 229), DATED FEBRUARY 28, 2018

DOCKET:	A-106-18
STYLE OF CAUSE:	RYAN FLARO, GABRIELLE BERGERON AND MAURICE FLARO v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 8, 2019
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	GAUTHIER J.A. GLEASON J.A.
DATED:	FEBRUARY 11, 2019

APPEARANCES:

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