

ONTARIO COURT OF JUSTICE

B E T W E E N:	)	
	)	
GLAD DAY BOOKSHOP INC. and	)	<u>Charles Campbell</u> for the
JEARLD MOLDENHAUER	)	Appellants
Appellants	)	
	)	
- and -	)	
	)	
DEPUTY MINISTER OF NATIONAL REVENUE)	)	<u>Vern Brewer</u> and
for CUSTOMS AND EXCISE	)	<u>Beverly Wilton</u> for the
Respondent	)	Respondent
	)	
	)	<u>Heard:</u> May 12, 13, 14 & 15,
	)	1992
	)	

HAYES J.

ENDORSEMENT AS TO COSTS

The appeal on this matter was taken to the Ontario Court of Justice (General Division) pursuant to section 67 and 71 of the Customs Act R.S. (1985) c.1 (2nd supp.). The appeal related to tariff classification of publications alleged to be obscene.

It is submitted by the Appellant that there is no jurisdiction to award costs. The Respondent submits that as no person was in jeopardy nor charged with an offence this was a civil proceeding and therefore the provisions of the Courts of Justice Act (1984) R.S.O. 1990 c.43 and the Rules of Civil Procedure apply to the question of costs.

Rule 57.01 which governs costs refers only to costs in a

"proceeding". Rule 1.03(22) defines a "proceeding" as an "action" or an "application" and the Appellant submits that "action" and/or "application" do not include an appeal from a decision of the Deputy Minister pursuant to the Customs Act. It is to be noted that the Ontario Court of Appeal in Goldman v. Hoffman-LaRouche Limited (1987), 60 O.R. 161 (C.A.) held that it is doubtful whether the Rules of Civil Procedure apply to search warrant proceedings under the Competition Act.

In the matter of the Deputy Minister of National Revenue v. Industrial Acceptance Corporation [1958] S.C.R. 645 the Supreme Court of Canada held that there is no authority to award costs with respect to an application under section 139 of the Customs Act. Sections 138 and 139 of the Customs Act relate to an application for an application for a declaration that one's interest in goods is not affected by a seizure under the Customs Act.

Section 140(1) of the Customs Act states:

"A person who makes an application under section 138 or the Crown may appeal to the Court of Appeal from an order made under section 139 and the appeal shall be asserted, heard and decided according to the ordinary procedure governing appeals to the Court of Appeal from the orders or judgments of a Court.

2. In this section "Court of Appeal" means, in the province in which an order under this section is made the Court of Appeal for the province as defined in section 2 of the Criminal Code.

The Supreme Court of Canada in Deputy MNR v. Industrial

Acceptance Corporation, supra, considered the predecessor sections of 138 and 139 that is section 166.

The Respondent in the Industrial Acceptance case had applied for a declaration that its interest in a car was not affected by the seizure. The declaration was granted by the trial judge and affirmed by the Court of Appeal with costs at trial and on appeal against the Minister of National Revenue.

The Supreme Court of Canada dismissed the appeal but the order as to costs was deleted in both judgments below and the Supreme Court of Canada held that the order for costs should not have been made by the superior court judge nor confirmed by the Court of Appeal. In the judgment of Fauteaux J. at p. 648 stated:

"Admittedly the vehicle was legally seized as forfeited under the Act. The relief claimed by the Respondent is of an exceptional and statutory nature. The special jurisdiction conferred in the matter by Parliament to a judge of the superior court is exhausted, in my view, once the application for relief has been heard and decided on the merit. Parliament has not seen fit to provide for the imposition of costs in the matter. That there was no intention of Parliament to allow the rule governing as to costs in ordinary procedure, under the code of Civil Procedure, to obtain on an application made under subsection 5 of section 166, is made clear when the terms of this subsection are contrasted with those of subsection 6 of section 166 providing for a right of appeal from an order given under subsection 5 and which, in part, an Act ---"the appeal shall be asserted, heard and decided according to the ordinary procedure governing appeals to the Court of Appeal from orders or judgments of a judge". (Note: section 166(6) is now section 140(1)).

Again by contrast section 135(1) of the Customs Act, which is to be found in the section of the Act dealing with forfeiture reads:

135(1) A person who requests a decision of the Minister under section 131 may within 90 days after being notified of the decision, appeal a decision by way of an action to the Federal Court - Trial Division in which that person is the Plaintiff and the Minister is the Defendant.

(2) But 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.

Subsection 2 specifically makes the rules governing the Federal Court, in general, applicable to an appeal of the decision of the Minister.

Section 71 of the Customs Act does not provide that the Rules of the Ontario Court (General Division) shall apply. This is to be contrasted with the provisions of section 135 subsection 2 of the Customs Act which makes special provision for the Federal Court Act and the Federal Court Rules applicable to ordinary actions to apply to appeals under section 135(1) of the Customs Act.

Parliament has also seen fit to allow the ordinary rules governing costs to apply to a matter relating to sections 139 and section 140 of the Customs Act.

It is therefore apparent that Parliament has either omitted or not seen fit to specify that the ordinary rules governing costs should apply in the appeal process under section 71 of the Customs Act.

In Deputy M.N.R. v. Industrial Acceptance, supra, Fauteaux J. has held that once the application for relief has been heard and decided on the merits the jurisdiction is exhausted.

The Industrial Acceptance decision has been applied and followed in Beach v. Canada (Deputy Minister of National Revenue Customs and Excise - MNR) [1992] O.J. 322 O.C.J. (General Division).

In the result, I find that there is no jurisdiction to make an order as to costs in this matter.

  
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F. C. HAYES, J.