Court File A-102-18

FEDERAL COURT OF APPEAL

BETWEEN:

Radu Hociung

Appellant (plaintiff)

and

Minister of Public Safety and Emergency Preparedness

Respondent (Defendant)

MEMORANDUM OF FACT AND LAW

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AND TO:

Eric Peterson, Counsel to the Defendant
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STATEMENT OF FACTS AND LAW

1. On October 21, 2014, the Applicant (Plaintiff) entered Canada with USD $220 currency, in the form of four $50 gold coins and twenty $1 silver coins.
2. Upon inspection, a Canada Border Services Agency (CBSA) border services officer discovered the currency and seized it, and demanded a Terms of Release payment for its return.
3. The explanation for the seizure was “unreported importation of goods, pursuant s. 12 of *Customs Act*” (*CA*)
4. The plaintiff requested a Ministerial Decision on the seizure, which was given on June 1, 2015.
5. The Applicant (Plaintiff) appealed the Minister's Decision by commencing an ordinary action in the Federal Court (first instance), in file T-1450-15
6. Written Examination for Discovery of the Defendant commenced on July 19, 2016, and is not complete as of October 20, 2018.
7. In response to the Discovery questions, the defendant brought a motion to strike the statement of claim (was unsuccessful) on August 30, 2016, and the same text again as a motion for Summary Judgement on March 1, 2017. It is the disposition of this Motion for Summary Judgement that makes the object of this appeal.
8. On January 31, 2017 the Defendant served partial answers to the Written Examination Questions.
9. On the basis of newly discovered evidence from the partial answers, the Plaintiff

brought a Motion to Amend the Statement of Claim, adding a new claim.

10. The first instance was under case management between November 9, 2016 and December 18, 2017, under the management of Prothonotary Aalto. In this time no meaningful progress was achieved in the proceeding, or the discovery.

11. On March 15, 2017, the Motion for Summary Judgement was granted by Judge Gleeson, dismissing the action in its entirety.

12. On March 15, 2017, concurrently with the Motion for Summary Judgement, Judge Gleeson also considered the Motion to Amend, and issued an Order dismissing it. That Order is the subject of a separate appeal in the file A-101-18

13. Judge Gleeson was extremely unjust and partial to the Defendant on the Summary motion, and the Court should set his Judgement and Reasons aside.

14. The Statement of Claim contains four claims, which can be summarized as follows

    (a) Claim 1: Appeal of the Minister's Decision pursuant s.135 of the Customs Act dated June 1, 2015.

    (b) Claim 2: BSO Debski's utterance of threats of violence

    (c) Claim 3: Fraud over $5000 by BSO Debski acting in his capacity as agent of the Crown, pursuant Criminal Code.

    (d) Claim 4: Fraud over $5000 by adjudicator A Kendall, CBSA employee in her capacity as agent of the Crown, pursuant Criminal Code.

    (e) Claim 5: Fraud over $5000 by adjudicator M Gagnon, CBSA employee in her capacity as agent of the Crown, pursuant Criminal Code.

(f) Claim 6: Minister of Public Safety and the CBSA facilitate crime and terrorism, pursuant Criminal Code.

(g) Claim 7: Declarations with respect to the treatment of currency with respect to the *Customs Act* and *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PMCLTFA)

15. It is not for the fact finder to have his fact finding narrowed to the scope desired by the defendant, as he has done in para 16 of his Judgement and Reasons (Appeal Book p.20). Instead it is the fact finder's role to determine which issues are determinative for the claims. At best the parties' submissions with respect to which issues are genuine is a suggestion for a starting point. Otherwise the defendant could simply tell the judge that there are no genuine issues for trial, and the motion would be granted without any fact-finding at all. The Motion Judge deferred his fact-finding role to the defendant in this case, and this is partial and fails to observe natural justice (defendant is not a judge).

16. The Motion Judge erred at para 26 of his Judgement and Reasons (Appeal Book p. 25) in not being persuaded that the action contemplated at s.135 of the Customs Act is an ordinary action where the rules under the *Federal Court Act* apply. It is plain and obvious from the reading of section 135 of the Customs Act and Rule 101 (Joinder of claims) is not excluded, and is therefore allowed. counter example, if Parliament intended to limit the scope of actions under s.135 of the *Customs Act*, it would have worded section 135 appropriately, as it has done in the case of actions brought under s.81.28(3) of the *Excise Tax Act*. In s81.28(3), joinder of causes of actions are not

permitted except to permit joinder of appeals under that part, as worded plainly in 81.28(3)(a):

> **81.28 (3)** An appeal to the Federal Court under this Part is deemed to be an action in the Federal Court to which the Federal Courts Act and the rules made under that Act applicable to an ordinary action apply, except as varied by special rules made in respect of such appeals and except that
>
> **(a)** the rules concerning joinder of parties and causes of action do not apply except to permit the joinder of appeals under this Part;
> **(b)** a copy of a notice of objection filed with the Federal Court under subsection 81.21(3) is deemed to be a statement of claim that is filed with the Court by the person serving the notice and served by that person on the Minister on the day it was so filed by the Minister; and
> **(c)** a copy of a notice of objection filed by the Minister pursuant to subsection 81.21(3) or an originating document filed by the Minister pursuant to subsection (1) shall be served in the manner provided in subsection (4).

17. By comparing the explicitly limited scope of the Excise Tax Act action with the unconstrained Customs Act s.135 action, it is clear that Parliament is able to constrain actions as needed, and there is no reasonable basis to conclude that if Parliament has not done so in the case of a s.135 action, it is nonetheless constrained in some unstated and arbitrary way. It was an error on the part of the Motion Judge to conclude that relief sought through the proposed amendments is beyond the scope and intent of section 135 of the *Customs Act*, as the scope of actions under that section was not

constrained by Parliament.

18. By comparing the explicitly limited scope of the Excise Tax Act action with the unconstrained Customs Act s.135 action, it is clear that Parliament is able to constrain actions as needed, and there is no reasonable basis to conclude that if Parliament has not done so in the case of a s.135 action, it is nonetheless constrained in some unstated and arbitrary way. It was an error on the part of the Motion Judge to conclude that relief sought through the proposed amendments is beyond the scope and intent of section 135 of the *Customs Act*, as the scope of actions under that section was not constrained by Parliament.

19. In considering the effects of section 131 of the *Customs Act*, the Motion Judge erred by conflating limitations on allowed scope the Minister's Decision, with limitations on the scope of the action appealing such a Decision. While s.131 does limit the Minister to only deciding whether or not a contravention occurred, s.135, which describes an appealing action, does not limit that an ordinary action brought to appeal the Decision is also limited in any way. He refereed to *Nguyen v. Canada (Public Safety and Emergency Preparedness)* 2009 FC 724 at paras 19 and 20, as the authority for his conclusion, however, he completely misread Justice Michel Shore's explanation. *Nguyen* was an application for judicial review, not an ordinary action. The applicant was trying to appeal a *Customs Act* s.131 decision by way of an application review, and J Shore was explaining that the application before him was not the proper way to appeal a s.131 decision, as the only way to appeal a s.131 decision is by way of an action as described in s.135. The Motion judge erred in understanding this explanation as proof that s.135 excludes the effect of Rule 101 (Joinder of claims)

20. At para 28 of his Judgement and Reasons (Appeal Book p 25), the Motion judge erred in law in relying on *Dokaj v. Canada (Minister of National Revenue)*, 2005 FC 1437. In that case, the judge was fact-finding with respect to the *PCMLTFA*, and was merely asserting similarities to the *Customs Act*. In that case, the judge neither made an analysis of the *Customs Act*, which was not relevant, nor made any reference to authorities. His pointing out similarities cannot therefore be construed as a reference in law.

21. At para 28 of this Judgement and Reasons (Appeal Book p 25), the Motion Judge also relied on *ACL Canada Inc. v. MNR* (1993), 107 DLR (4th) 736, 68 FTR 180 (TD), but erred in law in misreading the *ACL* decision to understand the opposite of what it said. In fact, *ACL* was indeed an appeal pursuant s.135 of the *Customs Act*, but there the judge explicitly found at para 60, 63 that other relief was available, namely that a decision pursuant s. 133 of the Customs Act be set aside, and that another adjudicator should reconsider the appropriate terms of forfeitures and remissions (ie, *mandamus*). Additionally, in ACL, a claim under the Canadian Charter of Rights and Freedoms had been made but was not pursued at trial. There was no determination that such a claim is not available as joinder of claims, and the Motion Judge has erred in concluding this claim was not possible. Since ACL did allow and make a ruling of mandamus with respect to s. 133, it is untrue that “the subsection 135(1) statutory right of appeal has been consistently found to be limited to the section 131 decision”; this statement is contradicted by the very authority the Motion Judge referred to.

22. At para 29 of his Judgement and Reasons, the Motion Judge erred in law in his

conclusion regarding *Starway v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1208. As in *ACL* above, also in Starway, and in this action, the Minister made two decisions, (1) under s.131 that there had been a contravention, and (2) under s.133 that the amount received for the return of seized goods shall be held as forfeit. In *Starway* Court in that case found that as there had not been a contravention, the money must be returned with interest. A separate plea for relief was not necessary, and it is the second example where the Motion Judge's own jurisprudence references contradict his interpretation that “the subsection 135(1) statutory right of appeal has been consistently found to be limited to the section 131 decision”.

23. At para 30, the Motion Judge stated that he agrees with Justice Harrington, who, in *Starway,* stated “[i]n accordance with section 135 of the Act, this is an ordinary action. The only special rule imposed is limited to whether Mr. Starway made an untrue statement”, and concluded that the exclusive issue to be determined in a 135(i) action is the contravention of the *Customs Act*. It is unfortunate that Justice Harrington's language is imprecise. Whether Mr. Starway had lied or not was a fact to be found in that particular proceeding, not a special procedural rule to apply to all s.135 actions. Section 135(2) says “The Federal Courts Act and the rules made under that Act applicable to ordinary actions apply in respect of action instituted under subsection (1) except as varied by special rules made in respect of such actions” . It clearly refers to Rules of The Federal Court being varied. For instance, it allows the various deadlines to be varied, or for discovery proceed in a particular form (written rather than oral, etc). In any case, there are no special (procedural) rules in this case. The Motion Judge is

grasping at straws. In any case, the issue of whether s.135 is intended to castrate the proceeding such that no remedy is possible in case of a Minister making bad, and damaging decisions, would clearly be a genuine issue for trial. Can the interpretation that the Minister has no liability in respect to damage caused, be just?

24. The interpretation that the ordinary action contemplated by s. 135 of the Customs Act does not permit joinder of claims or other remedies than the disposal of the Minister's decision under s.131 fails the principles of fundamental justice, and section 7 of the *Canadian Charter of Rights and Freedoms*. By way of example: A CBSA officer visits a place of business, conducts a search and concludes that s.12 of the Customs Act had been contravened, and that all the machinery found on premises had been imported without being declared (assume this is false for the purposes of the example). He proceeds to seize everything in sight and sets a Terms of Release of 1 million dollars. The business requests a Ministerial Decision, pursuant s.129 of the Customs Act. A few months later, the Ministerial Decision is made. In the meanwhile, the business closed as it could not operate without the machinery which had been seized Regardless of the Minister's decision, it can be proven at Trial that the seizure should not have occurred at all, and if follows that the Minister is liable for the damages of lost business, jobs, etc. It should be plain and obvious from the Charter that the Minister had caused some damages, and to restore justice, the Court must order remedies, beyond the finding whether the Act had been contravened or not. By common sense, that finding is most inconsequential to the plaintiff; it's the damages that the Plaintiff seeks to correct, not the inconsequential fact that the Minister considers him to have contravened the Customs Act. Without applying Charter principles, the Minister would

effectively have free reign to shut down any business he chooses, without any accountability. There is no other means to seek damages for a wrongful decision by the Minister, than the action prescribed at s.135, and the reason Parliament did not limit its scope is specifically to allow rogue Ministers to be held accountable by affected persons. The purpose of discovery is to find out why this injustice happened, such that the remedies will be just (is there a case to be made for punitive damages?). Did the Minister order the “hit” ? If so, why? How serious is his trespass? If it was a rogue CBSA employee, and not the Minister's initiative to hit the business, is he protected by the limitation of section 106 of the Customs Act? Note that the s.135 action is available regardless of the Minister's Decisions being in the positive or negative. Ie, even if the Minister ultimately decides that there was no contravention and the machinery be returned, the damage is already done. The decision may be just and correct, but the business is dead. The prerequisite for the s.135 action is simply that the Minister has been requested to make a decision, indifferent of the outcome of the decision. This implies that available remedies is not limited to setting the decision aside, as this would be pointless if the decision was that no contravention occurred If Parliament intended to limit the remedies available to disposal of the decision, section 135 would have read similar to “Where the Minister decides that a contravention has occurred..”

25. Officer Debski was not performing any duties under the Customs Act, when he threatened the plaintiff with arrest (violence). Furthermore, as the evidence shows (Plaintiff's Responding Motion Record, para 17), he understood that the coins were “technically currency” when he seized them. It was not a seizure under the Customs Act, but fraud as pleaded at para 1(k) and 1(l)(iv) (Appeal Book p. 49). Therefore, he is

not entitled to the limitation afforded to officers performing duties under the *Customs Act*, as neither uttering threats, not committing fraud are part of his duties under that Act as affirmed by *Zolotow v. Canada (Attorney General)*, 2011 FC 816 (CanLII) at para 30.

26. With respect to the other CBSA employees in the Recourse Directorate, namely A Kendall, M Gagnon and Jeffrey Strickland, they were furthering the fraud started by Officer Debski, trying to persuade the plaintiff to pay for the return of the currency. A Kendall changed her explanation several times as the pleadings show, in trying to persuade the plaintiff that the amount requested as “Terms of Release” was legitimate. This is a further clue that she was actively participating in the scheme. Similar behaviour from her colleague, M Gagnon is pleaded. As pleaded, J Strickland even changed the amount requested as Terms of Release, when in fact he had all the evidence possible to show the currency was not subject to the *Customs Act*. All three had demonstrated no bona fide effort to conduct themselves in accordance with their statutory obligations. The findings in *Zolotow* equally apply.

27. The Motion Judge erred in law in not considering whether the prerequisites for the s.106 protection were present (ie, whether the officers were performing a duty under the *Customs Act*). The issue of whether the individuals named in the Statement of Claim are afforded the s.106 protections is therefore another genuine issue for trial.

Claim 1. Judicial review of the Minister's Decision

28. With respect to the Minister's Decision the Motion judge did not, but should have

considered:

(a) Is the decision intelligible? The reasons given by the Minister show no statutory or jurisprudence basis for the decision, and thus the Plaintiff's right to reasons (sufficiently clear, precise and intelligible to enable him to understand the basis for the decision) were denied, and additionally the reasons given do not allow the court to review the decision making process: *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190 at paragraph 47

29. The reason that the Minister advanced for his determination that the coins are “goods” was quoted by the Motion Judge at para 33 of his Judgement and Reasons. The Minister's explanation is that the coins must be “goods” because they are not currency, as they are not intended for circulation. Ignoring for a second the “not intended for circulation” assertion, the Motion Judge went on to analyze the currency and circulation status at para 52-55 and found the coins to be indeed currency in actual use, contradicting the Minister's reason. Should it not mean that if the Minister's reasons were found to be incorrect, his decision cannot stand?

30. The Motion Judge misunderstood the relationship between “taxable” and “subject to Customs Act” at para 57 and 63-64of his Reasons. The plaintiff made representations with respect to the relationship between taxable status and the Customs Act” at para 8-10 of his Responding Motion Record (Appeal Book p121). The Motion Judge's undestanding is that “there is a “difference between “exempt from taxes” under the *Excise Tax Act* and “exempt from reporting” under the *Customs Act*”. He overlooked the effect of s50(1)(b) of the *Excise Tax Act* (Appeal Book p 168). It is this very section that enables the *Customs Act* operation when goods are imported. It is also why

reporting exempt goods like the water and headache pills that the plaintiff had purchased earlier in the US was not required, specifically because they are exempt from tax. The point of section 50, is that when a consumption tax applies to a class of goods, it is payable in accordance with the provisions of the *Customs Act* by the importer. It follows that where a consumption tax does not apply, nothing is payable, and the *Customs Act* does not apply. The purpose of the *Customs Act* is to collect the taxes that are due on importation. Where a tax is not due, the *Customs Act* is not enabled, and it serves no purpose. This principle is applied by the CBSA routinely when travellers enter Canada importing their own effects in their luggage and no report is required. Some goods are not taxable even if they have been newly purchased outside of Canada and are imported into Canada, such as foodstuffs. Foodstuffs are tax exempt as per Schedule III of the ETA, and for that reason a report is not required. In other words, “exempt from taxes” implies “exempt from *Customs Act*, including reporting”.

31. At paragraph 65 the Motion Judge said “the plaintiff has not argued that the coins, even if found to be goods, are exempt from the reporting requirement set out at subsection 12(1). In fact, the plaintiff argued precisely this fact at paragraphs 8-14 of his Responding Motion Record (Appeal Book p 121-122)

32. The Motion Judge also unfairly entered evidence, not adduced by either party at para 60 of his reasons. As the parties have had no opportunity to comment on this evidence, it is unjust. This evidence is a glossary definition of “money” taken out of context from s.123(1) of the *Excise Tax Act*. Section 123(1) starts “In section 121, this Part and

Schedules V to X", and continues by defining numerous terms. The defined terms clearly apply only within the context listed (section 121, part IX and Schedules V to X). It has no bearing outside of this context.

33. The purpose of the Motion Judge's evidence was to add a conflicting finding to his own finding that the coins are currency. Based on this evidence, and using some convoluted "magic" logic, he found that the currency in question becomes "goods". In so doing, he was not only partial to the defendant. He also ignored the Plaintiff's evidence, brought in the Statement of Claim para 1.d) at Appeal Book p 47, adducing Currency Act section 11, which explicitly states that currency cannot be used as anything other than currency. The Currency Act itself, as well as its US equivalent, pre-empt a finding that currency may be used as goods or anything other than currency.

34. At paragraphs 68-72, the Motion Judge himself made note of the conflict in his findings that currency is also goods, and attempted to wave the conflict away, preferring to ignore Currency Act s.11, which directly contradicts the finding that currency is goods.

35. There appears to be no jurisprudence on the classification of currency as goods.

36. The fact that a new question of law exists, and the Motion Judge found only conflicting way of statutory interpretation, it is clear that he was not able to make a confident ruling based on well established law and documentary evidence. If the Motion Judge considered the plaintiff's evidence in Currency Act s.11 and had not used his own evidence in form of the Excise Tax Act "money" definition", his conclusion would have been different (ie, that "No person shall [...] us otherwise than as currency any coin that is current and legal tender in Canada" (s.11). "[A] process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a

dispute": Hryniak v. Mauldin, [2014] 1 SCR 87, 2014 SCC 7 (CanLII)

Claims 3-5. Claims of threats and fraud

37. With respect to the claims of uttered violence and fraud, casually dismissed them in one fell swoop explaining that these claims are time-bared thanks to s.106 of the Customs Act. The claims are not brought pursuant this section, as the CBSA employees were not perfoming a duty under the *Customs Act* at the time the offences occured. The issue to be determined is whether the employees were performing a duty under the *Customs Act*: *Ingredia S.A. v. Canada*, 2010 FCA 176 (CanLII), *Zolotow*

Claims 6. Facilitating crime and terrorism by the Minister of Public Safety

38. The Motion Judge casually overlooked the claim of facilitating crime and terrorism by the Minister of Public Safety. All evidence available so far was adduced in paras 33-54, 79-90 of the plaintiff's Responding Motion Record. It is sufficient to show both that a genuine issue for trial exists. The Applicant respectfully submits that this claim is too complex to be disposed of by summary judgement.

Claim 7. Declaration with respect to nature of currency

39. The Motion Judge ignored the claim for declarations, on the basis that an action instituted pursuant s.135 of the Customs Act is limited to only one claim, ie, whether a contravention has occured. As shown above, this interpretation is not supported by statute interpretation or jurisprudence. Furthermore, under the Federal Courts Act, s.

18(1)(b) and 18.5the Federal Court has the jurisdiction to provide the relief sought:

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application **or other proceeding** for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[...]

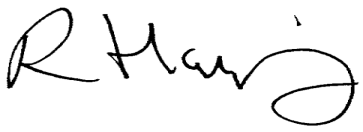
18.5 Despite sections 18 and 18.1, if an Act of Parliament **expressly provides for an appeal to the Federal Court**, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

[Applicant's highlighting]

40. The Federal Court Act specifically sets that the declaration sought must be brought pursuant s.135, since the Customs Act “expressly provided for an appeal to the Federal Court”. The declarations with respect to the nature of currency for *Customs Act* purposes cannot come in any other form than under a s.135 action. If there is an issue with this interpretation of the Federal Courts Act, it is a genuine issue for trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

DATE: Oct 20, 2018



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