Federal Court  Cour fédérale

Date: 20090715

Docket: T-1390-08

Citation: 2009 FC 724

Ottawa, Ontario, July 15, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THI NGOC NGUYEN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant, Ms. Thi Ngoc Nguyen, seeks to challenge a decision taken under section 133 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) ("the Act"), whereby the Minister of Public Safety and Emergency Preparedness ("the Minister") requires payment of a specified amount of money before returning a seized diamond ring. The Applicant's arguments are all directed at challenging the decision under section 131 of the Act whereby the Minister found that Ms. Nguyen had contravened s. 12 of the Act by failing to report an alleged importation of a ring. Subsection 131(3) of the Act is a privative clause within the *Customs Act* that requires decisions made pursuant

to s. 131 of the Act be subject to review only as described in s.135(1) of the Act. Subsection 135(1) of the Act requires that a Minister's decision made under s.131 of the Act be appealed by way of an action. In other words, a decision made pursuant s. 131 of the Act must be challenged by way of action and not by way of application for judicial review.

[2] As Justice Andrew MacKay stated in *ACL Canada Inc. v. Canada (Minister of National Revenue - M.N.R.)*, (1993) 68 F.T.R. 180, 107 D.L.R. (4th) 736 (F.C.T.D.):

> [54] In my view, Parliament has insulated from appeal the penalty imposed in the event there is found to be a contravention of the Act. That may seem surprising since the penalty will often be the primary concern of the person whose goods are seized under the Act or who is served with a notice and demand for payment under s.124. Yet that simply carries on a long-standing regime under Customs Acts of the past, at least in relation to goods seized, for the goods are forfeited to Her Majesty at the time of the contravention of the Act (s. 122), and terms of any remission, where the Act or regulations are contravened, have been considered beyond the role of the Court to review. (Lawson et al. v. The Queen, [1980] 1 F.C. 767 F.C.T.D. (per Mahoney J. at 772)).
>
> [Underlined by the court]

[3] A technical provision with a privative clause presents a conundrum to judicial review, when it does not result in a conclusion that would be reached due to factual evidence! In such an instance, the law is followed although justice may be undone. In the case at bar, this has occurred due to a series of circumstances which include language barrier challenges for an applicant, misinterpretation of significant evidence by first instance decision-makers and jurisprudence pointing at the frustration of judges for a period of years (*Dokaj v. Canada (Minister of National Revenue - M.N.R.)*, 2005 FC 1437, [2006] 2 F.C.R. 152; *ACL Canada*, above, at para. 56, see also below at paragraph 22 of this Decision).

[4] An iron-clad privative clause can only be interpreted as it is and nothing more, if a court recognizes it is but a court, and nothing more; nevertheless, the subject-matter can then be reviewed by the executive branch for eventual formulation by the legislative branch so that justice can prevail, where in rare exceptions, cases of honest citizens and residents of Canada fall through the cracks. Such is the situation in this case, wherein, the court understands its limitations under the separation of powers and the legislation is clear on given points under which a decision would be overturned, if it ruled differently. The court acknowledges even if it were inclined to rule otherwise, that under constitutional supremacy, it is not for the court, itself, to write the law but rather it is for the two other branches of government to remedy the situation if they so see fit.

[5] The fact a dialogue can ensue among the three branches of government through jurisprudence, represents, in and of itself, the measure of health in a democracy. The spirit of the law attempts to be at one with justice, as a synchronized whole, where the three branches of government, although working separately, set matters right under the supremacy of that constitutional framework, each within its own jurisdiction.

II. JUDICIAL PROCEDURE

[6] This is an application for judicial review of a Ministerial decision dated August 7, 2008 ("the Decision"), which made two determinations. First, pursuant to s. 131 of the Act, the Minister found that Ms. Nguyen had contravened s. 12 of the Act. Having found a contravention

of the Act, the Minister then determined pursuant to s. 133 of the Act that a ring under seizure would be returned to Mr. Nguyen upon receipt of the amount of $30,483.20, to be held as forfeit.

III. BACKGROUND

[7] Ms. Nguyen is a Canadian citizen who is originally from Vietnam, but who resided in Surrey, British Columbia at the time of the enforcement action. She was a mushroom farm worker but currently works as a manicurist.

[8] On February 15, 2007, Ms. Nguyen left Canada for a visit to Vietnam. She took with her various clothing and jewellery, including a diamond ring ("the ring"), two other diamond rings ("the engagement and wedding rings"), and two pairs of earrings with clear stones ("the earrings").

[9] About two weeks later, on March 2, 2007, Ms. Nguyen returned to Canada, bringing back all the jewellery which she had taken with her. In response to a question on her customs declaration form as to whether she was bringing into Canada items purchased or received abroad, she stated that she had nothing to declare. At the preliminary inspection point, she was referred to secondary inspection because of her difficulty communicating in English. A customs officer at the secondary inspection point opened Ms. Nguyen's luggage. This second customs officer unfolded a light jacket/shirt and felt a small lump in its pocket. When the customs officer opened the pocket, she discovered Ms. Nguyen's jewellery in a small jewellers' plastic bag.

[10] Ms. Nguyen provided an appraisal, an invoice, and a diamond grading report for the ring. The appraisal for the diamond in the ring was conducted by a gemological consultant in Vancouver on March 31, 2005. This appraisal suggested an insurance coverage of the diamond before its affixation to a gold ring at $124,800. The invoice was with respect to the cost of setting the diamond in a gold band. This invoice was issued by a jeweller located in Vancouver and was dated April 15, 2005. Finally, the diamond grading report was with respect to the diamond in the ring and was dated September 15, 2003 in Antwerp, Belgium.

[11] The customs officer told Ms. Nguyen that the documents do not establish that the ring had been legally imported into Canada or that applicable duties and taxes had been paid.

[12] Ms. Nguyen was unable to provide receipts for the purchase of any of her jewellery because the jewellery consisted of gifts from people with whom she was no longer in contact. She indicated to the customs officer that the engagement and wedding rings were given to her by her ex-husband while they both lived in Montreal. In her affidavit, she claims that her ex-husband gave her the gifts of earrings in 1994, and in 1997 he gave Ms. Nguyen the wedding and engagement rings. This jewellery is now over 10 years old. Ms. Nguyen was separated from her ex-husband in 1998 and they are not on speaking terms.

[13] She indicated to the customs officer that the ring was given to her in Vancouver as a gift from her boyfriend (Certified Record at pp. 2, 4-5). When asked what her boyfriend does for a living, she indicated that he owns a business in Hong Kong where he now lives (Certified Record at

p. 4). In her affidavit, Ms. Nguyen confirmed that she was given the ring on Valentine's Day in 2005 by her boyfriend in Vancouver. According to Ms. Nguyen, she was separated from her boyfriend by the end of 2006 and they are no longer in contact.

[14] Not satisfied, the customs officers seized the ring because Ms. Nguyen had not declared it on the customs forms as she allegedly was required to do. She also did not have receipts confirming when the jewellery was bought. The other jewellery was also kept in custody but was not seized; the customs officer believed that the other items may have been more than 10 years old; and, therefore, beyond the limitations period.

[15] At the request of the Minister, GLS Gemlab Limited conducted an appraisal of the ring. Based on this appraisal, the Minister informed Ms. Nguyen by letter dated April 4, 2007, that the ring would be released upon payment of $30,483.20 in duties and an additional $5,681.31 in Provincial Sales Tax.

[16] Ms. Nguyen duly requested the Minister to review the enforcement action. By letter dated June 22, 2007, Ms. Nguyen was informed that the Minister was reviewing the enforcement action which had been taken as Ms. Nguyen had not reported the alleged importation of the ring in contravention of s. 12 of the Act.

IV. THE IMPUGNED DECISION

[17] Upon review of the enforcement action, the Minister's delegate issued two determinations on August 7, 2007, as follows:

> After considering all of the circumstances, I have decided, under the provisions of section 131 of the Customs Act, that there has been a contravention of the Customs Act or the Regulations in respect of the goods that were seized.
>
> Under the provisions of section 133 of the Customs Act, the ring under seizure be returned to the appellant upon receipt of an amount $30,483.20 to be held as forfeit. If release of the goods is not taken on the foregoing terms, within 90 days from the date of this notice, they will be forfeited and disposed of.

V. APPLICABLE LEGISLATION

Report	**Déclaration**
12. (1) Subject to this section, all goods that are imported shall, except in such circumstances and subject to such conditions as may be prescribed, be reported at the nearest customs office designated for that purpose that is open for business.	**12.** (1) Sous réserve des autres dispositions du présent article, ainsi que des circonstances et des conditions prévues par règlement, toutes les marchandises importées doivent être déclarées au bureau de douane le plus proche, doté des attributions prévues à cet effet, qui soit ouvert.
Time and manner of report **(2)** Goods shall be reported under subsection (1) at such time and in such manner as the Governor in Council may prescribe.	Modalités (2) La déclaration visée au paragraphe (1) est à faire selon les modalités de temps et de forme fixées par le gouverneur en conseil.
Who reports **(3)** Goods shall be reported under subsection (1) (a) in the case of goods in the actual possession of a person arriving in Canada, or	Déclarant (3) Le déclarant visé au paragraphe (1) est, selon le cas : *a*) la personne ayant en sa possession effective ou parmi ses bagages des marchandises

that form part of the person's baggage where the person and the person's baggage are being carried on board the same conveyance, by that person or, in prescribed circumstances, by the person in charge of the conveyance; (a.1) in the case of goods imported by courier or as mail, by the person who exported the goods to Canada; (b) in the case of goods, other than goods referred to in paragraph (a) or goods imported as mail, on board a conveyance arriving in Canada, by the person in charge of the conveyance; and (c) in any other case, by the person on behalf of whom the goods are imported. **Goods returned to Canada** **(3.1)** For greater certainty, for the purposes of the reporting of goods under subsection (1), the return of goods to Canada after they are taken out of Canada is an importation of those goods. **Where goods are reported outside Canada** **(4)** Subsection (1) does not apply in respect of goods that are reported in the manner prescribed under subsection (2) prior to importation at a customs office outside Canada	se trouvant à bord du moyen de transport par lequel elle est arrivée au Canada ou, dans les circonstances réglementaires, le responsable du moyen de transport; *a.1*) l'exportateur de marchandises importées au Canada par messager ou comme courrier; *b*) le responsable du moyen de transport arrivé au Canada à bord duquel se trouvent d'autres marchandises que celles visées à l'alinéa *a*) ou importées comme courrier; *c*) la personne pour le compte de laquelle les marchandises sont importées. **Marchandises qui reviennent au Canada** **(3.1)** Il est entendu que le fait de faire entrer des marchandises au Canada après leur sortie du Canada est une importation aux fins de la déclaration de ces marchandises prévue au paragraphe (1). **Exception : déclaration à l'étranger** **(4)** Le paragraphe (1) ne s'applique qu'à la demande de l'agent aux marchandises déjà déclarées, conformément au paragraphe (2), dans un bureau de douane établi à l'extérieur du Canada. […] **Déclaration écrite** **(6)** Les déclarations de

unless an officer requires that the goods be reported again under subsection (1) after importation. […] **Written report** **(6)** Where goods are required by the regulations to be reported under subsection (1) in writing, they shall be reported in the prescribed form containing the prescribed information, or in such form containing such information as is satisfactory to the Minister. […]	marchandises à faire, selon les règlements visés au paragraphe (1), par écrit sont à établir en la forme, ainsi qu'avec les renseignements, déterminés par le ministre ou satisfaisants pour lui. […]

Decision of the Minister **131. (1)** After the expiration of the thirty days referred to in subsection 130(2), the Minister shall, as soon as is reasonably possible having regard to the circumstances, consider and weigh the circumstances of the case and decide (*a*) in the case of goods or a conveyance seized or with respect to which a notice was served under section 124 on the ground that this Act or the regulations were contravened in respect of the goods or the conveyance, whether the Act or the regulations were so contravened;	**Décision du ministre** **131. (1**) Après l'expiration des trente jours visés au paragraphe 130(2), le ministre étudie, dans les meilleurs délais possible en l'espèce, les circonstances de l'affaire et décide si c'est valablement qu'a été retenu, selon le cas : *a*) le motif d'infraction à la présente loi ou à ses règlements pour justifier soit la saisie des marchandises ou des moyens de transport en cause, soit la signification à leur sujet de l'avis prévu à l'article 124; *b*) le motif d'utilisation des moyens de transport en cause dans le transport de

(*b*) in the case of a conveyance seized or in respect of which a notice was served under section 124 on the ground that it was made use of in respect of goods in respect of which this Act or the regulations were contravened, whether the conveyance was made use of in that way and whether the Act or the regulations were so contravened; or (*c*) in the case of a penalty assessed under section 109.3 against a person for failure to comply with subsection 109.1(1) or (2) or a provision that is designated under subsection 109.1(3), whether the person so failed to comply. (*d*) [Repealed, 2001, c. 25, s. 72] **Exception** **(1.1)** A person on whom a notice is served under section 130 may notify the Minister, in writing, that the person will not be furnishing evidence under that section and authorize the Minister to make a decision without delay in the matter. **Notice of decision** **(2)** The Minister shall, forthwith on making a decision under subsection (1), serve on the person who requested the decision a detailed written	marchandises ayant donné lieu à une infraction aux mêmes loi ou règlements, ou le motif de cette infraction, pour justifier soit la saisie de ces moyens de transport, soit la signification à leur sujet de l'avis prévu à l'article 124; *c*) le motif de non-conformité aux paragraphes 109.1(1) ou (2) ou à une disposition désignée en vertu du paragraphe 109.1(3) pour justifier l'établissement d'une pénalité en vertu de l'article 109.3, peu importe s'il y a réellement eu non-conformité. *d*) [Abrogé, 2001, ch. 25, art. 72] **Exception** **(1.1)** La personne à qui a été signifié un avis visé à l'article 130 peut aviser par écrit le ministre qu'elle ne produira pas de moyens de preuve en application de cet article et autoriser le ministre à rendre sans délai une décision sur la question. **Avis de la décision** **(2)** Dès qu'il a rendu sa décision, le ministre en signifie par écrit un avis détaillé à la personne qui en a fait la demande. **Recours judiciaire**

notice of the decision. **Judicial review** **(3)** The Minister's decision under subsection (1) is 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 by subsection 135(1).	**(3)** La décision rendue par le ministre en vertu du paragraphe (1) n'est susceptible d'appel, de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues au paragraphe 135(1).

Where there is contravention **133. (1)** Where the Minister decides, under paragraph 131(1)(*a*) or (*b*), that there has been a contravention of this Act or the regulations in respect of the goods or conveyance referred to in that paragraph, and, in the case of a conveyance referred to in paragraph 131(1)(*b*), that it was used in the manner described in that paragraph, the Minister may, subject to such terms and conditions as the Minister may determine, (*a*) return the goods or conveyance on receipt of an amount of money of a value equal to an amount determined under subsection (2) or (3), as the case may be; (*b*) remit any portion of any money or security taken; and (*c*) where the Minister considers that insufficient	**Cas d'infraction** **133. (1)** Le ministre, s'il décide, en vertu des alinéas 131(1)*a*) ou *b*), que les motifs d'infraction et, dans le cas des moyens de transport visés à l'alinéa 131(1)*b*), que les motifs d'utilisation ont été valablement retenus, peut, aux conditions qu'il fixe : *a*) restituer les marchandises ou les moyens de transport sur réception du montant déterminé conformément au paragraphe (2) ou (3), selon le cas; *b*) restituer toute fraction des montants ou garanties reçus; *c*) réclamer, si nul montant n'a été versé ou nulle garantie donnée, ou s'il estime ces montant ou garantie insuffisants, le montant qu'il juge suffisant, à concurrence de celui déterminé conformément au

money or security was taken or where no money or security was received, demand such amount of money as he considers sufficient, not exceeding an amount determined under subsection (4) or (5), as the case may be. […] **Return of goods under paragraph (1)(*a*)** **(2)** Goods may be returned under paragraph (1)(*a*) on receipt of an amount of money of a value equal to (*a*) the aggregate of the value for duty of the goods and the amount of duties levied thereon, if any, calculated at the rates applicable thereto (i) at the time of seizure, if the goods have not been accounted for under subsection 32(1), (2) or (5) or if duties or additional duties have become due on the goods under paragraph 32.2(2)(*b*) in circumstances to which subsection 32.2(6) applies, or (ii) at the time the goods were accounted for under subsection 32(1), (2) or (5), in any other case; or (*b*) such lesser amount as the	paragraphe (4) ou (5), selon le cas. […] **Restitution des marchandises** **(2)** La restitution visée à l'alinéa (1)*a*) peut, s'il s'agit de marchandises, s'effectuer sur réception : *a*) soit du total de leur valeur en douane et des droits éventuellement perçus sur elles, calculés au taux applicable : (i) au moment de la saisie, si elles n'ont pas fait l'objet de la déclaration en détail ou de la déclaration provisoire prévues au paragraphe 32(1), (2) ou (5), ou si elles sont passibles des droits ou droits supplémentaires prévus à l'alinéa 32.2(2)*b*) dans le cas visé au paragraphe 32.2(6), (ii) au moment où elles ont fait l'objet de la déclaration en détail ou de la déclaration provisoire prévues au paragraphe 32(1), (2) ou (5), dans les autres cas; *b*) soit du montant inférieur que le ministre ordonne. […]

Minister may direct. […]	

Federal Court	Cour fédérale
135. (1) A person who requests a decision of the Minister under section 131 may, within ninety days after being notified of the decision, appeal the decision by way of an action in the Federal Court in which that person is the plaintiff and the Minister is the defendant.	**135. (1)** Toute personne qui a demandé que soit rendue une décision en vertu de l'article 131 peut, dans les quatre-vingt-dix jours suivant la communication de cette décision, en appeler par voie d'action devant la Cour fédérale, à titre de demandeur, le ministre étant le défendeur.
Ordinary action **(2)** The Federal Courts Act and the rules made under that Act 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.	**Action ordinaire** **(2)** La *Loi sur les Cours fédérales* et les règles prises aux termes de cette loi applicables aux actions ordinaires s'appliquent aux actions intentées en vertu du paragraphe (1), sous réserve des adaptations occasionnées par les règles particulières à ces actions.

VI. ISSUES

[18] Two questions are raised:

1. Is the Applicant able to challenge in judicial review the Minister's determination made pursuant s. 131 of the Act that the Applicant contravened s. 12 of the Act?
2. Was the Minister's decision pursuant s. 133 of the Act requiring the Applicant to remit a certain monetary amount for the release of the seized ring unlawful?

VII. ANALYSIS

a. Is the Applicant able to challenge in judicial review the Minister's determination made pursuant s. 131 of the Act that the Applicant contravened s. 12 of the Act?

[19] The Applicant is challenging the Minister's finding of a contravention of the Act made pursuant s. 131 of the Act of this application for judicial review. Subsection 131(3) of the Act is a privative clause within the *Customs Act* that requires decisions made pursuant to s. 131 of the Act be subject to review only as described in s. 135(1) of the Act. Subsection 135(1) of the Act requires that a Minister's decision made under s. 131 of the Act be appealed by way of an action.

[20] No such statutory right of appeal exists with respect to Ministerial decisions taken under s. 133 of the Act. Section 133 of the Act provides that where the Minister finds under s. 131 of the Act that a contravention of the Act has occurred, the Minister may impose a penalty or other applicable remedial action such as the return of goods on receipt of an amount of money. Accordingly, a determination made pursuant s. 133 of the Act may often be dependent on a finding of a contravention of the Act. Nevertheless, the two decisions are separate and distinct, and must be challenged separately. The determination made pursuant to s. 131 of the Act in respect of a contravention of s. 12 of the Act may only be appealed by way of an action to this Court. Meanwhile, a determination made pursuant s. 133 of the Act regarding the release of the goods may

be challenged only by way of an application for judicial review in accordance with s. 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

[21] As Justice Carolyn Layden-Stevenson recognized in a case interpreting similarly structured legislation, “the result is one that is both awkward and inconvenient” (*Dokaj*, above, at para. 39). Indeed, Justice Andrew Mackay of this Court, in *ACL Canada Inc.*, above, recommended that the bifurcated legislative scheme be amended by Parliament:

> [56] I note in passing that if my interpretation of the Act is correct, there is an anomalous situation presented for anyone seeking to question the Minister's decisions in relation to seizures and forfeitures. The Act provides for an appeal of a decision of the Minister on the issue of whether there has been a contravention of the Act or regulations and such an appeal may be made by way of an action in this Court within 90 days of notice of the decision. The exercise of discretion in imposing the penalty, like any other administrative discretion, even where there is a privative clause, is subject to judicial review in this Court, but since amendments to the Federal Court Act effective February 1, 1992, relief must be sought by an application for judicial review, not by an action, to be commenced within 30 days of the decision sought to be reviewed, unless the Court grants an extension of time to apply. The person affected by customs seizures and penalties can only be confused by the two remedial processes Parliament has now provided under the two statutes. Parliament might well consider whether both decisions of the Minister, under ss. 131 and 133, should be subject to review in a single proceeding, by way of an appeal or on application for judicial review.

[22] The interpretation of the Act, requiring that s. 131 determinations be appealed by an action has repeatedly been supported by this Court as proceedings by way of judicial review have not been able to address the evidence in such cases due to the technical language in the legislation with its privative clause (See *Dokaj*, above at para. 42; *ACL Canada Inc.*, above, at paras. 52-56; *Time Data Recorder International Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, (1993) 66 F.T.R. 253, 42 A.C.W.S. (3d) 66 (F.C.T.D.) at para. 22 aff’d. (1997) 211 N.R. 229, 70 A.C.W.S. (3d) 819

(F.C.A.) at para. 21; *He v. Canada* (2000), 182 F.T.R. 85, 95 A.C.W.S. (3d) 82 (F.C.T.D.) at para. 11.)

2. Was the Minister's decision pursuant s. 133 of the Act requiring the Applicant to remit a certain monetary amount for the release of the seized ring unlawful?

[23] On judicial review, this court agrees with the position of the Respondent, as the court has no choice due to the legislation as specified. Ms. Nguyen has not shown that the determination by the Minister made pursuant s. 133 was unlawful. All of Ms. Nguyen's evidence and argument was directed solely towards showing that she had not contravened s. 12 of the Act. As stated above, that inquiry cannot be made by this Court in an application for judicial review; it would have to be taken by means of an action within the current legislation; and, thus, the context for the court decision would be different. Ms. Nguyen has not provided any other evidence or argument in response to the Minister's determination made pursuant to s. 133 of the Act regarding the release of the seized ring that could alter the decision bearing in mind its present context. Nevertheless, the court, in conclusion, fully acknowledges that although the factual evidence is overwhelmingly in Ms. Nguyen's favour, the legislative provisions with the privative clause are so restrictive that the factual evidence, although fully considered, cannot make a difference under the legislative context in Ms. Nguyen's case.

VIII. CONCLUSION

[24] In order to attempt to overturn the Minister's determination pursuant to s. 131 of the Act that there has been a contravention of s. 12 of the Act, the Applicant would have to make an appeal by way of an action. The Applicant, by way of judicial review, has not been able to show that the Minister's determination made pursuant s. 133 of the Act was unlawful.

[25] Recognizing the related, but separate, nature of the s. 131 and s. 133 determinations, it is open to this Court to suspend a judicial review of a determination made pursuant s. 133 of the Act until an appeal of a determination made pursuant s. 131 of the Act. Justice Sean Harrington stated in *Samson v. Canada (Attorney General)*, 2008 FC 557 that when an application for judicial review of a determination made pursuant s. 133 of the Act is made before an appeal of a determination of a contravention of the Act has taken place, the judicial review ought to be suspended:

> [5] This implies, therefore, that it is best to file an application for judicial review of a penalty even before a hearing is held deciding the grounds of the offence. Clearly, if it were determined that no offence was ever committed, the penalty would fall and the judicial review would become moot. In any event, the judicial review ought to be suspended pending a decision on the matter before the Court.

[26] In this case, however, given that Ms. Nguyen has not initiated any appeal of the Minister's determination made pursuant s. 133 of the Act, this court cannot exercise a discretion it does not have. The court cannot suspend an application for judicial review when no action has been initiated. The fact that no action was initiated due to the financial considerations of the Applicant, as was clearly specified by Ms. Nguyen's counsel during his oral representations, cannot change the nature of the limitation of the court's discretion.

[27] Therefore, the court has no choice but to interpret the legislation rather than to formulate it. As a result, the application for judicial review must be dismissed.

IX. OBITER

[28] Due to the deference owed by this court under constitutional supremacy, as discussed in the introduction, it is outside of the procedural and technical legal framework of the decision which recognizes the restrictive language of the legislation, that a reckoning of the big picture can only be examined more fully in obiter subsequent to the decision itself.

[29] Exceptional circumstances require an exceptional measure of care to ensure that no case falls through the cracks.

[30] It is recognized due to the prescription period specified in the *Customs Act*, and, also, due to the high cost of actions before the court, an action is often not an option for applicants.

[31] A suggestion for the executive and legislative branches (as part of an indirect dialogue that exists between the three branches of government through jurisprudence) may be to consider that citizens or residents of Canada who are about to leave Canada, prior to departure, be more easily made aware that they are to make known for the purpose of customs officials any object of worth, leaving Canada on their person or in their luggage that they intend to bring back to Canada which may initiate questions in regard to customs duties on their return.

[32] The case at bar may assist as an example on the basis of the evidence: customs officials appeared to have based themselves on the belief that Ms. Nguyen had obtained the ring in question in Hong Kong, whereas she consistently indicated that she had been given the ring in Vancouver. In its seizure synopsis, customs officials determined that the origin or country of purchase of the ring was in Hong Kong (Certified Record at p. 151). Moreover, in its reasons for decision, the Minister's Delegate refers several times to how Ms. Nguyen had claimed to receive the ring as a gift from a her boyfriend in Hong Kong (Certified Record at pp. 21, 26). This loose language leaves as ambiguous whether the Minister's Delegate believed that the ring had been given to Ms. Nguyen in Hong Kong, even though the evidence only points to the boyfriend as being a businessman from Hong Kong. As stated above, Ms. Nguyen consistently indicated that she had been given the ring in Vancouver. In the customs officer's own narrative report, the customs officer reports that Ms. Nguyen indicated to her that the ring was given to her in Vancouver (Certified Record at pp. 157). The Minister's Delegate never makes a clear determination as to where the ring was received.

[33] It appears that Ms. Nguyen did everything she reasonably could have done given her particular factual circumstances. While the decision stated that the appraisal and invoice of the ring "does not constitute evidence that the ring was legally imported into Canada or that applicable duties and taxes were accounted for" (Certified Record at p. 14); the evidence demonstrates that Ms. Nguyen provided as much documentation of the ring as she reasonably could have possibly done. As stated in the facts, Ms. Nguyen provided at the border an appraisal, an invoice, and a diamond grading report for the ring. The appraisal for the diamond in the ring was conducted by a

gemological consultant in Vancouver on March 31, 2005. This appraisal suggested an insurance coverage of the diamond before its affixation to a gold ring at $124,800. The invoice was with respect to the cost of setting the diamond in a gold band. This invoice was issued by a jeweller located in Vancouver and was dated April 15, 2005.

[34] The diamond grading report was with respect to the diamond and was dated September 15, 2003 in Antwerp, Belgium. Diamonds are usually imported from abroad by Canadian jewelers. As is clearly stated in the July 8, 2007 GLS Gemlab Limited letter, "Any Canadian jeweller can import loose diamonds and import mountings from Hong Kong or India, set the diamonds and sell these items in Canada" (Certified Record at p. 79). Thus, most diamonds purchased by consumers in Canada will have already been imported by Canadian jewelers. Private individual buyers of diamond rings would not have any evidence as to whether the diamonds were legally imported or that applicable duties and taxes were accounted for as that would have been done by those in the business thereof.

[35] Moreover, as stated by the Applicant at paragraphs 24-25 of its Memorandum of fact and law, it is not unusual for people who have owned jewelry for a long time, such as Ms. Nguyen, to no longer possess the cash receipts with respect to all her jewelry. Here, the CBSA's own jewelry appraisers give evidence that it is reasonable for the ring to have been in Canada for several years. In an appraisal dated March 7, 2007 made at the request of the government itself, the CBSA, GLS Gemlab Limited stated that the ring "has been worn for some time…" (Certified Record at p. 117). In a follow-up letter, GLS Gemlab Limited, mandated by the government itself as demonstrated

above, stated that the original owner of the diamond in the ring would have most likely have been given a certificate describing the characteristics of the diamond. Nevertheless, GLS Gemlab Limited stated that "I meet many people who own laser engraved diamonds and they do not have the matching paper work" (Certified Record at p. 79).

[36] Finally, it does not appear reasonable for the recipient of a gift to ask the person who has given the gift for a sales receipt. Ms. Nguyen has also consistently stated that the ring was given to her in Vancouver by her boyfriend. While there may have been some confusion as to whether her boyfriend owned businesses in Hong Kong or in Vancouver, information relayed by Ms. Nguyen through a translator to a customs officer who initially asked several questions at once, these answers, in and of themselves, do not appear to constitute core evidence that would help lead to a determination of the origin of the ring. Ms. Nguyen's documentary evidence appears to substantiate her response to the customs officers, yet, nevertheless, that has not changed her situation.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is dismissed.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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