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Our File: 9624785
Notre dossier:

Your File:
Votre dossier:

February 26, 2019

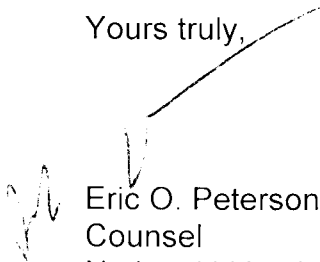
Radu Hociung
246 Southwood Drive
Kitchener, Ontario
N2E 2B1

Dear Sir:

Re: **HOCIUNG, Radu and Minister of Public Safety and Emergency
Preparedness**
Court File No.: A-102-18

Please find enclosed the Respondent's Memorandum of Fact and Law regarding the above noted matter which is being served upon you pursuant to *Federal Court Rules*.

Yours truly,



Eric O. Peterson
Counsel
National Litigation Sector

Encl.

Canada



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Our File: 9624574
Notre dossier:

February 27, 2019

Federal Court of Appeal
90 Sparks Street
Ottawa, Ontario
K1A 0H9

Attention: The Registrar

Dear Sirs/Mesdames:

Re: **HOCIUNG, Radu v. CANADA (Public Safety and Emergency Preparedness)**
Court dockets: A-101-18 and A-102-18

I am counsel to the Respondent in the above-noted appeals. Please find enclosed the Respondent's Memorandum of Fact and Law for each appeal, with proof of service.

The Respondent notes that the Appellant has already attempted to file the requisitions for hearing. The Respondent objects to the Appellant's time estimate of two and a half days for the appeals. The Respondent submits that a total of two hours is sufficient for oral argument for the appeals. The Respondent suggests that an hour and fifteen minutes be allocated for the Appellant's submissions, half an hour for the Respondent's submissions, and fifteen minutes for any reply.

The Respondent requests a direction as to the duration of time for the appeal hearings. The Respondent also request a direction allowing the parties to file separate books of authority for each appeal rather than joint books, due to past difficulties between the parties in coordinating matters pertaining to this litigation.

Yours very truly,

Eric Peterson
Crown Counsel
National Litigation Sector
EP/dr
Encls.
Copy to the Appellant

Canada

TO: **Registrar**
Federal Court of Appeal
Suite 200, 180 Queen Street West
Toronto, Ontario
M5V 3L6

TO: **Radu Hociung**
246 Southwood Drive
Kitchener, Ontario
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Tel: (519) 883-8454
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Appellant

Court File No.: A-102-18

FEDERAL COURT OF APPEAL

BETWEEN:

RADU HOCIUNG

Appellant

and

**MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

RESPONDENT'S MEMORANDUM OF FACT AND LAW
(Appeal from Order Refusing Leave to Amend Claim)

PART I – STATEMENT OF FACTS

1. The Appellant appeals from the Order of a judge of the Federal Court dated March 15, 2018 whereby the Appellant's motion to amend his statement of claim in Federal Court file number T-1450-15 was dismissed.¹

2. The action is a statutory appeal under section 135 of the *Customs Act*² of a decision of the Minister's delegate confirming that there was a contravention of Act, namely, the Appellant's failure to declare various

¹ Notice of Appeal; Appeal Book, tab 2

United States Treasury collector coins that he purchased in Buffalo, New York, upon his return to Canada.³

3. The Appellant subsequently brought a motion to amend his claim, after the close of pleadings. His proposed amended statement of claim would seek the relief originally pleaded as well as additional relief including adding Canada Border Services Agency (CBSA) and Her Majesty the Queen in Right of Canada as defendants, and pleading criminal activities carried out by the proposed new defendants and their employees.⁴

4. At the parties' request, the motions judge dealt with the motion pursuant to rule 369 on the basis of the parties' written submissions.

5. In his Order dated March 15, 2018,⁵ the motions judge noted that a statutory appeal under section 135 is limited to the sole issue of whether the Minister made the proper determination as to whether there has been a contravention of the Act. Any other relief must be pursued separately.⁶

6. The motions judge found that the substantive aspects of the Appellant's proposed amendments consisted of pleas for criminal penalties,

² *Customs Act*, R.S.C., 1985, c.1 (2nd Supp.)

³ Statement of Claim in Federal Court file T-1450-15; Appeal Book, tab 3

⁴ Plaintiff's Motion to Amend Statement of Claim; Appeal Book, tab 5

⁵ Order on Motion to Amend Statement of Claim; Appeal Book, tab 2

damages, and for extraordinary remedies pursuant to section 18.1 of the Federal Courts Act. The motions judge held that the relief sought in the proposed amendments was beyond the scope and intent of section 135.⁷

7. The motions judge noted that a claim for damages arising from officers' performance of their duties under the *Customs Act* must be brought within the limitation period set out at subsection 106(1) of the *Customs Act*. The motions judge found that the limitation period for the commencement of a proceeding pursuant to subsection 106(1) had passed.⁸

8. The motions judge noted that on a motion to amend a claim, the court will consider whether the proposed amendments demonstrate a reasonable chance of success. The motions judge determined that the proposed amendments did not demonstrate a reasonable chance of success in an action brought pursuant to section 135 of the *Customs Act*.⁹

9. In the result, the motions judge dismissed the Appellant's motion to amend and granted costs in the cause. This appeal follows.

⁶ Order on Motion to Amend Statement of Claim, above, at page 2 of the Order, first two paragraphs; Appeal Book, tab 2

⁷ Order on Motion to Amend Statement of Claim, above, at page 2 of the Order, third and fourth paragraphs; Appeal Book, tab 2

⁸ Order on Motion to Amend Statement of Claim, above, at page 2 of the Order, fifth and sixth paragraphs; Appeal Book, tab 2

⁹ Order on Motion to Amend Statement of Claim, above, at page 3 of the Order, first three paragraphs; Appeal Book, tab 2

PART II – POINTS IN ISSUE

10. Does the determination by the motions judge that the proposed amendments do not demonstrate a reasonable chance of success in an action brought pursuant to section 135 of the *Customs Act* disclose a reviewable error?

PART III – SUBMISSIONS

11. In *Teva Canada Limited v. Gilead Sciences Inc.*¹⁰, this Court discussed the standard of review for an appeal from an order of a judge of the Federal Court refusing to grant leave to amend a claim, where the motions judge dealt with the matter at first instance. The Court will not intervene unless it is persuaded that the motions judge erred on a pure question of law or on a legal principle that can be extracted from a question of mixed fact and law. Absent that sort of legal error, the appellant can succeed only if it demonstrates palpable and overriding error. A palpable and overriding error is one that is both obvious and determinative in the sense that it undermines the outcome reached below. The Court also noted that the standard of review for this type of order is deferential.¹¹

¹⁰ *Teva Canada Limited v. Gilead Sciences Inc.*, 2016 FCA 176

¹¹ *Teva*, above, at paragraphs 20 through 25, per Stratas J.A. (Dawson and de Montigny J.J.A. concurring). At paragraph 28, Justice Stratas observed, "... [I]t makes no sense for a court to allow an amendment that is doomed to fail."

12. The Court in *Teva* held that the absence of a reasonable prospect of success is a valid basis upon which a court may dismiss a motion for leave to amend.¹²

13. Here, the motions judge committed no reviewable error. The motions judge identified the correct test for the Appellant's motion to amend, namely, whether the proposed amendments had a reasonable prospect of success. The motions judge cited two decisions of this Court with respect to that test, *Bauer Hockey Corp. v. Sport Maska Inc. (Reebok-CCM Hockey)*, 2014 FCA 158, at paragraph 16, and *Teva Canada Limited v. Gilead Sciences Inc.*, 2016 FCA 176.¹³

14. The motions judge then properly applied the test to a consideration of the facts and the law. In particular, the motions judge found that:

- (i) the substantive aspects of the plaintiff's proposed amendments consist of pleas for criminal penalties, damages, and for extraordinary remedies pursuant to section 18.1 of the *Federal Courts Act*;¹⁴
- (ii) the relief sought through the proposed amendments is beyond the scope and intent of section 135 of the *Customs Act*.¹⁵

¹² *Teva*, above, at paragraphs 28 through 31

¹³ Order on Motion to Amend Statement of Claim, above, at page 3 of the Order, first paragraph; Appeal Book, tab 2

¹⁴ Order on Motion to Amend Statement of Claim, above, at page 2 of the Order, third paragraph; Appeal Book, tab 2

¹⁵ Order on Motion to Amend Statement of Claim, above, at page 2 of the Order, fourth paragraph; Appeal Book, tab 2

- (iii) a claim for damages arising from officers' performance of their duties under the *Customs Act* must be brought within the limitation period set out at subsection 106(1) of the *Customs Act*,¹⁶ and
- (iv) the limitation period for the commencement of a proceeding pursuant to subsection 106(1) of the *Customs Act* has passed.¹⁷


15. The motions judge's analysis shows an understanding and application of the proper legal principles. The motions judge's analysis of the facts and application of the legal principles to those facts is not vitiated by palpable and overriding error.¹⁸

PART IV – ORDER SOUGHT

16. The Respondent asks that the appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 25th day of February, 2019



Eric Peterson, Crown Counsel
Of Counsel to the Attorney General of
Canada
DEPARTMENT OF JUSTICE
CANADA
Ontario Regional Office, Toronto

Counsel to the Respondent

¹⁶ Order on Motion to Amend Statement of Claim, above, at page 2 of the Order, fifth paragraph; Appeal Book, tab 2

¹⁷ Order on Motion to Amend Statement of Claim, above, at page 2 of the Order, sixth paragraph; Appeal Book, tab 2

¹⁸ *Teva*, above, at paragraph 39

PART V – LIST OF AUTHORITIES

Teva Canada Limited v. Gilead Sciences Inc., 2016 FCA 176

APPENDIX A - STATUTES AND REGULATIONS

Customs Act, R.S.C., 1985, c. 1 (2nd Supp.)

Limitation of action against officer or person assisting

106 (1) No action or judicial proceeding shall be commenced against an officer for anything done in the performance of his duties under this or any other Act of Parliament or a person called on to assist an officer in the performance of such duties more than three months after the time when the cause of action or the subject-matter of the proceeding arose.

Request for Minister's decision

129 (1) The following persons may, within 90 days after the date of a seizure or the service of a notice, request a decision of the Minister under section 131 by giving notice to the Minister in writing or by any other means that is satisfactory to the Minister:

- (a) any person from whom goods or a conveyance is seized under this Act;
- (b) any person who owns goods or a conveyance that is seized under this Act; ...

Notice of reasons for action

130 (1) Where a decision of the Minister under section 131 is requested under section 129, the President shall forthwith serve on the person who requested the decision written notice of the reasons for the seizure, or for the notice served under section 109.3 or 124, in respect of which the decision is requested.

Evidence

(2) The person on whom a notice is served under subsection (1) may, within thirty days after the notice is served, furnish such evidence in the matter as he desires to furnish.

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;

(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.

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 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).

Federal Court

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.

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.

Federal Court Rules, SOR/98-106

Amendments with leave

75 (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.