Fax Cover Sheet

Date: 18-03-26	**To:** Dept. of Justice
Fax: 416-973-5004	**Attn:** Eric Peterson
From: Radu Hociung	**Re:** A-101-18 Memo of Fact and Law
Phone: (519) 883-8454	**Pages:** 17, Including Cover

Notes:
Mr Peterson,

Please find attached the Memorandum of Fact and Law for File A-101-18

Sincerely
Radu Hociung
Tel: 519-883-8454

Court File A-101-18

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:

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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 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).

6. As part of discovery in the first instance, the Plaintiff discovered evidence that the Minister's Decision was not an error, but the consequence of an elaborate money

laundering scheme implemented by the Defendant.

7. The Plaintiff made a Motion for Leave to Amend the Statement of Claim to the Federal Court, adding the new cause of action discovered, and corresponding claims for relief.

8. The Motion for Leave to Amend was decided by judge Gleeson of the Federal Court, and that decision makes the subject of this appeal.

9. The Motion for Leave to Amend sought to amend several existing claims by adding date and location particulars that are vital to establishing the Court's territorial jurisdiction at Trial. Also it sought to add Her Majesty the Queen as party to the action as the Crown is liable for torts committed by the CBSA officers named in the Statement of Claim pursuant *Crown Liability and Proceedings Act* s.3(b)(i).

10. The Motion also sought to add a new claim and cause of action that originated in the discovery of the new cause of action from the Defendant's answers to discovery. The cause of action was discovered in the “Precious Metals Bulletin”, a copy of which was included in the motion record (Appeal Book p.98), as evidence that the amendment does not seek to “frustrate the course of justice”, ie, that it was requested at the earliest possible opportunity, only days after being discovered.

11. With respect to new the new claims, Canderell Ltd. v. Canada (CA), sets “the general rule is that an amendment should be allowed at any stage of an action for the purposes of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice. ” [1]

12. A requirement that amendments not frustrate the course of justice, and definition of this concept are also found in Canderell [2] It boils down to whether a trial date has already been set, or if a new amendment could have been brought much earlier in the proceeding, such that discovery required by the new claims would cause the proceeding to be delayed in a way not compensable by costs, ie, prejudicial to one of the parties.

13. As evidenced by “Precious Metals Bulletin”, in this case the new claims sought to be added to the Statement of Claim could not have been brought any sooner.

14. In his Order, the Motion Judge said of the proposed amendments that they supplement the original claim without substantively updating or changing the claim. In fact, the location particulars are vital to establishing the Court's territorial jurisdiction at trial. Also

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1 *Canderell Ltd. v. Canada (C.A.),* 1993 CanLII 2990 (FCA), [1994] 1 F.C. 3 C.C.A, p. 10.

2 As further held by Mr. Justice Decary in *Canderell, supra* at p. 11.

, the addition of Her Majesty the Queen as party is vital to prosecuting the individuals named in the action, as they are agents of the Crown. The named defendant as the Statement of Claim stands is simply the Minister of Public Safety, who cannot be held liable for torts committed by agents of the Crown.

15. The Motion Judge erred in rejecting the updates to the existing claims and to the named parties by not considering that these amendments are vital to the success of the claims.

16. Rule 104 states that the Court may at any time order that a person who ought to have been joined as a party or whose presence before the Court is necessary be added as a party.

17. In his Order, the Motion Judge stated that “the relief sought through the proposed amendments is beyond the scope and intent of section 135 of the *Customs Act*”, but failed to describe what the supposedly limited scope and intent might be. Further, he erred by extrapolating the scope of s.135 of the *Customs Act* to the entire action.

18. Section 135 of the *Customs Act* reads:

> [margin: 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.

[margin: 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.

19. Section 135 of the *Customs Act* sets the forum (Federal Court), time limitation (ninety days), proceeding type (Ordinary Action), and the required style of cause (Minister as Defendant, person who requests the decision as Plaintiff) by which the Minister's Decision may be appealed; it does not limit the scope of the action, or the Minister's liability. For greater clarity, s.135(2) sets that the *Federal Courts Act* and the rules made under that Act apply to this action. The Federal Court Rules in fact allow multiple claims stemming from materially the same fact to be made in the same action under Rule 101 (joinder) . Although s.135(2) provides an exception for “special rules made in respect of such actions”, there are no special rules in respect to the action in the first instance.

20. As a 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:

> **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).

21. 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.

22. 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 referred to *Starway, v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1208 at para 22 and *Nguyen v. Canada (Public Safety and Emergency Preparedness)* 2009 FC 724 at paras 19 and 20, as the authority for his conclusion, however, *Starway* shows exactly the opposite. In Starway, as 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. The 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.

23. Furthermore, in Starway, there were no additional claims that were struck for any reason. The only claim in that action was with respect to the appeal of the Minister's decision. Starway shows no sign of precedent that an action brought pursuant section 135 is limited in scope to the Minister's Decision, and that it may not contain joinder of causes of action or parties as in Excise Tax Act s.81.23 referred to above at para 20.

24. The Motion Judge also erred in his reliance on *Nguyen v. Canada (Public Safety and Emergency Preparedness)*, 2009 FC 724 because that proceeding was an Application for judicial review, not an ordinary action as we have here. At para 20, *Nguyen* said that while a determination made pursuant s 131 may only be appealed by way of an action in the Federal Court, a determination pursuant s 133 of the *Customs 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*. *Nguyen* was an application for judicial review, not an action as in this case, that sought to challenge a decision pursuant s.131 of the Customs Act. The point of the judge in that case was that the challenge to s.131 should have been brought as an action pursuant s.135, and not as an application for judicial review, as the Applicant had done. He made no rulings on limitations of such an action, and is not relevant for determining the amendment motion appealed here.

25. The Motion Judge also erred in citing a limitation period for commencement of a proceeding pursuant to s.106(1) of the *Customs Act*. The proceeding was not commenced pursuant to s.106(1) of the *Customs Act*. There are no claims in the original or the proposed amendments that is pursuant to s.106(1). The officers in question were committing fraud while acting as agents of the Crown. As such, the various claims against them are clearly identified to be pursuing relevant sections of the *Criminal Code*. They were not performing any duty under the *Customs Act*, which is the prerequisite for the limitations under s.106 of the *Customs Act*, because the *Customs Act* does not apply to currency, and three of the four individuals not Customs

Officers, but paralegals (adjudicators) when they committed the alleged fraud. If at trial, this fact is found with respect to the Minister's Decision (ie, *Customs Act* does not apply here). The officers were holding the Plaintiff's currency for ransom, attempting to use the *Customs Act* as a liability shield. As a fictional example, if the CBSA border officers held a person captive and demanded “Terms of Release”, invoking the Customs Act as their right to do so, it would be plain and obvious that they are in fact kidnapping and demanding for ransom, which are criminal offences, as the *Customs Act* only applies to non-tax-exempt, consumption goods being imported.

26. In any case, while the Defendant may wish to pursue a defence that the individuals in question are afforded the limitations of the *Customs Act* s.106, he should do so at trial, and adduce evidence in favour of this defence. Determining the Motion to Amend cannot rely on evidence, as it is an interlocutory process, not a fact-finding process.

27. The Motion Judge erred in deciding that the added factual detail does not substantively update the claim. He is referring to the added time and location of events, which are necessary at trial in order for the Court's jurisdiction to be established. Without this detail, the original pleadings will likely be found defective. Similarly, the Statement of Claim as it stands does not include Her Majesty The Queen in the style of action, thus making the existing and new claims against her agents (the individual CBSA employees), defective, and this is why amending the style is necessary.

28. The Motion Judge noted 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[34], but erred in law in twisting its meaning to conclude that "the proposed amendments expanding the plaintiff's claims do not demonstrate a reasonable chance of success in an action brought pursuant to section 135 of the *Customs Act*". In other words, he understood it to mean that the claims themselves should be self evident such that the their chance of success need be higher than a "reasonable" threshold. Instead, the meaning in *Bauer* is that the absence of a prospect of success must be shown: "When determining whether an amendment should be allowed, it is helpful for the judge deciding the matter to ask whether the amendment would be a plea capable of being struck". In other words, the judge must find a defect in the plea, such as "plain and obvious that the Amended Statement of Claim discloses no reasonable cause of action": *Bauer* para 35

29. Absence of evidence is not evidence of absence (of a reasonable prospect of success).

30. An amendment that is doomed to fail should not be allowed, however, there must be a reason why it is doomed to fail. If such a reason cannot be articulated, it cannot be said the amendment is doomed to fail, and cannot be denied on this basis.

31. In *Visx Inc. v. Nidek Co*. (FCA) (1996), 1996 CanLII 11534 (FCA), 209 N.R. 342, 72

3 Bauer Hockey Corp. v. Sport Maska Inc. (Reebok-CCM Hockey), 2014 FCA 158 at para 16
4 Teva Canada Limited v. Gilead Sciences Inc., 2016 FCA 176

C.P.R. (3d) 19 at p. 24 of the C.P.R. Ed, was found that:

> "In determining whether an amendment to a defence should be allowed, it is often helpful for the Court to ask itself whether the amendment, if it was already part of the proposed pleadings, would be a plea capable of being struck out under Rule 419. If yes, the amendment should not be allowed. See, for example, *Chrysler Canada Ltd. v. The Queen*, [1978] 1 F.C. 137 (T.D.). Procedurally, the Court will not receive any evidence where the basis for striking out paragraphs in a statement of defence is alleged to be that they disclose no reasonable defence [Rule 419(1)(a)]. Rule 419(2) expressly prohibits the use of evidence on a Rule 419(1)(a) motion. In similar fashion, the Court should not accept any evidence in support of an application for leave to amend pleadings under Rule 420, unless evidence is required in order to clarify the nature of the proposed amendments. Rather, the Court must assume that the facts pleaded in the amendments are true for the purposes of considering whether or not to grant leave to amend."

32. Proving that a reasonable prospect is absent relies on finding a fatal defect in the pleadings such that even if their truth is assumed, they would not be successful, that is to say, regardless of any evidence, fact-finding is not necessary at trial to determine that the claim fails. In other words, it is for the Motion Judge to assume the claim is true and to find and articulate the fatal defect, and not for the motion Applicant to make the

proposed amendments self-evident.

33. While jurisprudence shows that it is impossible to enumerate all the factors a judge must take into consideration in determining whether it is just, in a given case, to authorize and amendment, some factors are found in Bauer, *Visx*[5] and *Imperial Tobacco*[6], ie, the same grounds as for striking a claims.

34. The Motion Judge erred in law in expecting that the amendments be self-evident. As Visx, Bauer confirm, the Court must assume the facts pleaded in the amendments are true for the purposes of considering whether or not to grant leave to amend. The assumption that the facts pleaded in the amendments will demonstrate that there is a reasonable prospect of success, but the decision to grant the leave doesn't hinge on that, but rather on whether a defect exists that would cause the pleading to fail in spite of its truth. One example might be an special rule such as shown above at para 7, by which joinder of claims is statutorily barred, but such a special rule does not exist here.

35. Interpretation of Acts with respect to claims requires considering evidence, and constitutes the process of fact-finding.

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5 *Visx Inc. v. Nidek Co*. (FCA) (1996), 1996 CanLII 11534 (FCA), 209 N.R. 342, 72 C.P.R. (3d) 19

6 *R. v. Imperial Tobacco Canada Ltd.* [2011] 3 SCR 45, 2011 SCC 42

36. In order to find whether the action is limited to one issue, he would have to consider evidence, and find whether the ordinary action prescribed by s.135 of the *CA* was intended by Parliament to have only the scope of an application for judicial review.

37. He found that the limitation period set out in s.106(1) of the *Custom Act* applies.

38. In order to find if such a limitation applies, he would have had to consider evidence as whether the officers in question were performing any duties under the *Customs Act*.

39. In his order, the Motion Judge misrepresented the precedent set by *Starway v. Canada*, 2010 FC 1208, by taking only paragraph 22 (and presumably 23) out of the larger context, and wrongly concluding joinder of claims is not permitted by section 135 of the Customs Act. Paras 22 and 23 only mean that another procedure (judicial review) is required if the only relief sought was to change the penalty amount to a different amount. *Starway* went on to consider at para 27 a second issue; the imposition of the penalty, and granted relief with respect to it also.

40. In *Starway*, the action brought pursuant s 135 of the CA, was explicitly found to not be "limited to a determination by the minister as to whether or not there has been a contravention of that Act". Specifically, *Starway* provided relief to the plaintiff that a sum of money be returned by the Minister, together with interest. This directly contradicts the Motion Judge's conclusion that "any other plea for relief must be pursued

separately".

41. In *Imperial Tobacco*[7] para 22: "The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated"

42. In *Imperial Tobacco*[8] para 25: "The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding."

43. In his Order, the Motion Judge speculated that the action has no reasonable prospect of success, as he failed to find and articulate a reason for this conclusion.

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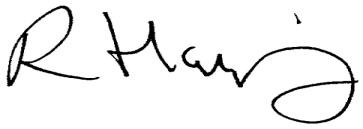
7 *R. v. Imperial Tobacco Canada Ltd.* [2011] 3 SCR 45, 2011 SCC 42 para 22

8 *R. v. Imperial Tobacco Canada Ltd.* [2011] 3 SCR 45, 2011 SCC 42 para 25

44. The Motion Judge dismissed the motion to Amend on the basis of his speculations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

DATE: Oct 20, 2018



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