Dokaj v. Canada (Minister of National Revenue), 2005 FC 1437 (CanLII)

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[...]
ANALYSIS

[23]In *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, Mr. Justice Iacobucci, at paragraphs 26-29, discussed the principles of statutory interpretation. Those paragraphs (citations omitted) state:

In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like [page 581] people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56 (CanLII), at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". . . .

Other principles of interpretation--such as the strict construction of penal statutes and the "*Charter* values" presumption--only receive application where there is ambiguity as to the meaning of a provision. . . .

What, then, in law is an ambiguity? To answer, an ambiguity must be "real". . . . The words of the provision must be "reasonably capable of more than one meaning". . . . By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, 1999 CanLII 680 (SCC), [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

[24]Guided by these principles, I turn to the Act which is the result of an initiative that is not unique to Canada. The Financial Action Task Force (FATF), of which Canada is a member, is comprised of approximately 40 nations (all of them industrialized). FATF is committed to addressing, among other things, the sharing of information in relation to transnational crime. The Act received Royal Assent on June 29, 2000, and many of its provisions have been introduced piecemeal.

[25]The objectives of the Act are set out in section 3 [as am. by S.C. 2001, c. 41, s. 50] therein and include the following:

3. . . .

(*a*) to implement specific measures to detect and deter money laundering and the financing of terrorist activities and to facilitate the investigation and prosecution of money laundering offences and terrorist activity financing offences, including

. . .

(ii) requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments, and

. . .

(*b*) to respond to the threat posed by organized crime by providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves; and

(*c*) to assist in fulfilling Canada's international commit-ments to participate in the fight against transnational crime, particularly money laundering, and the fight against terrorist activity.

[26]Of particular concern, here, is the objective stipulated in subparagraph 3(*a*)(ii). Implementation of this objective was to have been achieved through Part 2 of the Act

which provides for a currency reporting regime whereby importers and exporters of currency must make a report to a customs official whenever they import or export large quantities of currency or monetary instruments into or out of Canada. Part 2 of the Act became effective with the coming into force of the *Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412 (the Cross-border Regulations) on January 6, 2003. The relevant reporting requirements in this case (involving the exportation of currency) stem from subsection 12(1) and paragraph 12(3)(*a*) [as am. by S.C. 2001, c. 41, s. 54] of the Act in conjunction with sections 2, 3 [as am. by SOR/2002-412 , s. 19], and 11 of the Cross-border Regulations. These provisions require every person who exports, from Canada, currency or monetary instruments worth $10,000 or more to report this exportation to a customs official.

[27]When reports are made with respect to cross-border movements of currency or monetary instruments in excess of $10,000, the reports are forwarded to the Financial Transaction Reports Analysis Centre of Canada (FINTRAC) which apparently possesses expertise in tracking and analysing international currency and monetary instruments transfers. If patterns appear, FINTRAC may become suspicious that the funds constitute "dirty" money in which case information may be passed on to a law enforcement agency.

[28]Notably, the Act does not prohibit the transporting of large amounts of currency. Rather, it requires that amounts exceeding $10,000 be reported. The obligation to report arises in all cases, i.e. whether the money is "dirty" or otherwise.

[29]The scheme in relation to the transporting of more than $10,000 of currency or monetary instruments is contained in sections 12 through 39 of the Act and in the Cross-border Regulations. In circumstances where a person exports from Canada currency worth more than $10,000 and fails to report the exportation, subsection 18(1) of the Act provides that the currency is subject to seizure as forfeit, by a customs officer, if the customs officer believes on reasonable grounds that subsection 12(1) of the Act has been contravened. By virtue of subsection 18(2) of the Act, the customs officer must return the seized currency or monetary instruments less the prescribed penalty (which ranges from $250 to $5,000 under section 18 of the Cross-border Regulations) unless the officer has reasonable grounds to suspect that the currency is proceeds of crime or funds for terrorist financing.

[30]Section 23 of the Act stipulates that (subject to return under subsection 18(2) and the review provisions of sections 25 to 31) currency seized as forfeit under subsection 18(1) is automatically forfeited to Her Majesty in right of Canada from the time of the contravention in respect of which it was seized and no act or proceeding after the forfeiture is necessary to effect the forfeiture.

[31]Section 25 of the Act permits either the person from whom the currency was seized or the lawful owner of the currency to request a decision of the Minister[1] as to whether subsection 12(1) of the Act was contravened, provided such a request is made in writing within 90 days after the date of the seizure. If such a request is made, the

Commissioner[2] is obliged to serve that person with written notice of the circumstances of the seizure, pursuant to subsection 26(1) of the Act. The person is then entitled, under subsection 26(2), to provide any evidence in the matter that he or she wishes to submit provided that the evidence is tendered within 30 days of receiving the Commissioner's written notice.

[32]The Minister is required, under section 27 of the Act, to make a decision with respect to whether subsection 12(1) of the Act was contravened. If the Minister decides that there was no failure to report, the currency or the assessed penalty must be returned to the person, pursuant to section 28 of the Act. If, on the other hand, the Minister decides that there was a failure to report, the Minister will, under section 29 of the Act, determine the appropriate sanction for the infraction, including whether to confirm the forfeiture (where the customs officer has determined that the currency or monetary instruments constitute proceeds of crime or terrorist financing).

[33]Section 30 of the Act permits the person who requested a decision of the Minister to appeal that decision by way of an action in the Federal Court. The narrow issue is which decision is appealable, the section 27 decision, the section 29 decision, or both.

[34]With respect, I do not share Mr. Dokaj's view that a decision under section 27 and a decision under section 29 constitute the "same decision". A reading of the provisions simply does not support such an interpretation. Section 27 requires nothing more and nothing less than for the Minister to decide whether subsection 12(1) was contravened. The fact that an affirmative response precipitates a review of the penalty which, in turn, results in another determination does not convert the two decisions into a single determination.

[35]The decisions of the Minister pursuant to sections 27 and 29 are discrete decisions. One deals with contravention; the other deals with penalty and forfeit. Section 27 stipulates that the Minister shall decide whether subsection 12(1), i.e. the requirement to report, was contravened. The wording is unequivocal and leaves no room for doubt. Section 29 provides that, in circumstances where the Minister determines that there was a failure to report, the Minister is to review the quantum of the sanction imposed by the customs official under subsection 18(2), i.e. full forfeiture or a penalty ranging from $250 to $5,000. The Minister will either confirm the customs official's determination with respect to sanction or reduce it to some lesser penalty.

[36]What then of the appeal procedure provided for in section 30 of the Act? I share the Minister's view that the section provides for a statutory appeal in relation to the determination made under section 27. It does not permit an appeal of a decision made under section 29. For ease of reference, subsection 30(1), section 25 and subsection 27(1) are again reproduced. The emphasis is mine.

30. (1) A person who requests a decision of the Minister under section 25 may, within 90 days after being notified of the decision, appeal the decision by way of an action in the Federal Court in which the person is the plaintiff and the Minister is the defendant.

. . .

25. A person from whom currency or monetary instruments were seized under section 18, or the lawful owner of the currency or monetary instruments, may within 90 days after the date of the seizure request a decision of the Minister as to whether subsection 12(1) was contravened, by giving notice in writing to the officer who seized the currency or monetary instruments or to an officer at the customs office closest to the place where the seizure took place.

. . .

27. (1) Within 90 days after the expiry of the period referred to in subsection 26(2), the Minister shall decide whether subsection 12(1) was contravened.

[37]There is no ambiguity in the language. The Act authorizes an appeal in relation to a decision of the Minister under section 25. Section 25 relates only to a decision as to whether subsection 12(1) was contravened (the provision that imposes the obligation to report). It necessarily follows that the references to "a decision" and "the decision" in subsection 30(1) refer to the Minister's determination under section 27 of the Act. In my view, it cannot reasonably be construed in any other way. Consequently, the Federal Court's jurisdiction, pursuant to section 30 of the Act, is limited to reviewing the decision under section 27 of the Act. That decision is with respect to whether or not there was a contravention of the Act under subsection 12(1).

[38]While other ministerial decisions taken in the context of a seizure under the Act, such as a decision under section 29, may be the subject of judicial review applications initiated under section 18 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, they cannot be the subject of a statutory appeal brought pursuant to section 30 of the Act. Section 24 of the Act constitutes a strong privative clause that insulates, but does not immunize, decisions (other than those under section 27) from judicial review. Indeed the Minister takes the position that judicial review of such decisions is available and the existence and ambit of the privative clause is to be assessed in the consideration of the factors comprising the pragmatic and functional analysis (see: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982).

[39]I agree with Mr. Dokaj that the result is one that is both awkward and inconvenient. I disagree, though, with his thesis that Parliament could not reasonably have intended two different mechanisms of review regarding the same decision. First, I have determined that the decisions are discrete. Second, I have concluded that the interpretation of the provision in question yields the result that Parliament's intention was to restrict the statutory appeal to decisions made under section 27 of the Act. Third,

even in circumstances where the result can be viewed as unfair, if such a result is contemplated by the legislation, it does not displace Parliament's intent: *Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 (CanLII), [2005] 2 S.C.R. 539.

[40]My conclusion in this respect is supported by reference to the jurisprudence dealing with the analogous seizure review and appeal mechanism provided in the *Customs Act*. The similarity between the seizure review and appeal mechanism contained in the Act and that contained in the *Customs Act* is readily apparent. Specifically, the sections concord as follows: section 12 of the Act with section 12 [as am. by S.C. 1992, c. 28, s. 3; 1996, c. 31, s. 75; 1997, c. 36, s. 149; 2001, c. 25, s. 12] of the *Customs Act*; section 18 of the Act with sections 110 and 117 [as am. by S.C. 1997, c. 36, s. 185; 2002, c. 22, s. 338] of the *Customs Act*; section 23 of the Act with section 122 of the *Customs Act*; section 24 of the Act with section 123 [as am. by S.C. 2001, c. 25, s. 66] of the *Customs Act*; section 25 of the Act with section 129 [as am. *idem*, s. 69] of the *Customs Act*; section 26 of the Act with section 130 [as am. by S.C. 1993, c. 25, s. 83; 1999, c. 17, s. 127; 2001, c. 25, s. 71] of the *Customs Act*; section 27 of the Act with section 131 [as am. by S.C. 1993, c. 25, s. 84; 2001, c. 25, s. 72] of the *Customs Act*; section 28 of the Act with section 132 [as am. by S.C. 1992, c. 28, s. 26; 1993, c. 25, s. 85; 2001, c. 25, s. 73] of the *Customs Act*; section 29 of the Act with section 133 [as am. by S.C. 1992, c. 28, s. 27; 1993, c. 25, s. 86; 1997, c. 36, s. 189; 2001, c. 25, s. 74] of the *Customs Act*; and section 30 of the Act with section 135 of the *Customs Act*.

[41]A review of these provisions indicates that Parliament intended that the seizure review and appeal mechanisms in the Act mirror and complement those found in the *Customs Act* so that the two regimes can operate harmoniously. The same basic scheme is to apply in relation to both Acts. It is also notable that Parliament entrusted the administration and enforcement of the cross-border currency reporting regime in the Act to the same customs officials who are assigned and experienced with the administration and enforcement of the "goods reporting regime" in the *Customs Act*.

[42]The Federal Court has concluded that its jurisdiction on a section 135 *Customs Act* statutory appeal is confined to determining whether there has been a contravention of the *Customs Act* that would justify the seizure. The Court is precluded from dealing with any other issues on such statutory appeals, including reviews of decisions rendered by the Minister in relation to sanctions. An individual who disagrees with the sanction imposed for contravening the *Customs Act*must resort to section 18 of the *Federal Courts Act*: *ACL Canada Inc. v. M.N.R.* (1993), 1993 CanLII 9341 (FC), 107 D.L.R. (4th) 736 (F.C.T.D.); *Time Data Recorder International Ltd. v. M.N.R.* (1993), 66 F.T.R. 253 (F.C.T.D.); affd (1997), 211 N.R. 229 (F.C.A.); *Nerguizian v. M.N.R.* (1996), 121 F.T.R. 241 (F.C.T.D.); *He v. Canada* (2000), 2000 CanLII 14822 (FC), 182 F.T.R. 85 (F.C.T.D.).