

FEDERAL COURT OF CANADA

BETWEEN:

Radu Hociung

Appellant

and

**Minister of Public Safety and Emergency Preparedness
and
Canada Border Services Agency
and
Her Majesty the Queen in Right of Canada**

Defendants

**LETTER TO THE COURT
Re: Submissions**

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TO:

The Registrar
Federal Court of Canada
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Re: Court dockets A-101-18 and A-102-18, Submissions

Honourable Court,

At the May 23, 2019 Toronto hearing of these appeals before Justices Gauthier, Webb and Rivoalen, the Appellant was directed to serve and file a letter by Jun 7, 2019 explaining what makes the Crown vicariously liable for the actions of the four individuals named in the Statement of claim, to make submissions pertaining costs, and to respond to the Respondent's Letter to the Court dated May 29, 2019.

Vicarious Liability.

1. By virtue of *The Crown Liability and Proceedings Act*, s.3(b)(i), the crown is liable in Ontario for torts committed by a servant of the crown, and is subject to those “liabilities in tort to which, if it were a person of full age and capacity, it would be subject”. As the Crown acts through its agents and servants, its liability arises on the basis of vicarious liability.
2. The *Canada Border Services Act*, at s.2, creates the CBSA, a Crown corporation, as an agent of Her Majesty in Right of Canada, for all purposes.
3. Per *Canada Border Services Act*, s.9(2)(a) one of the roles of the CBSA, specifically its President, is to designate a “person” or “persons within a class”, officers as defined in s2(1) of *Customs Act*.
4. Per *Customs Act* s2(1), “officer” means a person employed in the administration or enforcement of the Act, meaning Her Majesty the Queen in the Right of Canada is the employer, and the CBSA is the hiring agent.
5. Per *Customs Act*, s3(1),(2), the Customs Act is binding on Her Majesty, and throughout the Act, all taxes collected/owed (s.97.22), and forfeitures (s2(1)) are to Her Majesty in the right of Canada. Everywhere in this Act, everything collected is collected for Her

Majesty, by the Customs Officers, who are the employees/servants tasked with doing the collecting work.

6. Per *Canada Border Services Act*, s11, officers and employees necessary for the proper conduct of the work of the Agency are appointed in accordance with the *Public Service Employment Act*. These are the Corporate officers (not Customs Officers) and administrative staff tasked with “keeping the lights on”, creating the working conditions for “persons designated as Customs Officers”. In simple terms, the workers in charge of administration, scheduling, maintenance, paying bills, supplying IT services, etc, etc, are employees of the Agency (CBSA), while the designated persons to act as Customs Officers, are employees/servants of Her Majesty The Queen in the Right of Canada, and are in charge of collecting Her Majesty's revenue. For certainty, if the cashier at the CBSA office would have perpetrated the fraud, the Crown would not be vicariously liable, since he is an employee of an Agent of the Crown (Agents are not servants). This cashier is not designated to be a Customs Officer (ie, he may not take reports, perform inspections, assess forfeitures, etc – his task is recording the payments, only). On the other hand, the Customs Officers (uniformed, usually), are servants of the Crown, employed by Her Majesty to enforce the Act and collect her dues.
7. At common law, a master or employer is vicariously liable for a tort committed by her servant or employee in the course of employment¹. Section 3(a)(i) of the *Crown Liability and Proceedings Act* imposes vicarious liability on the Crown “in respect of a tort committed by a servant of the Crown”. Section 10 provides that no proceedings may be brought against the Crown unless proceedings in tort may be brought against the servant. Thus, only recognized heads of tort may lead to vicarious liability. This requirement is met, as shown below.
8. As a general rule, when a Crown servant commits a tort, the servant is personally liable; if the tort is committed in the course of employment, the Crown is vicariously liable as well². However, legal authority is a defence to a tort against both the Crown and the Crown servant. Acts of Crown servants **that are authorised by statute** cannot be tortious. In the present case, their acts are not authorised by statute.
9. In each of the four individual cases, they were conducting the work of Her Majesty, ie,

¹ See, generally, Atiyah, *Vicarious Liability in the Law of Torts* (1967), chs. 3-8

² Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1965)

they were “on the clock”, and acting in their official capacities, and not in a private capacity. In their private lives, they would not have interacted with the Plaintiff at all, as no private relationship exists.

10. With respect to the fraud charges, in the case of Mr Debski, the BSO that seized the currency, he did not have the statutory authority to seize currency under the *Customs Act* (as currency is not subject to *Customs Act* provisions). Also, he did not have the statutory authority to seize the currency under the *Proceeds Act*, as the requirement to report was not triggered. All he did was misrepresent the *Customs Act* in order to deprive the Plaintiff of his currency, which are the basic criteria for existence of fraud.
11. With respect to the fraud charges for the other three individuals, in addition to misrepresentations similar to Mr Debski, they also acted negligently, as there was ample evidence in front of them that the seizure was improper, but they preferred their own opinion instead of considering the *Currency Act* evidence before them.
12. With respect to the threats of violence by Mr Debski, they are also not authorised by statute, and thus not an available defense.
13. Where a statutory power relied upon by the servants is invalid/*ultra vires* (ie, the Bulletin, if it were to be construed as a statutory power), it will not afford a defense the official charged with enforcing it³.

Heads of Liability

14. In the present case, operational negligence is one tort. The CBSA does on some occasions administer the *Proceeds Act*, and it is its duty to do so, as per the *Canada Border Services Act*. This shows that at the planning level of government, there is a policy decision to enforce the *Proceeds Act*. However, operationally, it is not enforced with respect to specific forms of currency and financial instruments (generally precious metals). The distinction between planning and operational levels of government limits the liability of the Crown⁴, and according to those principles, liability is recognised in this case.

³ Rubinstein, *Jurisdiction and Illegality* (1965), ch.6

⁴ *City of Kamloops v. Nielson*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641 (subsequent references are to [1984] 2 S.C.R.). The planning/operational distinction originated in the United States where it appears to have first been applied in *Dalehite v. United States*, 346 U.S. 15, 97 L. ed. 1427, (1953). See, also, *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122 (1955).

15. Another head of general liability is fraud.
16. Another head of general liability is utterances of threats.
17. Time limitations do not yet apply to the fraud charges, as they are processes still ongoing. The four individuals are still hoping to collect the ransom they termed “terms of release”, and are still in possession of the Appellant's currency, and in fact, the Respondent is working on their behalf also, when he mentions that they should be protected by *Customs Act* s.106

Replies

18. The Respondent points to the Customs Tariff, and other CBSA documents as proof that exemptions are given by the Customs Tariff. Specifically, he says that Tariff Item 98.04 is the authoritative source for an exemption for travellers. This Tariff Item is not the authority, but merely a reference to Excise Tax Act Schedule III, Part VII, which is the authoritative source granting the exemption. Without Schedule III, Part VII, the 98.04 exemption would also not exist. As stated on the inside cover of the Customs Tariff, a CBSA document, it is a “Departmental Consolidation”. The inside cover reads:

WARNING

Users of this Departmental Consolidation are reminded that it is prepared for convenience of reference only and that, as such, has no official sanction.

19. He also submits that if a traveller wishes to benefit from an exemption, he is required to make a report. This is nonsensical, as the exemption provided by *Excise Tax Act* s.51(1) is an exemption from importation taxes, and implicitly from the *Customs Act* provisions, including the reporting requirement.
20. The Respondent submits that the Internal Bulletin was not before Judge Gleeson on the motion for summary judgement, but only on the motion to strike the claim. First,

there is no motion to strike a claim under consideration here. Assuming he meant the motion to ammend the statement of claim, **the Bulletin was in fact before the J. Gleeson on both motions**. On the Summary motion, it was adduced as evidence in the Plaintiff's responding motion record, in representations, at paras.33-54, under subtitle "CBSA's Bulletin is a recipe for money laundering", and enclosed at TAB 18 of that motion record (in the Appeal Book A-102-18, the "Recipe" representations are at pp.122-124, and the Bulletin itself is at pp.252-254 of the Appeal Book). In the Motion to Ammend, it was provided at TAB 2 of the Reply to the Defendant's Response (in the Appeal Book A-101-18, at pp.99-101)

Costs

21. Although the Appellant is self represented, he is entitled to compensation for his time in handling this matter (*Yu. v. Canada (AG)*, 2011 FCA 42 at para 37; *Sherman v. Canada (Minister of National Revenue)*, 2003 FCA 202 at para 42-52, *Air Canada v. Thibodeau* 2007 FCA 115 at para 24). This case is much larger than a simple non-reporting infraction, which is only the tip of the iceberg. The real issue is that of money laundering by a Crown corporation, which has required much research and preparation. The appellant saw this work as so important as he practically abandoned his electrical engineering career to focus on learning and prosecuting this case. Even this choice is likely orders of magnitude cheaper than if he had hired professional lawyers to do the same work. That would have been financially untenable.
22. The Appellant respectfully requests a 7 day extension of time to prepare the disbursement and time report.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Hociung'.

Radu Hociung - Plaintiff