

Federal Court



Cour fédérale

Date: 20111125

Docket: T-1189-08

Citation: 2011 FC 1365

Ottawa, Ontario, November 25, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

KEVIN PETER TRITES

Plaintiff

and

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] The plaintiff appeals to this Court from a finding of the defendant Minister that the plaintiff violated section 12 of the *Customs Act* (R.S.C., 1985, c. 1 (2nd Supp.)). For the reasons that follow, the appeal is dismissed.

[2] The plaintiff, Kevin Trites, is a mechanic who lives in Woodstock, New Brunswick. He has a passion for race cars and has been very successful in building a career in providing technical support to professional race teams. He travels extensively throughout the United States (U.S.) to

various races and, of necessity, transports a considerable amount of equipment. On November 16, 2006, he and two friends, Kelly Fitzsimmons and Jamie Dobbin, travelled from Canada to North Carolina where Mr. Trites purchased a Kenworth diesel truck with an enclosed camper-van configuration behind the driver's cab. The cab had living and sleeping quarters and several large storage compartments, accessible from the outside. He also purchased a 30 foot long enclosed trailer that could be configured on different levels to transport a race car and to store parts and equipment.

[3] At 6:00 a.m. on November 19, 2006, the plaintiff, accompanied by his friends, drove up to the Canadian Port of Entry in Woodstock, New Brunswick. Mr. Fitzsimmons was driving.

[4] Officer Brad Polchies, a Canada Border Services Agency (CBSA) Border Services Officer, was on duty and responsible for primary inspection. He asked the driver and the passengers the standard questions as to their citizenship, residency, length of absence from Canada, purpose of their trip and whether they had purchased or acquired goods while in the U.S. Mr. Fitzsimmons, the driver, advised of the existence of a GMC pick-up in the trailer which they had bought for parts. Mr. Trites, in response to the question, added they had also purchased an engine for \$50.00US. Officer Polchies directed them inside the CBSA office at the Port of Entry to pay the tax and duty on the truck and to complete forms required by Transport Canada governing the importation of vehicles into Canada. At the same time, Officer Polchies also referred them for secondary examination for which Officers Adam Carson and his supervisor, Albert Price, took responsibility.

[5] While further conversation subsequently transpires between Officers Carson and Price, the plaintiff, Dobbin and Fitzsimmons, it is sufficient to note here that Mr. Trites did not, up to this point, declare that he had purchased the trailer and cab the day before in North Carolina. In consequence he was found by CBSA Officers to have violated section 12 of the *Customs Act*. The trailer and cab were seized and a penalty assessed of \$22,860.71CND. The Minister upheld the finding of a violation and the penalty.

[6] Mr. Trites appealed the decision to this Court by way of a trial *de novo*, as provided by section 135 of the *Customs Act*. He advances three grounds upon which he contends the violation and penalty should be overturned. First, he claims that he declared to the officers that he had just purchased the vehicle, that it was its first entry into Canada, and that he had no intent to violate section 12 of the *Customs Act*. Secondly, he contends that he is not the purchaser and hence not responsible for the payment of taxes and duties, and finally, that he exercised all due diligence in importing the vehicle to Canada. I find against the plaintiff on all three grounds.

Analysis

Failure to Declare

[7] Once inside the CBSA office at the Port of Entry, Mr. Trites provided a purchase and sale agreement for the GMC pickup as well as the Vehicle Identification Number (VIN) to the Officers. As a matter of operational practice, visual identification of the VIN by a CBSA Officer was required. Price, Carson, the plaintiff, Fitzsimmons and Dobbin all walked back to the trailer, which had now been moved out of the entry lane and parked on a siding. As the pickup truck occupied almost the entire width of the trailer, Officer Price climbed over the hood of the pickup truck and

looked down from the roof into the door frame in order to see the VIN. It was too dark inside the trailer for Price to read the VIN, he requested that the trailer light be turned on. Either Dobbin or Fitzsimmons turned on the generator and lights. The plaintiff's testimony is that at this point, one of the officers commented on the fact that the trailer was gleaming and appeared new. Mr. Trites testified that he said that he had just purchased it the day before and that this was its first entry into Canada. Neither Officers Carson nor Price recall this statement.

[8] Officer Price testified, in cross-examination, that he did not recall the conversation. Nor did Officer Carson. I do not believe that this disclosure as to provenance and acquisition of the cab and trailer would have been so willingly made given the multiple occasions during the preceding period of time between primary inspection and the start of the secondary examination to make the same disclosure. Additionally, following the inspection of the GMC, both officers testified that the focus of their search was for contraband. Had the plaintiff made the disclosure as contended, while in the trailer, the search would have unfolded in a much different manner.

[9] I also note that the evidence of the plaintiff is inconsistent with what transpired as the search unfolded. Officer Price assigned Officer Carson to continue with the search of the trailer while he attended to the search of the cab. While searching the cab he found receipts from East Coast Trailer of North Carolina. Both were dated November 17, 2006, one for the trailer for \$30,000.00US and that for the cab was \$49,800.00US. Officer Price then entered the living quarters of the cab and confronted Mr. Trites with the receipts. At that point (7:05 a.m.) Officer Carson advised the plaintiff and his companions that they were detained for failing to report and that the vehicles were seized. Officer Carson then cautioned them and advised as to their right to counsel. In response to

both the plaintiff said that he understood and declined the right to counsel. As the Canadian sniffer dog was unavailable the U.S. Customs and Border Protection dog was requested to assist in a thorough search. Nothing was found.

[10] I accept Officer Price's testimony that while in the cab he was searching for contraband and that the vehicle they were searching itself had not been declared only became apparent on discovery of the invoices. I find that had the statement been made, the search would have unfolded in a much different manner. Put otherwise, I reject the plaintiff's testimony as it is inconsistent with subsequent events. In sum, the plaintiff's evidence that he declared the acquisition is simply implausible, as it requires the Court to believe that neither officer asked further questions following his statement in the trailer that he just bought the cab. I find it improbable that the plaintiff would so casually and spontaneously concede acquisition and provenance of the vehicle when he had approximately an hour (between 6:03 a.m. and 7:05 a.m.) to do so and did not. In sum, I find that the plaintiff failed to declare the acquisition of the goods as required by section 12 of the *Customs Act*.

[11] Strictly speaking, as a matter of law, it is not essential to make a finding on this aspect of the evidence. I find, based on the evidence of Officer Polchies that the required questions had been posed while the vehicle was at the port of entry during the primary inspection and the answers provided. The violation of section 12 was established at that point. The existence of the cab and trailer could well have been declared, first to Officer Polchies on arrival and in response to the questions, as the plaintiff walked with the officer from the truck, now parked on a siding, into the CBSA office to complete the paperwork with respect to the pickup truck and while completing the

paper or on the return to the trailer for secondary inspection. There was ample opportunity to declare.

Not the Owner

[12] I turn to the plaintiff's second argument, namely that he did not own the vehicle. The plaintiff contends that his sponsor, the Canadian subsidiary of a large engine-motor oil company, "sponsored" the purchase. He adduces evidence supporting this, including MasterCard receipts indicating that the payments for the vehicle were charged to Mr. Bruce Lawson, Regional Sales Manager of the plaintiff's sponsor.

[13] While I accept this to be the case, it is, however, irrelevant as to whether or not there has been a failure to report. The legal obligation, as manifested by Officer Polchies' questions at primary inspection, is clear. The questions are directed at acquisition or purchase. The obligation to report is not displaced simply by asserting an agency or brokerage relationship, or that title will pass to a third person upon entry into Canada or at some future date.

[14] The purpose and effect of section 12 is plain and obvious (Annex A). It applies to all goods imported into Canada and the trigger for its application is importation. Sub-section (3) makes clear that the obligation to report is tied to possession, not where title might ultimately lie.

[15] Even if the plaintiff was simply an importer, the obligation rests equally on him; see *He v Canada*, 2000 CanLII 14822 (FC), para 8 wherein Justice Yvon Pinard held:

The Act creates a voluntary reporting legislative framework in which importers must accurately declare all goods, must accurately account

for the quantity and value of the goods, and must pay the duty and taxes attracted by all goods imported. Both the importer and the owner of the goods are jointly and severally liable for the duty and taxes attracted by the goods imported (sections 12, 17, 32 and 151 of the Act). Therefore, the Act is contravened when an incorrect declaration is made by or on behalf of an importer. Furthermore, the source of that error is irrelevant. The importer is liable for having failed to meet the obligation to accurately account for the goods which, from the time of the contravention, are forfeit to the Crown. A lack of intention on the part of the importer to evade duty and taxes is irrelevant in a seizure proceeding. Neither the lack of intent to mislead Customs, nor the presence of an inadvertent error in reporting goods, affects the validity of a seizure.

[16] In any event, the only direct evidence of ownership entered in evidence at this trial were the two invoices, both of which indicated the plaintiff as purchaser and which have his signatures acknowledging that fact. This argument fails, therefore, on both the facts and the law.

Due Diligence

[17] The third argument is that of due diligence. In his cautioned statement the plaintiff said that he did not think that duty was owing and that he was misled by the vendor who said everything would be in order at the border.

[18] The *Customs Act* depends, for its effective operation, on voluntary reporting and strict liability attaches to those that fail to report: *Prue v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1234. The lack of intention is thus irrelevant in assessing whether or not a seizure and penalty is valid. The violation occurs when there is a failure to report.

[19] Counsel for the Minister argues that due diligence is not a defence to a section 12 violation. *Samson v Canada (National Revenue)*, 2007 FC 975, which is relied on in support, does not support

this proposition. If that argument were correct a violation of section 12 would be one of absolute liability. I question why Parliament would provide recourse to this Court by way of an unrestricted *de novo* appeal if there are, in essence, no grounds upon which an appeal could succeed.

[20] In any event, the plaintiff cannot establish a defence of due diligence. The test was well framed by Madam Justice Johanne Gauthier in *Cata International Inc. v Canada (Minister of National Revenue)*, 2004 FC 663 at para 22:

To begin with, it appears that the respondent misunderstands the nature of the due diligence defence. It will not suffice to plead forgetfulness or an error made in good faith. A party wishing to rely on the defence must establish that he or she has taken all reasonable steps to ensure that the declarations are accurate. This is a difficult burden to discharge, and so far every time such a defence has been used it has been unnecessary for the Court to determine whether it applies, because the party using it was unable to establish due diligence.

[21] The test of due diligence is both objective and subjective. In this case, the plaintiff fails in respect of each criteria.

[22] In any event, the plaintiff gave inconsistent testimony with respect to this defence. In his cautioned statement he said that he did not know that duty was payable, but also said that he thought that his vendor would attend to it, and, in the alternative, that he thought that he would pay the tax when he registered the vehicle in New Brunswick. The plaintiff also knew enough to declare the GMC pickup and engine. When cross-examined as to why he did not call as a witness the vendor who he testified assured him that the taxes would be looked after, he testified that he telephoned the vendor and was advised that the particular sales representative no longer worked for East Coast Trailers. He took no further steps to locate the individual. I find that the plaintiff was aware of his

obligation to pay tax and duty and did not hold the subjective belief necessary to sustain a defence of due diligence.

[23] Even if the plaintiff crossed this threshold, the defence of due diligence could not be sustained on an objective basis. The burden of proving due diligence is a heavy one, as the *Customs Act* depends on voluntary compliance for its effective enforcement. Citizens are presumed to know the law, and, if in doubt, to take all reasonable measures to ensure that they are in compliance. The plaintiff made no inquiries, spoke to no official, sought no advice, nor ruling from CBSA on the consequences of the importation of a vehicle worth over \$80,000.00CND into Canada. He offered no evidence that suggested that tax money had been paid, but not received. In sum, objectively viewed, the conduct falls far short of that expected of a reasonable citizen.

[24] The Court of Appeal has observed that the scope of due diligence is somewhat nebulous, but it will be established, if the accused or, in this case, plaintiff "...reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, ...": *R. v Sault Ste. Marie (City)*, [1978] 2 SCR 1299; *Office of the Superintendent of Bankruptcy [Laperrière] v MacLeod*, 2011 FCA 4, at para 18. Here, as in *Laperrière*, no set of facts was identified, let alone established in evidence that would fall within the parameters of the *Sault Ste. Marie* test. Nor does the fact that the plaintiff was co-operative, otherwise in compliance with the law or made the error through forgetfulness constitute the defence of due diligence. It must be remembered that the plaintiff violated section 12 because he failed to report. This is not a case where a declaration was made but an error was made in the calculation of the amounts owing or in assessing the scope of the fiscal obligation. I therefore dismiss the third ground of appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal be and is hereby dismissed. Costs are granted to the defendants.

"Donald J. Rennie"

Judge

ANNEX A

Customs Act (R.S.C., 1985, c. 1 (2nd Supp.))	Loi sur les douanes (L.R.C. (1985), ch. 1 (2e suppl.))
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	Modalités
(2) Goods shall be reported under subsection (1) at such time and in such manner as the Governor in Council may prescribe.	(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	Déclarant
(3) Goods shall be reported under subsection (1)	(3) Le déclarant visé au paragraphe (1) est, selon le cas :
(a) in the case of goods in the actual possession of a person arriving in Canada, or 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) la personne ayant en sa possession effective ou parmi ses bagages des marchandises 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) in the case of goods imported by courier or as mail, by the person who exported the goods to Canada;	a.1) l'exportateur de marchandises importées au Canada par messenger ou comme courrier;
(b) in the case of goods, other than goods referred to in paragraph (a) or	b) le responsable du moyen de transport arrivé au Canada à bord duquel se trouvent d'autres

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.

marchandises que celles visées à l'alinéa a) ou importées comme courrier;

c) la personne pour le compte de laquelle les marchandises sont importées.

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 unless an officer requires that the goods be reported again under subsection (1) after importation.

Exception

(5) This section does not apply in respect of goods on board a conveyance that enters Canadian waters, including the inland waters, or the airspace over Canada while proceeding directly from one place outside Canada to another place outside Canada unless an officer otherwise requires.

Written report

(6) Where goods are required by the regulations to be reported under

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.

Exception : transit

(5) Le présent article ne s'applique qu'à la demande de l'agent aux marchandises se trouvant à bord d'un moyen de transport qui se rend directement d'un lieu à un autre de l'extérieur du Canada en passant par les eaux canadiennes, y compris les eaux internes, ou l'espace aérien du Canada.

Déclaration écrite

(6) Les déclarations de marchandises à faire, selon les règlements visés au

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.

Certain goods not subject to seizure

(7) Goods described in tariff item No. 9813.00.00 or 9814.00.00 in the List of Tariff Provisions set out in the schedule to the Customs Tariff

(a) that are in the actual possession of a person arriving in Canada, or that form part of his baggage, where the person and his baggage are being carried on board the same conveyance,

(b) that are not charged with duties, and

(c) the importation of which is not prohibited under the Customs Tariff or prohibited, controlled or regulated under any Act of Parliament other than this Act or the Customs Tariff

may not be seized as forfeit under this Act by reason only that they were not reported under this section.

paragraphe (1), par écrit sont à établir en la forme, ainsi qu'avec les renseignements, déterminés par le ministre ou satisfaisants pour lui.

Marchandises soustraites à la saisie-confiscation

(7) Ne peuvent être saisies à titre de confiscation en vertu de la présente loi, pour la seule raison qu'elles n'ont pas fait l'objet de la déclaration prévue au présent article, les marchandises, visées aux nos tarifaires 9813.00.00 ou 9814.00.00 de la liste des dispositions tarifaires de l'annexe du Tarif des douanes, pour lesquelles les conditions suivantes sont réunies :

a) elles sont en la possession effective ou parmi les bagages d'une personne se trouvant à bord du moyen de transport par lequel elle est arrivée au Canada;

b) elles ne sont pas passibles de droits;

c) leur importation n'est pas prohibée par le Tarif des douanes, ni prohibée, contrôlée ou réglementée sous le régime d'une loi fédérale autre que la présente loi ou le Tarif des douanes.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1189-08

STYLE OF CAUSE: KEVIN PETER TRITES v MINISTER OF PUBLIC
SAFETY AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: Moncton, New Brunswick

DATE OF HEARING: October 11, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** RENNIE J.

DATED: November 25, 2011

APPEARANCES:

Kevin Peter Trites PLAINTIFF

Mark S. Freeman FOR THE DEFENDANT

SOLICITORS OF RECORD:

None FOR THE PLAINTIFF

Myles J. Kirvan, FOR THE DEFENDANT
Deputy Attorney General of Canada
Halifax, Nova Scotia