

Federal Court



Cour fédérale

Date: 20130514

Docket: T-1716-08

Citation: 2013 FC 505

Ottawa, Ontario, May 14, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

**ALAIN FILION
AND
GINETTE IPPERSIEL**

Plaintiffs

and

THE MINISTER OF NATIONAL REVENUE

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a simplified action pursuant to the *Excise Act, 2001*, SC 2002, c 22, [the Act] section 276 and Rules 292 to 299 of the *Federal Courts Rules*, SOR/98-106 [the Rules]. The plaintiffs challenge a decision made by the Canada Revenue Agency (CRA) on August 8, 2008 to confirm the seizure of Canadian currency totalling \$11,775.00 in accordance with s 275(2)(a) of the Act.

[2] For the reasons that follow, the action is dismissed.

BACKGROUND:

[3] On September 5, 2007, a member of the Canada Border Security Agency (CBSA) observed a GMC Safari van leaving the Ontario part of the Mohawk territory of Akwesasne on Cornwall Island. Cornwall Island is known as a source of contraband including illicit drugs and tobacco. The van had been observed by the CBSA member on several prior occasions going to Cornwall Island and leaving after a short time. Access to the international bridge from the island could be made without passing through the Canada Customs border station.

[4] The van, driven by Mr. Filion with Ms. Ippersiel in the passenger seat, was followed by members of the Royal Canadian Mounted Police (RCMP) as it travelled north from Cornwall. It was ultimately stopped at Alfred, Ontario, where it was searched and was found to contain three boxes of contraband tobacco products of an estimated value of \$3300. The plaintiffs were then detained for possession of non-stamped tobacco products contrary to s 32 (1) of the Act and cautioned.

[5] Ms. Ippersiel was found to have \$10,475 in Canadian currency in her purse and Mr. Filion had \$1,300 in cash in his shorts pockets for a total of \$11,775. The cash held by Ms. Ippersiel was largely in bundles of \$20 notes secured by rubber bands. Ms. Ippersiel was also carrying two notebooks containing handwritten entries indicating names and prices.

[6] The RCMP seizure report indicates that, at the scene, neither plaintiff offered an explanation as to a legitimate source of the money. When asked about the cash in her purse, Ms. Ippersiel stated

that Mr. Filion had given it to her and told her “ça tombe du ciel” [“it fell from the sky”]. The report also records that Mr. Filion stated that he had made at least three trips to Cornwall Island to buy cigarettes on behalf of his colleagues at work and had paid \$500 per case.

[7] The RCMP seized the \$11,775 and the tobacco products. The cash and tobacco were transferred to the CRA on September 30, 2007. On November 20, 2007 the plaintiffs filed an objection to the seizure and requested a decision of the Minister. In subsequent correspondence, the plaintiffs did not contest the seizure of the tobacco but contended that the cash had been obtained from clients for work done by Mr. Filion.

THE IMPUGNED DECISION:

[8] On August 8, 2008 the manager of the CRA Tax and Charities Appeals Directorate advised the plaintiffs by letter that their objection had been disallowed. The letter stated that:

Pursuant to s. 273 of the *Excise Act 2001*, there has been a contravention under s. 32 et al of this *Act* with respect to the tobacco and currency, which were seized. Under s. 275 of the *Excise Act 2001*, the currency under seizure is held as forfeit.

[9] This decision was based upon an analysis prepared by Mr. Dwayne Mockler, an appeals officer. He noted that the evidentiary standard for a seizure under subsection 260(1) (f) of the Act was reasonable belief. After reciting the background facts and the grounds for the objection submitted by the plaintiffs, Mr. Mockler set out the factors which he considered significant. These included the circumstances of the seizure described above and the manner in which the cash was packaged and transported, which he found to be consistent with money laundering.

[10] A Statement of Claim was filed by the plaintiffs on November 6, 2008 and a Statement of Defence on December 5, 2008. For reasons that are not relevant to this decision, trial of the action was delayed and postponed on several occasions.

[11] In a simplified action under Rules 292 to 299, examinations for discovery are limited and evidence in chief is adduced by affidavit.

THE EVIDENCE:

[12] In Mr. Filion's affidavit of January 27, 2012, he stated that on September 3, 2007 he received \$15,509.92 in cash for two contracting jobs, one for Mr. Éric Bissonnette (\$7,738.00) and one for Mr. Claude Major (\$7,771.92). Mr. Filion said that this was the source of the seized cash. He denied that the funds were related to any infraction.

[13] Photocopies of receipts for Mr. Filion's ice-fishing business and construction work were attached to his affidavit. Those for the ice fishing business are dated in December 2006 through March 15, 2007. The receipts are numbered sequentially from #39 to #50 and then again from #01, dated January 16, 2007 through to #30 on March 15, 2007 with only #6 missing. All of these receipts but one bear notations that they were paid ("Payé" or "Payé cash" or "Payé par cheque"). The next series begins at #23 with a receipt to a Mr. Fowler. The date and other notations are illegible but Mr. Filion deposed that it was for construction work on or about May 29, 2007 in the amount of \$1117.58 cash. Mr. Major's and Mr. Bissonnette's receipts dated September 3, 2007 are numbered 24 and 25 respectively and are written in a much clearer pen or pencil. No explanation

was provided for the absence of any receipts between March 15, 2007 and May 29, 2007 and between May 29, 2007 and September 3, 2007, for the absence of any receipts in the series numbered 01 to 22, or for the different appearance of the Major and Bissonnette receipts.

[14] In his annual tax return for 2007, Mr. Filion declared a total revenue of \$28,225.39 from his several occupations (construction and the operation of an ice-fishing business), which, after deductions, left him a net income of \$8,139.31. On cross-examination, he initially testified that he had no other revenue for the 2007 taxation year and declared that the information in his affidavit and tax return was correct. Later, however, he stated that he had received a deposit of \$800 for work on a garage on Cornwall Island and that the client had broken off the contract after the September 5, 2007 incident, leaving the work unfinished and him unpaid. He added that he had lost two other partially completed construction jobs between March and September 2007 on Cornwall Island and had not declared the resulting losses.

[15] Mr. Filion testified that his system for billing clients for construction work was to accept periodic unreceipted cash advances as a job progressed, then once the work was finished to provide a receipt for the total amount and collect any final sum still owing. He explained that he did not trust banks. Also, when banks started to hold cheques until payment cleared, he felt this was unfair. From that point on, he had held his accumulating balances in cash. Ms. Ippersiel normally carried the cash because he was inclined to spend it too easily.

[16] The couple had the total paid by Messrs Major and Bissonnette in cash for work done in 2006 and 2007 with them when they left their home in the early afternoon of September 5th. When

cross-examined, Mr. Filion said that he had also had money remaining from other jobs and had thus started the day with \$18,000 cash. Enroute to Cornwall Island he had stopped and paid \$3,000 of the cash to a garage as the balance remaining in relation to work on a truck which he had given to his son. He and Ms. Ippersiel had also done some small shopping in town, including clothes for Ms. Ippersiel, leaving them with at least \$14,000.

[17] Mr. Filion testified that his reason for going to Cornwall Island on September 5, 2007 was to estimate the cost of a construction job on the reserve. In his affidavit, however, Mr. Filion had stated that he and Ms. Ippersiel had taken the cash he had received from Mr. Bissonnette and Mr. Major with them on that day for a trip to the United States during which they made several purchases. There is no evidence that the couple entered the United States on that date. At the hearing, he insisted that there had been no shopping trip planned. Rather, he met a client on Cornwall Island who crossed over to the U.S. to buy construction materials after discussing what to purchase.

[18] Upon arriving at the reserve, Mr. Filion had given the list of construction materials to his client and discussed it. After going over the evening's events a few times, varying the chronology each time, he established that the couple had next left the reserve to buy gas and have a meal at the Vieux Duluth restaurant, paying in cash and spending approximately \$60 on the meal and a maximum of \$110 and more like \$70 or \$80 on the gas. After eating, they returned to the reserve. Mr. Filion testified that he went down into the client's basement and inspected the construction purchases and discussed them with the client for an hour or so. The couple then departed the reserve.

[19] Mr Filion acknowledged that contraband cigarettes had been found in his van when he was stopped near Alfred, Ontario, but he denied having bought them. He testified that his client on the reserve asked that Mr. Filion do him a favour. The client put the boxes of illegal cigarettes in his vehicle while he was in the client's basement. Mr. Filion knew that he was to bring something away with him, but he did not know what. He saw the cigarettes for the first time when the vehicle was stopped and he walked around it with the RCMP officers. When they asked him if he had contraband products and he answered yes, three boxes of DK cigarettes, it was because they were all standing by the back of the van looking through its window, and he could see the boxes.

[20] When cross-examined, Mr. Filion said that he had told the RCMP officers that he was doing a favour for a friend in Hawkesbury by driving the boxes, although he said he had refused to divulge the friend's name to the officers. He claimed that this had been omitted from the RCMP report. He had not bought cigarettes on his previous three trips to Cornwall Island since March 2007 either; the arrangement had been that residents of the Reserve put boxes in his car for the friend in Hawkesbury. He was never aware that the contents were cigarettes.

[21] Mr. Filion alleged that although the RCMP seized \$11,775, he and Ms. Ippersiel had still had at least \$14,000 on them, and that the RCMP officers had kept the difference. He had explained to the officers that the cash represented payment for two construction jobs, although he had not given the names of his customers. This had also been omitted from their report. When the RCMP had asked him about the price of the cigarettes, he asserted under cross-examination that he had not admitted to paying \$500 a box, but rather had said that he was aware that the going rate for a box of contraband cigarettes was around \$500.

[22] The evidence of Mr. Bissonnette was that he knew Mr. Filion from ice-fishing. He had paid Mr. Filion in cash for work that was carried out on his deck in 2006 and for a retaining wall and installation of insulation that was completed in 2007. He had not asked for estimates for the work or for purchases of materials, nor had Mr. Filion supplied plans or drawings before beginning work. His bank records did not show a large withdrawal prior to the seizure. Rather, Bissonnette said he took small amounts of cash out of his savings account, joint account, and line of credit over the course of a year, making about twenty-five small withdrawals of sums almost all between \$100 and \$400. He accumulated this cash until the moment when he paid Filion the total of a little under \$8,000 for all of the work. He thought he had paid Filion in October until reminded of his affidavit which states that it was on September 3, 2012.

[23] Mr. Major testified that he has known Mme Ippersiel since high school and Mr. Filion for at least fifteen years. He said he had been hiring Filion for various sub-contracting jobs since at least 1998. He generally paid advances at the end of every week and produced an adjustment bill at the end of a job; he said that normally there would be almost nothing remaining to pay at the end. He preferred to pay in cash, rather than by cheque. He has no records of the work done in 2007 (he explained that all plans were returned to owners after construction was completed) and did not produce his bank records for that year.

[24] Both Mr. Major and Mr. Bissonnette testified entirely in French (both in their affidavits and during cross-examination). Mr. Filion also testified in French and expressed difficulty in understanding English at moments during the hearing. It was not explained why he annotated the

two receipts for Mr. Major and Mr. Bissonnette in English, with “Paid Cash”, rather than in French, with “Payé” or “Payé cash” like the other receipts.

[25] Mr. Mockler of the CRA explained that he had not been present on the evening of September 5, 2007, but had analysed the RCMP seizure report based on his 22 years of experience. He stated that entries in the two notebooks carried by Ms. Ippersiel were well-known codes for cigarette smuggling, with “blanc”, “brune” and so on standing for types of cigarettes. Mr. Mockler had given less weight to the receipts presented by Mr. Filion to account for the cash because they had not been accompanied by affidavits, but he had considered them.

[26] Mr. Mockler agreed under cross-examination that Ms. Ippersiel’s statement that the source of the money was “ça tombe du ciel” could mean anything, but stated that what it indicated to him was that the couple had no reasonable explanation to give. In his experience, first reactions were normally the truth. Also, the fact that the couple did not know how much money they were carrying did not suggest that it was cash earned from contracting jobs. It was also not common to carry about funds packaged in plastic and mainly in twenty dollar bills, which happened to be easier to launder or convert.

[27] In cross-examination of the RCMP officers, counsel for Mr. Filion established that there was no evidence that he had stopped between leaving Cornwall Island and the intercept near Alfred, Ontario. There was no indication that he had sold anything or been paid for anything while being followed by the RCMP and thus there was no evidence that he had collected the seized cash in connection with a contraband cigarette transaction that evening.

[28] Mr. Filion's counsel also suggested that there was no evidence that the three boxes of cigarettes were not for Mr. Filion's personal consumption and that the lack of an explanation for the cash was due to the plaintiff's sporadically remembering to exercise his right to remain silent while under detention.

THE ISSUE:

[29] The issue in this case is whether the Minister exercised his discretion reasonably in not granting relief from the seizure and forfeiture of the currency.

ANALYSIS:

[30] Although the initial seizure was authorized under s 260(2) (f) on the basis of a reasonable belief by the officers, to succeed in his appeal of the Minister's decision, the plaintiff Mr. Filion has the burden of demonstrating on a balance of probabilities that the seized currency was not used for a purpose contrary to the Act and that the Minister was unreasonable to conclude that a contravention did occur and therefore to confirm the seizure.

[31] As noted by Justice Boivin in *Legal v Canada (Revenue Agency)*, 2010 FC 554, a judicial review of a decision denying a tobacco manufacturing licence renewal, "The Excise Act governs the taxation and regulation of activities involving the manufacture, possession and sale of tobacco at the federal level" (para 14). The Court held that the standard of review of discretionary decisions by the Minister in this area "is reasonableness and that a very high degree of deference should be

accorded” (para 20). While this is an appeal and not a judicial review, the Court must be cognizant of the standard which applies to the Minister’s decision.

[32] I did not find Mr. Filion’s testimony or that of Messrs Bissonnette and Major to be credible. Filion was evasive and defensive and his testimony varied from that which he deposed in his affidavit. Mr. Bissonnette’s account of how he had accumulated sufficient cash by small withdrawals from his account over the course of a year defied belief. As a contractor, Major’s claim that he had no records of the work done for him by Filion in 2007 was inexplicable. The receipts prepared in their names differed in substantial respects from those made out to Filion’s other customers. In my view, they were prepared to substantiate a false claim as to the source of the funds he had in his possession when stopped by the RCMP

[33] In contrast, the testimony of the RCMP officers was credible and persuasive. I do not accept that the RCMP officers had any reason to invent the statements made by the plaintiffs at the scene of the seizure or that they had taken a portion of the cash as claimed by Filion. I find that Filion made the trip to Cornwall Island for the purpose of buying contraband cigarettes and that he had done so on prior occasions as he told the officers.

[34] The pattern of visits to Cornwall Island, the presence of admitted contraband tobacco products in the vehicle, the lack of an explanation for the currency, the size of the amount carried in cash, the packaging of the currency without bank markings and the conjunction with notebooks showing well-known cigarette trafficking jargon, are all evidence pointing to a connection between the money and a contravention of the Act. Mr. Filion’s admissions under cross-examination that he

was allowing his vehicle to be used for smuggling, although not directly involving himself, also pointed towards a connection between the money and a contravention.

[35] The explanation of a legal source for the money was that the cash, an amount double Mr. Filion's declared annual net revenue, had been received mainly from two construction customers and possibly from other construction customers over a period of a year or more in dribs and drabs, repackaged into bundles, and carried around daily in cash by Mr. Filion and Ms. Ippersiel. Mr. Filion gave two different explanations for not trusting banks and several different explanations of how much the total amount of cash had been. He initially claimed that the cash came directly from the two construction work payments of September 3, 2007, then appeared to assert that at least one of those payments had only been a final instalment and that the balance of the cash came from previous jobs. He did not explain whether he had spent all of the May money from Mr. Fowler and the ice-fishing revenues or whether these were included in the bundles of cash. He provided no comment on the anomalies in the receipts or on the months without income, and the billing system as described was implausible. Mr. Filion stated that he had received additional undeclared cash revenue from customers but did not explain how this tallied with the various sums done up until that point.

[36] While the defendant Minister did not provide any evidence that the cash was the result of a contraband sale specifically on the evening of September 5th, the burden of demonstrating that it had been acquired from legitimate sources rested with the plaintiff.

[37] The plaintiff has failed to establish on a balance of probabilities that the Minister was unreasonable in concluding that a contravention had occurred and in confirming the cash seizure under s 275(2)(a) of the Act.

[38] As the defendant has been wholly successful on this appeal, it shall have its costs.

JUDGMENT

THIS COURT’S JUDGMENT is that the action is dismissed. The defendant is awarded its costs in accordance with Tariff B, Column III of the Federal Courts Rules and its disbursements.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1716-08

STYLE OF CAUSE: ALAIN FILION
AND
GINETTE IPPERSIEL

and

THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: January 22, 2013

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

DATED: May 14, 2013

APPEARANCES:

Brian Fisher	FOR THE PLAINTIFFS
Talitha A. Nabbali	FOR THE DEFENDANT

SOLICITORS OF RECORD:

BRIAN FISHER Gravel Charest Fisher Ottawa, Ontario	FOR THE PLAINTIFFS
MYLES J. KIRVAN Deputy Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT