

Federal Court



Cour fédérale

Date: 20130530

Docket: T-883-08

Citation: 2013 FC 581

Toronto, Ontario, May 30, 2013

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

ELBERT ABDELSEED

Plaintiff

and

CANADA BORDER SERVICES AGENCY

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Late one night, the Plaintiff, Mr. Abdelseed, arrived in Canada by bus. He was one of two passengers on the bus. The bus belonged to United Bus Lines (United), which had a business located in New Jersey. The bus was driven to Canada by a bus driver employed by United.

[2] Mr. Abdelseed owns a transportation and limousine service, Park Lane Limousine Services Inc. (Park Lane) in the Greater Toronto Area. Upon arriving at the Canadian border, he told the

CBSA Officer that he was not bringing anything into Canada. The driver did not declare any goods either.

[3] Upon further investigation, the Customs Officers involved determined after speaking with the driver that the bus would remain in Canada until the final completion of a sale of the bus to Park Lane.

[4] The Customs Officers then impounded the bus. Mr. Abdelseed was charged a penalty of \$19,425.00 for failing to declare that he was bringing the bus into Canada. However, Mr. Abdelseed did not own the bus, could not insure the bus, could not drive the bus and could not use the bus.

[5] Upon subsequent payment the bus was released. When the transaction for the bus was finally completed after all paperwork was exchanged and liens removed, the bus was driven back to the United States by United and then brought into Canada by Park Lane at which time appropriate duties were paid.

[6] Against this brief background, the question is whether Mr. Abdelseed was required to declare the bus upon his arrival at the Canadian border.

Evidence

[7] As this was a simplified trial, Mr. Abdelseed's evidence was given by affidavit. The Defendant, Canada Border Services Agency (CBSA), brought a motion at the opening of trial to

strike various paragraphs of Mr. Abdelseed's affidavit on the ground that they were "opinions, tendentious arguments and legal conclusions" and that an Exhibit, being a decision of the Ontario Court of Justice acquitting Mr. Abdelseed of all charges, was inadmissible and irrelevant. The matters in the motion were left to be dealt with during the course of evidence and in argument at the conclusion of the case.

[8] Mr. Abdelseed was subjected to a vigorous cross-examination by counsel for CBSA. Having observed Mr. Abdelseed closely during the cross-examination, I found him to be a frank and straightforward witness who did not vary in his evidence during the cross-examination. English is not his first language but nonetheless he was articulate and forthright. I accept Mr. Abdelseed's evidence. The following summary of the evidence is taken from both his affidavit and the cross-examination. Much of the evidence was non-controversial and where there was controversy with other witnesses I prefer the evidence of Mr. Abdelseed.

[9] Mr. Abdelseed is the principal shareholder of Park Lane. On three prior occasions he had purchased limousines on behalf of Park Lane in the United States and brought them into Canada. He said that he was familiar with the process involving the importation of vehicles into Canada and that he had followed all of the procedures required by the *Customs Act*, R.S.C. 1985, c.1 (2nd Supp.) and the CBSA.

[10] Mr. Abdelseed was aware from an advertisement that a 2002 Freightliner Limousine Bus (the Bus) was for sale in Newark, New Jersey. Mr. Abdelseed travelled to Newark on August 29, 2006 to meet with the owners of United who had advertised the sale of the Bus. Mr. Andrea Scalzo,

a mechanic and licensed bus driver in the employ of Park Lane accompanied Mr. Abdelseed. Prior to travelling to Newark, Mr. Abdelseed had obtained information about the Bus and was hopeful of being able to purchase it for Park Lane.

[11] Mr. Scalzo accompanied Mr. Abdelseed so that he could inspect the Bus and if it was purchased Mr. Scalzo could drive it back to Canada. Mr. Scalzo conducted a thorough inspection of the Bus and was satisfied with its condition.

[12] Mr. Abdelseed proceeded to make arrangements with United to purchase the Bus on behalf of Park Lane.

[13] In anticipation that the Bus would pass the inspection, Mr. Abdelseed had arranged to bring with him a bank draft in the amount of \$70,000.00 payable to United.

[14] Unfortunately, United could not complete a sale of the Bus and transfer the ownership of the Bus to Park Lane because there was an outstanding lien registered against the Bus by Daimler Chrysler Financial Services (Daimler Financial) which secured a loan from Daimler Financial to United. Daimler Financial also had possession of the actual title documents to the Bus.

[15] Mr. Abdelseed was satisfied with the purchase price for the Bus and its condition. As he could not get the Bus transferred to Park Lane he decided that he would enter into an escrow arrangement with United pending removal of the lien on the Bus. The \$70,000.00 was to be held in escrow until the transfer of the ownership of the Bus to Park Lane was complete.

[16] The bank draft was provided to Wachovia Bank to be held by them in escrow until they were notified that Daimler Financial had discharged its lien and the sale was completed. As part of the transaction Wachovia Bank was instructed to transfer \$41,010.42 to Daimler Financial. Presumably, the transfer would be made only after confirmation that Daimler Financial would in fact release the Bus. In turn, United executed an agreement in which it authorized Daimler Financial to release title to the Bus to Park Lane once Daimler Financial received its payment. The various documents relating to the Bus transaction were filed as exhibits.

[17] The final piece of the puzzle that needed to be put in place as Mr. Abdelseed testified was ensuring the Bus would in fact be available to Park Lane once Daimler Financial removed its lien and the purchase funds were paid. This concern was solved apparently by an arrangement whereby United agreed to deliver the Bus to Canada where it would remain until title was transferred. Once title was transferred to Park Lane it would be returned to the United States and then imported by Park Lane for use.

[18] Mr. Abdelseed gave evidence that as Park Lane did not own or have title to the Bus his driver, Mr. Scalzo could not drive the Bus to Canada nor would it be covered by Park Lane's insurance. The Bus continued to belong to United and they had the responsibility of driving it to Canada and doing so under the United insurance policy.

[19] Thus, United's driver, Mr. Edward Kelley, drove the Bus to Canada. Mr. Abdelseed and Mr. Scalzo were the passengers.

[20] When the Bus arrived at the Canadian border, Mr. Abdelseed was asked by a CBSA Officer the purpose of his visit and responded that he had gone to purchase a motor vehicle. His evidence was that he was not asked any further questions about the nature of the motor vehicle.

[21] Mr. Abdelseed gave evidence that the CBSA Officer located the documents pertaining to the Bus. He explained to a CBSA Officer that he was not importing the Bus and that he was not the owner. He gave evidence that he intended to properly import the Bus if Park Lane was able to complete the sale and thereby obtain title to the Bus.

[22] After the various CBSA Officers interviewed Mr. Abdelseed, the Bus was seized and Mr. Abdelseed was required to make a payment of \$19,425.00 for its release. In addition, Mr. Abdelseed was charged with various offences under sections 153(a) and (c) and 159 of the *Customs Act*. Mr. Abdelseed was acquitted of all charges in the Ontario Court of Justice. With respect to the penalty, Mr. Abdelseed appealed, but the penalty was upheld.

[23] Subsequently, on September 5, 2006, Daimler Financial released its lien and the title of the Bus was transferred to Park Lane. Notably, it was only on September 14, 2006 after confirmation of the transfer of title of the Bus to Park Lane that payment of the seizure amount of \$19,425.00 was made.

[24] Thereafter, Mr. Abdelseed arranged for the Bus to be imported to Canada with all appropriate forms.

[25] Mr. Abdelseed was emphatic and did not waiver in cross-examination that he in no way was making any false statements to any CBSA Officer or in any way tried to deceive any CBSA Officer. I accept his evidence.

Evidence of CBSA

[26] The evidence of the CBSA was put in through Samantha Collee, an Officer with CBSA and Customs Inspector at Queenston Bridge; Scott Turner, at the time a CBSA Officer at Queenston Bridge; Tracy Gould, a CBSA Officer at Queenston Bridge; and, Nadine Robinson, a Lawyer assisting counsel for CBSA.

[27] Much controversy arose over the evidence offered by CBSA especially as it related to hearsay which will be addressed further below.

Evidence of Samantha Collee

[28] Ms. Collee's evidence was to the effect that she was on duty as a CBSA Officer at the time the Bus entered Canada. She said she interviewed the three occupants of the Bus and conducted a vehicle search to "confirm compliance with import obligations". She said that no one reported the Bus as an "imported good". She described the driver, Mr. Kelley as "sweating and nervous".

[29] Ms. Collee then made statements regarding what Mr. Kelley said and things he is alleged to have said which were told to her by another CBSA Officer. These statements were objected to as clearly hearsay. CBSA did not call Mr. Kelley as a witness and indeed filed evidence that he could

not be located. There was a suggestion in the evidence that he might be in jail. However, that also was hearsay. In any event, this evidence is of no moment.

[30] During the trial the Court ruled that evidence of what Mr. Kelley said to Ms. Collee or any other CBSA Officer was hearsay and could not be saved by the exceptions to hearsay based on its unreliability [see *R. v. Khan* [1990] 2 S.C.R. 531]. Those oral reasons for refusing the evidence based on hearsay are hereby adopted into these reasons for decision. The reasons relating to the admissibility of this evidence and other evidence was in response to motions by both parties to strike evidence of the other party.

[31] The evidence of Ms. Collee also strayed down the path of conclusions and surmise, particularly as it related to whether or not the Bus was being imported and the requirement to pay duties. Again, that evidence was determined to be inadmissible.

[32] Ms. Collee also stated that she located documents in the Bus indicating that Mr. Abdelseed had purchased the Bus. However, that was a conclusion of law. The evidence of Mr. Abdelseed was not that he wanted to purchase the Bus but Park Lane. The documents relating to the anticipated purchase were located on the Bus and described by Ms. Collee. There is no dispute about the documents. The only dispute is whether Mr. Abdelseed imported the Bus and whether there was an obligation by Mr. Abdelseed to declare the Bus when he entered Canada.

Evidence of Scott Turner

[33] Scott Turner, now Chief of Operations at Hamilton International Airport, was on duty as a CBSA Officer when the Bus entered Canada.

[34] He gave evidence of his discussions with both Mr. Scalzo and Mr. Abdelseed. As noted, the Court disallowed as inadmissible the hearsay statements of Mr. Kelley. Mr. Turner's evidence also covered an appeal made by Mr. Abdelseed to the Minister of Public Safety and Emergency Preparedness and included Mr. Turner's conclusions of law. Much of this evidence was also held to be inadmissible. However, the result of the appeal was referred to and the decision was entered as an exhibit. The Crown conceded the decision was not binding on the Court as this trial is a hearing *de novo*.

Evidence of Tracy Gould

[35] Tracy Gould, another CBSA Officer, also gave evidence as she was on duty the night of August 30, 2006 and described the enforcement operations relating to the seizure of the Bus. Again, there was much of Ms. Gould's evidence which was hearsay as it related to what she understood or was told by Mr. Kelley whether directly or by colleagues. None of this evidence was admissible for the same reasons as noted above.

[36] The Bus was seized at a Level One which was described in the evidence as the most lenient and would result in the lowest possible penalty. Although the ultimate intended use of the Bus was commercial, if the transaction concluded, the penalty was assessed based on the personal seizure

penalty regime at a rate of 25% of the value which resulted in the payment required of \$19,425.00 which includes both penalty and taxes and duties.

Issues

[37] The primary issue for determination is whether Mr. Abdelseed was required, pursuant to the *Customs Act*, to declare the Bus when he arrived at the Canadian border. The answer to this issue requires a consideration of section 12 of the *Customs Act*; the nature of the transaction engaged in by Mr. Abdelseed respecting the Bus; the relative rights to the Bus; and, the legal implications that flow from these considerations.

Discussion

[38] To provide the necessary context a review of several sections of the *Customs Act* is necessary. Those sections include the following:

PART II IMPORTATION PERSONS		PARTIE II IMPORTATION PRÉSENTATION AU BUREAU	
Presentation of persons on arrival in Canada	11. (1) Subject to this section, every person arriving in Canada shall, except in such circumstances and subject to such conditions as may be prescribed, enter Canada only at a customs office designated for that purpose that is open for business and without delay present himself or herself to an officer and answer truthfully any questions asked by the officer in the performance of his or her duties under this or any other Act of Parliament.	11. (1) Sous réserve des autres dispositions du présent article, ainsi que des circonstances et des conditions prévues par règlement, toute personne arrivant au Canada ne peut y entrer qu'à un bureau de douane, doté des attributions prévues à cet effet, qui est ouvert, et doit se présenter sans délai devant un agent. Elle est tenue de répondre véridiquement aux questions que lui pose l'agent dans l'exercice des fonctions que lui confère la présente loi ou une autre loi fédérale.	Arrivée au Canada
REPORT OF GOODS		DÉCLARATION	
Report	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	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	Déclaration

	designated for that purpose that is open for business.	de douane le plus proche, doté des attributions prévues à cet effet, qui soit ouvert.	
Time and manner of report	(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.	Modalités
Who reports	(3) Goods shall be reported under subsection (1) (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.1) in the case of goods imported by courier or as mail, by the person who exported the goods to Canada; (b) in the case of goods, other than goods referred to in paragraph (a) or 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.	(3) Le déclarant visé au paragraphe (1) est, selon le cas : 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) l'exportateur de marchandises importées au Canada par messenger ou comme courrier; b) le responsable du moyen de transport arrivé au Canada à bord duquel se trouvent d'autres marchandises que celles visées à l'alinéa a) ou importées comme courrier; c) la personne pour le compte de laquelle les marchandises sont importées.	Déclarant
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.	(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).	Marchandises qui reviennent au Canada

[39] The definition of “import” in section 2 is not very helpful – import means import into Canada. The Shorter Oxford English Dictionary defines “import” as “that which is imported or brought in from abroad”. Thus, to import is to bring something in from abroad - the Bus, for example. Importing is the act of bringing something into Canada. It is therefore clear that the Bus was “imported” into Canada.

[40] Section 12 of the *Customs Act* requires that “all goods that are imported shall . . . be reported at the nearest customs office designated for that purpose that is open for business”. Subsection 3 describes the circumstances under which the goods shall be reported. Where goods are in the actual possession of a person “by that person” or “by the person in charge of the conveyance”.

[41] Where the goods are imported “in any other case, by the person on behalf of whom the goods are imported” [subsection 12(3)(c)].

[42] In the unique circumstances of this case, the question becomes by whom was the Bus imported into Canada. This question engages principles of sale of goods and title and possession of the goods.

[43] Mr. Abdelseed argues that he could not import the Bus as he was neither the owner, the driver, nor was he in charge of the Bus as a conveyance. The Bus was entirely useless to him and to Park Lane until title was legally transferred to Park Lane and the Bus properly imported into Canada.

[44] Mr. Abdelseed was not forthcoming with the full story surrounding the Bus when he arrived in Canada. However, there was no evidence that he was deliberately concealing the documents. They were in relatively plain view in the Bus and were easily located by the CBSA Officers.

[45] Mr. Abdelseed’s case revolves around whether he had ownership of the Bus and whether it was within his control. On the basis of the evidence I find that there was no completed transaction

for the sale of the Bus to Park Lane as of the time of its arrival in Canada on August 30, 2006 and that the Bus was in the possession of and control of United thorough United's driver, Mr. Kelley.

[46] Mr. Abdelseed was never the intended purchaser. It was always to be purchased by Park Lane. All of the documents refer to Park Lane as the ultimate purchaser and the entity to which title would pass provided the condition of clear title was met. Ownership of the Bus was contingent upon a future event: *viz.* release of the lien by Daimler Financial. It was argued that this was a true condition precedent and therefore there was no enforceable contract and therefore Mr. Abdelseed had no responsibility to report the Bus as being imported. Mr. Abdelseed's subjective belief was that he did not own the Bus and therefore it was not his responsibility to report anything about the Bus.

[47] In *Zhilka v. Turney*, [1959] S.C.R. 578, the Supreme Court of Canada held that a true condition precedent to a contract does not allow either side to enforce performance. Such obligations which are future, uncertain, and rely upon the will of a third party prevent a party from suing for its enforcement. By analogy, Mr. Abdelseed argues that the release of the lien was entirely in the hands of Daimler Financial and was a future uncertain event. There was therefore no basis upon which the contract could be performed. Thus, it was a true condition precedent and neither Mr. Abdelseed nor Park Lane had ownership of the Bus [see also *Dilip Shah v. Jai Kumar Ahuja*, 2012 ONSC 1479, at paras. 33 – 35].

[48] At all material times, the Bus belonged to United. It was their driver who drove it into Canada. It was United's insurance under which the Bus was covered. It was United's driver who was in the care and control of the Bus. It was being brought to Canada by United for the purpose of giving Mr. Abdelseed comfort regarding completion of the sale to Park Lane if the lien was released. Thus, insofar as section 11 of the *Customs Act* is concerned Mr. Abdelseed answered truthfully although somewhat artfully that the Bus was not his and he was not bringing it in. While pushing the limits of the *Customs Act*, I am nonetheless satisfied that he was answering within the limits of the law. He had no intention to deny payment of the appropriate duty that should be paid if the Bus was properly imported when it would be owned by Park Lane.

[49] The issue of whether Mr. Abdelseed had possession of the Bus was argued at length. Reliance was placed upon *Ready John Inc. v. Canada (Department of Public Works & Government Services)*, 2004 FCA 222, in which the Federal Court of Appeal had to determine the question of possession of a certain number of chemical toilets as part of a procurement contract. On judicial review the requirement of "possession" of the toilets was an issue. The case revolved around a judicial review of a decision of a tribunal to award a procurement contract to a competitor of the applicant.

[50] The Court considered both dictionary meanings and legal meanings of possession. The Court observed:

[42] The Tribunal was on firm ground when it concluded that a person may be in possession of something, even though they do not own it. The most pertinent definitions of possession in the *New Shorter Oxford English Dictionary* are: "the action or fact of holding or having something ... in one's control; actual holding ..." and, in law, "visible power or control over a thing".

[43] The French text of the Specification was not before the Court. However, a letter on PWGSC letterhead attached to the notice of proposed procurement which included the Specification, stated: "*le fournisseur retenu droit posséder au minimum 250 toilettes chimiques. . .*" "*Posséder*" has very similar meanings to "possess". The English text of the letter, however, differed from paragraph 14.1.1 itself, in that it used the word, "available", not "possess".

[44] When used in legal contexts in connection with chattels, the core meaning of possession is the physical control of a thing and often, but not necessarily, exclusive control. Thus, *Black's Law Dictionary*, 7th ed. (St. Paul: West Group, 1999) defines "possession" as: "The fact of having property in one's power"; ... "The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object."

[45] Whether a person is in possession of property may depend upon the kind of property over which possession is claimed and on the particular legal context in which the determination must be made. Thus, while physical control lies at the core of the meaning of possession, a person who has the practical means of controlling something and preventing others from interfering with it may have possession of it: see, for example, *Morrison (Committee of) v. Cormier Vegetation Control Ltd.* (1996), 32 C.I.T.T. 209 (B.C. C.A.) at 215 (delivery of keys to a car in a parking lot). In some contexts, a legal right to assume immediate control of something may also be sufficient for a person to be in possession of it: *United States of America and Republic of France v. Dollfus Meig et Cie. S.A. and Bank of England*, [1952] A.C. 582 at 605; *Halsbury's Laws of England*, 4th ed., vol. 35 (London: Butterworths, 1980) at para. 1211.

[46] Possession expresses a relationship between an individual and a particular piece of property, not generic goods of a given description. Thus, as applied to tangible personal property, it connotes control, often exclusive of others, or the legal right to assume control. Whether a person has sufficient control over a particular chattel to have it "in their possession" for the purpose of a legal rule is a question of mixed fact and law.

[51] As noted, physical control of the goods is a key component of possession. In this case, while Mr. Abdelseed was an occupant of the Bus he did not have all of the indicia of possession. He could not use the Bus in any way and United was free, as owner of the Bus, to move it wherever it wanted. He did not have physical control of the Bus. Physical control was in the hands of United's employee, Mr. Kelley, the driver. Thus, there was no onus or requirement on Mr. Abdelseed to report the Bus as being imported.

[52] The Crown argues that the condition precedent analysis in *Zhilka* is not analogous in this case as Mr. Abdelseed had possession of the Bus. However, his possession was not absolute as it was not him looking to buy the Bus and the completion of the sale to Park Lane was contingent upon a future uncertain event entirely in the hands of a third party. While everyone may have believed that the future event was certain to occur it had not as of the date the Bus came into Canada.

[53] As further support for this approach, it has been held that goods brought to Canada in Ontario are governed by the *Sale of Goods Act*, R.S.O. 1990, C. s.1, and more particularly section 18 thereof. That section provides in essence that the parties' intention regarding the transfer of property is derived from a consideration of the terms of the contract [see *Therm-O-Comfort Co. v. Minister of National Revenue*, 153 F.T.R. 32, per Tremblay-Lamer, J. at para. 36]. The intention as gleaned from the contract was that the transfer of the Bus would not occur until a future date when the lien was fully released and title vested in Park Lane. This is consistent with principles in section 18 of the *Sale of Goods Act*.

[54] The Crown vociferously argues that Mr. Abdelseed was in breach of ss. 12 (1) and (3) of the *Customs Act* and the duty to report imported goods. However, as I have found that Mr. Abdelseed was neither the owner nor legally in possession, the duty to report was on the owner of the Bus, United and its driver Mr. Kelley. Rather than engage in the subterfuge of who owned the Bus, the simple approach would have been for United through its driver to declare the Bus and explain why it was being parked in Canada until the transaction was completed.

[55] Notably, all duties relating to the Bus were not only intended to be paid by Mr. Abdelseed but were in fact paid.

[56] The Crown argues that Mr. Abdelseed “lied” to the CBSA Officers. That is not the case. He responded with a technically legal position that he did not own the Bus and had no duty to report. The argument that Mr. Abdelseed had “joint” possession of the Bus also does not pass legal muster. Legally the Bus could not be driven, insured or otherwise used by Park Lane or Mr. Abdelseed until title actually passed to Park Lane. Mr. Abdelseed firmly believed that he did not own the Bus and could not until the lien was released. Thus, United and its driver should have been the subject of any action by the CBSA Officers.

[57] Counsel for CBSA also colourfully argues that to absolve Mr. Abdelseed of any requirement to report the Bus is to make “cheesecloth” of the legislation. This is not the case. These facts are unique and the outcome of this case depends entirely on the facts. The Bus was properly imported when the title transfer was complete. The legislation required United to declare the Bus not Mr. Abdelseed. The legislation works as it should.

[58] Counsel for CBSA also argued that *He v. Canada*, [2000] F.C.J. No. 93 supports CBSA's position. It is cited for the proposition that whether or not Mr. Abdelseed thought he was acting in good faith was an irrelevant consideration and Mr. Abdelseed's belief that he did not have to report the Bus does not matter. However, the facts in *He* are very different from here. In that case there were invoices for goods imported into Canada which were in error as invoices were found with higher values. The shipment of goods was seized. The alleged "innocent mistakes" regarding the values on the invoices were found to be irrelevant and both the owner of the goods and the importer were to be found jointly liable. The lack of intention of the importer and owner to avoid taxes was also found to be irrelevant [see para. 8]. That is a different circumstance than is the case as Mr. Abdelseed was neither the importer nor the owner.

[59] Counsel for CBSA also relies upon *Sarji v. Canada (Minister of National Revenue, Customs and Excise – M.N.R.)* [1999] F.C.J. No. 401. This was an appeal from a seizure of jewellery. Apparently, the jewellery had been taken on a trip to the United States but the Sarji's did not bring it back with them but Mrs. Sarji had declared it. Mr. Sarji obtained possession of the jewellery when he was next in the United States and brought it back but he did not declare it. The jewellery was seized. It was found that the seizure was correct as Mr. Sarji had an obligation to report the jewellery because it was in his possession notwithstanding that it had previously been reported. Again, the facts are entirely different from those in issue in this case. The fact that Mr. Abdelseed believed he had no requirement to report the Bus is irrelevant. What is relevant is that on the facts of the case he was not the person in possession who was bringing the Bus into Canada. It was not his Bus but the Bus of United, which had the obligation to report it under the *Customs Act*.

[60] The decision of the Federal Court of Appeal in *Time Data Recorder International Ltd. v. Canada (Minister of National Revenue – M.N.R.)* is instructive. In that case the driver of a truck who was importing goods into Canada failed to bring the shipping documents with him. There were discrepancies between what the driver reported to CBSA Officers and the actual contents of the truck. A seizure of the goods resulted and criminal charges were laid against the driver. Based on the acquittal, the driver argued *res judicata* with respect to the seizure. The Federal Court of Appeal held that the acquittal was a criminal offence and the seizure was a civil proceeding and so the acquittal did not constitute *res judicata*. There was no due diligence defence to the seizure. However, the Federal Court of Appeal made the following observation in relation to section 12 of the *Customs Act*:

The goods here in question were clearly “on board a conveyance arriving in Canada.” It was, therefore, **the person in charge of the conveyance, in this instance the truck driver, who, alone, had the duty to report them.** His failure to comply with section 12 was sufficient to support the Minister’s finding. The decision of the criminal court acquitting the appellant, whatever be its authority, could not affect that conclusion. [para. 15 – emphasis added]

[61] Thus, the driver of the Bus had an onus to report bringing the Bus into Canada because it was for the benefit of United to complete the transaction if the lien was released. There is no doubt Mr. Abdelseed had an interest in seeing the transaction completed and his company may have benefited, but the onus was on the driver to report.

[62] In summary, the question of whether Mr. Abdelseed was required to declare the Bus must be based on the facts. Merely being a passenger in a bus is insufficient. The Bus was being brought to Canada by United to provide comfort to Mr. Abdelseed that in the event all of the documentation necessary to complete the transaction was available, Park Lane would obtain title. The *He* case is a

useful statement of the onus in cases such as this. The Honourable Mr. Justice Yvon Pinard sets out the onus as follows: “In seizure proceedings such as those at bar, the onus is on the plaintiffs to establish, on a balance of probabilities, the seizures were unlawful”. On a balance of probabilities, based on all of the evidence, as against Mr. Abdelseed the seizure was unlawful.

[63] Mr. Abdelseed is therefore entitled to recover the penalties paid plus accrued interest at the rate referred to in the *Federal Courts Rules* plus costs to be assessed at Column III of Tariff B. It is unclear from the evidence if the amount of \$19,425.00 paid by Mr. Abdelseed includes amounts which would otherwise be properly payable upon the importation of the Bus. The parties shall calculate the correct amount owing to Mr. Abdelseed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Plaintiff shall recover the penalties paid resulting from the seizure of the Bus in the amount of \$19,425.00 together with accrued interest thereon.
2. If the amount of \$19,425.00 includes an amount properly payable on the importation of the Bus the parties shall calculate the correct amount owing to Mr. Abdelseed.
3. The Plaintiff is entitled to his costs to be assessed at Column III of Tariff B.
4. If there are offers to settle which may impact the costs award the parties may write to the Court concerning the issue of costs.

“Kevin R. Aalto”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-883-08

STYLE OF CAUSE: ELBERT ABDELSEED
v. CANADA BORDER SERVICES AGENCY

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 2 – 3, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT** AALTO P.

DATED: May 30, 2013

APPEARANCES:

Mr. Steven Bookman FOR THE PLAINTIFF
Mr. Chris Stankiewicz
Ms. Gillian Bookman

Mr. Christopher Parke FOR THE DEFENDANT

SOLICITORS OF RECORD:

Bookman Law Professional Corporation FOR THE PLAINTIFF
Barristers

William F. Pentney FOR THE DEFENDANT
Deputy Attorney General of Canada