

Federal Court



Cour fédérale

Date: 20140320

Docket: T-1476-12

Citation: 2014 FC 270

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 20, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ALAIN THÉRIAULT

Plaintiff

and

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

Overview

[1] The plaintiff, Alain Thériault, appeals a decision by a delegate of the Minister of Public Safety and Emergency Preparedness (the Minister) finding that he had committed the offence under section 12(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 (the *Act*), for failing to report the amount of CAN\$16,210.50 in his possession when about to board a flight to the Dominican Republic.

[2] The plaintiff argues that part of that amount belonged to his two travelling companions, his son and a friend of his son, that he reported the approximate amount in his possession when he was intercepted and that he believed in good faith to have already passed through customs at that point. He adds that, in any event, since he was still not on board the conveyance when he was intercepted, he was not a person who must report within the meaning of section 12(3)(a) of the *Act*.

[3] For the reasons set out herein, I am of the view that the plaintiff's action should be dismissed.

Factual Background

[4] Since section 30 of the *Act* provides that a decision of the Minister shall be appealed by way of an action, the parties submitted evidence to the Court. The plaintiff, his son James Thériault and the son's friend, André Bruneau, testified upon request. The defendant called only one witness, Jesse Au, the Border Services Officer who intercepted the plaintiff.

[5] The evidence shows that on March 10, 2011, the plaintiff, James Thériault and André Bruneau went to the Pierre Elliott Trudeau Airport with the intention to travel to the Dominican Republic. At the time, they allegedly had in their possession the amounts of CAN\$8,000, CAN\$4,000 and CAN\$4,000, respectively. They proceeded to check their baggage and only the plaintiff kept a carry-on suitcase, a bag that had his documents. They then proceeded to go to security where they all went through the full-body X-ray scanner. They took their money out of their pockets and held it in their hands when assuming their position in the scanner.

[6] They finally headed to the boarding gate to wait for their flight to leave. The plaintiff therefore put his money back in his bag and his two companions asked him to put their money and other personal effects in his bag as well. While Mr. Bruneau says that he gave his passport to the plaintiff when he gave him his money, the plaintiff and his son rather contend that they did so immediately after they went through the airline counter.

[7] The plaintiff and his travelling companions state that while in the gateway leading to the plane, Mr. Bruneau was intercepted by the Border Services Officer who asked to see his passport. Since the passport was in the plaintiff's bag, he had to open it to give it to him and that is when he was asked whether he was carrying cash. He allegedly replied that he was did in fact have cash on him and that he was also carrying his travelling companions' cash, which exceeded CAN\$10,000.

[8] As for Mr. Au, he testified that he is part of the Canada Border Services Agency's Flexible Response Teams and that he is responsible, *inter alia*, for currency export controls. On February 10, 2011, he was positioned where the corridor meets the gateway leading to a flight for Santo Domingo, Dominican Republic, for a routine check with two co-workers. He explains that this destination is considered at risk of exporting currency as it is a transit for drugs. He explains that he intercepted the plaintiff, believing that he was travelling alone. In his experience, persons who export currency usually travel alone. He then learned that the plaintiff was not travelling alone and asked the three men whether they were carrying cash. The plaintiff said US\$5,000 and the other two said US\$4,000 each. He therefore decided to perform a currency check and asked the three individuals to follow him to the mezzanine, which was upstairs. On the mezzanine floor, he asked

the plaintiff to withdraw the currency from his bag. The plaintiff first withdrew 13 bundles of \$20 bills (\$1,000 per bundle) in United States currency and CAN\$1,290 from his wallet. A subsequent search revealed another bundle of \$20 bills and a bundle of \$100 bills worth US\$1,000 each.

[9] After performing the checks and since there was no reason to believe that the money was proceeds of crime or that it was meant to be used for terrorist activities, Mr. Au gave the money back to the plaintiff. However, because the plaintiff was in possession of over CAD\$10,000, which he failed to report, Mr. Au decided to execute a level one seizure: seizure by which he imposed a penalty of CAN\$250, the smallest penalty provided by law. The relevant documentation was completed and the plaintiff and his travelling companions were able to board their flight.

[10] Under section 25 of the *Act*, the plaintiff requested a decision of the Minister with respect to the seizure. Said request was denied primarily because since the currency was in the plaintiff's possession at the time the check was performed, it should have been reported.

Issue

[11] The only issue in this appeal is the one before the Minister, namely:

- (i) Whether the plaintiff committed the offence provided for in section 12 of the *Act*.

[12] The plaintiff cannot, on an appeal under section 30 of the *Act*, contest a decision by the Minister to order the forfeiture of the penalty imposed on the plaintiff for his contravention of

section 12(1) of the *Act* (*Dokaj v Canada (Minister of National Revenue)*, 2005 FC 1437 (*Dokaj*)).

[13] Since this is a trial *de novo* before the Court, I am not to review the record that was before the Minister when the decision was made, but rather to assess the evidence that is before me and determine whether it shows that the plaintiff failed to report cross-border currency (*Zeid v Canada (Minister of Public Safety and Emergency Preparedness)* 2008 FC 539).

Analysis

[14] As set out in section 3, the object of the *Act* is essentially to detect and deter money laundering and the financing of terrorist activities and to assist in fulfilling Canada's international commitments to participate in the fight against transnational crime. To this end, it requires, *inter alia*, the reporting of cross-border movements of currency.

[15] This reporting requirement is provided for in section 12 of the *Act*, the relevant portions of which read as follows:

12. (1) Every person or entity referred to in subsection (3) shall report to an officer, in accordance with the regulations, the importation or exportation of currency or monetary instruments of a value equal to or greater than the prescribed amount.

...
(3) Currency or monetary instruments shall be reported under subsection (1)

12. (1) Les personnes ou entités visées au paragraphe (3) sont tenues de déclarer à l'agent, conformément aux règlements, l'importation ou l'exportation des espèces ou effets d'une valeur égale ou supérieure au montant réglementaire.

[...]
(3) Le déclarant est, selon le cas:

(a) in the case of currency or monetary instruments in the actual possession of a person arriving in or departing from Canada, or that form part of their baggage if they and their 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 les espèces ou effets se trouvant à bord du moyen de transport par lequel elle arrive au Canada ou quitte le pays ou la personne qui, dans les circonstances réglementaires, est responsable du moyen de transport;

...

[...]

(4) If a report is made in respect of currency or monetary instruments, the person arriving in or departing from Canada with the currency or monetary instruments shall

(4) Une fois la déclaration faite, la personne qui entre au Canada ou quitte le pays avec les espèces ou effets doit :

(a) answer truthfully any questions that the officer asks with respect to the information required to be contained in the report; and

a) répondre véridiquement aux questions que lui pose l'agent à l'égard des renseignements à déclarer en application du paragraphe (1);

b) on request of an officer, present the currency or monetary instruments that they are carrying or transporting, (unload any conveyance or part of a conveyance or baggage and open or unpack any package or container that the officer wishes to examine.

b) à la demande de l'agent, lui présenter les espèces ou effets qu'elle transporte, décharger les moyens de transport et en ouvrir les parties et ouvrir ou défaire les colis et autres contenants que l'agent veut examiner.

(5) Officers shall send the reports they receive under subsection (1) to the Centre.

(5) L'agent fait parvenir au Centre les déclarations recueillies en application du paragraphe (1).

[16] The prescribed amount referred to in subsection 12(1) of the *Act* is set at CAN\$10,000 pursuant to section 2 of the *Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412 (*Regulations*).

[17] It is section 18 of the *Act* which sets out the powers of the Border Services officer who intercepts a traveller in possession of currency in excess of CAN\$10,000. If there are reasonable grounds to believe that section 12 was contravened, the officer may seize the currency. However, if after performing a check there are no reasonable grounds to believe that it is proceeds of crime, he will return the currency upon payment of the prescribed penalty which varies between CAN\$250 and CAN\$5,000 (section 18 of the *Regulations*).

[18] Aside from the fact that he claims that a portion of the amount seized in his possession did not belong to him, which I will deal with later, the plaintiff adopts a somewhat surprising stance before the Court. He argues that he believed in good faith to have passed through Canadian customs when he and his companions went through the full-body scanner. Indeed, he confused customs and security. At that point in time, he did not have over CAN\$10,000 in his possession, and had no obligation to report. In the same breath, he claims that when he was intercepted, he was not on board a conveyance and, as such, he did not meet the definition of a person who must report under section 12(3) of the *Act*.

[19] The plaintiff also attempts to make certain distinctions that the *Act* does not make. When leaving Canada, passengers are not required to automatically go through customs, as they are required to do upon their arrival. They are, however, required to report any exportation of currency

of a value exceeding CAN\$10,000. As Mr. Au explains, passengers must locate the Canada Border Services Agency counter and go there on their own initiative to fill out a report (see also section 11 of the *Regulations*). Moreover, the evidence is clear and unequivocal with respect to the fact that when he was intercepted, the plaintiff was leaving the terminal and entering the plane. He also intended to carry or transport the full amount to the destination. The plaintiff's argument, with respect to when he was intercepted, is therefore of no assistance to him.

[20] Overall, the testimonies of the plaintiff and his travelling companions contained contradictions and raised some questions. First, the plaintiff explained that the purpose of the trip was to get closer to his son, who, at the time, was an 18 year old who had just finished his CEGEP studies. Mr. Bruneau, who was depressed at the time, decided to accompany them to take a vacation. As for Mr. Bruneau, he explained that he goes to the Dominican Republic to help the plaintiff perform construction work in the hotel he owns. As for the reason why they needed so much money for a trip for which the flight was clearly paid for and accommodation was assured, the plaintiff stated that the money was to be used for accommodation, food and potential medical emergencies, whereas James Thériault and André Bruneau explained that they intended to visit the casino located near the plaintiff's hotel. Not to mention the fact that the testimonies of James Thériault and André Bruneau were rather vague and hesitant. It seems odd that an 18 year old who just finished his CEGEP studies would have US\$4,000 in cash for personal expenses while on a one-week trip with his father. This, combined with the fact that all the bundles of bills found in the plaintiff's bag were identical and kept in the same manner held by two elastic bands, could cast doubt on their version of the facts.

[21] In any event, subsection 12(3) of the *Act* clearly states that the person who must report is the person who has in his or her actual possession currency or monetary instruments when departing from Canada. The plaintiff had in his actual possession money when departing from Canada and intended to retain it in his possession until he got to the destination. The use of the expression “actual possession” in subsection 12(3) of the *Act* does not make it possible to accept the plaintiff’s argument based on article 921 of the *Civil Code of Québec* that possession, for the purposes of subsection 12(1) of the *Act*, may be the exercise in fact, by another person having detention of the property, of a real right, with the intention of acting as the holder of that right.

[22] To accept the position of the plaintiff would be to say the least difficult for the position of the Border Services officers called upon to apply the *Act*. By definition, evidence of ownership of cash is difficult, if not impossible, to establish. That is why a strict application of the *Act* makes it possible to take into account underlying policy considerations and alone is likely to ensure that its objectives are met.

Conclusion

[23] For all these reasons, the plaintiff’s appeal will be dismissed with costs.

JUDGMENT

THE COURT ORDERS that:

1. The appeal of plaintiff Alain Thériault is dismissed;
2. Costs are in favour of the defendant.

“Jocelyne Gagné”

Judge

Certified true translation
Daniela Guglietta, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1476-12

STYLE OF CAUSE: ALAIN THÉRIAULT v MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: FEBRUARY 25, 2014

**REASONS FOR JUDGMENT
AND JUDGMENT BY:**

MADAM JUSTICE GAGNÉ

DATED: MARCH 20, 2014

APPEARANCES:

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