

Federal Court



Cour fédérale

Date: 20140613

**Docket: T-158-12
T-159-12**

Citation: 2014 FC 568

Ottawa, Ontario, June 13, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

CHRISTOPHER MYRON WARD

Plaintiff

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Defendant

JUDGMENT AND REASONS

[1] These proceedings constitute two appeals by way of simplified actions, pursuant to subsection 135(1) of the *Customs Act*, RSC, 1985, c 1 (2nd Supp) [the Act], and rule 292 to 299 of the *Federal Court Rules*, SOR/98-106 [the Rules].

[2] The first, court file number T-158-12, challenges a decision dated October 20, 2011, by Jonathan Ledoux-Cloutier, a Senior Program Advisor, Appeals Division, Canadian Border Services Agency [the Minister].

[3] The second, court file number T-159-12, also challenges a decision by the Minister, dated October 19, 2011.

I. Facts

A. *T-158-12*

[4] The parties agree that on April 23, 2010, the Plaintiff re-entered Canada in Sydney, British Columbia, at the Washington State Ferries Terminal.

[5] According to the affidavit of Border Services Officer Roger Van Kempen Seket, the Plaintiff declared \$4,000 USD in used bicycle parts as gifts from his aunt, who lives in Washington State. Mr. Van Kempen Seket conducted a secondary examination, and the Plaintiff again confirmed that the goods were valued at \$4,000 and were gifts from his aunt. Mr. Van Kempen Seket contacted the Plaintiff's aunt via telephone. She stated that the Plaintiff purchased the goods with his own money through eBay. She stated that they were not gifts to the Plaintiff, but she did allow him to ship them to her address.

[6] When confronted with this information by Mr. Van Kempen Seket, the Plaintiff admitted that his initial declaration of goods was false. The Plaintiff agreed to log into his eBay account

and cross reference his purchase history with the goods in his possession. This list revealed a number of undeclared goods, including additional bicycle parts, shoes and a Rolex watch which he had concealed on his person. The value of the undeclared goods totalled \$19,804.74. The undeclared goods were seized as forfeit and upon payment of \$8,655.44 they were returned to the Plaintiff.

[7] The Plaintiff's affidavit describes an essentially similar sequence of events as does the affidavit of Mr. Van Kempen Seket. However, the Plaintiff disputes certain aspects and characterizes them differently:

4. I never told my aunt that I was using PayPal to pay for the items I bought on eBay...

6. I have been diagnosed with post chemotherapy cognitive impairment, which is a permanent disability. Because of this acquired disability I have difficulty with planning, organization, memory and executive function. The task of returning to Canada with such a large number of goods was something I had not planned for, I was not organized and I was unprepared. I didn't know exactly what I had packed in the boxes and I didn't have any idea of the total value of the goods. I have a lot of trouble remembering where I put things so when I opened the package that the Rolex watch was in, I put it on my arm so I wouldn't forget where it was.

8. I think I asked him (Mr. Van Kempen Seket) for the forms I needed and he replied in a manner that seemed to be demeaning that he didn't know what forms I was talking about, or words to that effect. I remember feeling frustrated and annoyed by his demeanour which I perceived to be arrogant and disrespectful. Without thinking I impulsively stated that the goods were gifts, I didn't consider the consequences of saying that. It was a result of my frustration and being unprepared.

9. Van Kempen Seket asked me what I thought the value of the goods was; I think I said I thought it might be around four thousand, I really didn't have any idea what the total value was and I didn't state that it was the value of the goods because at the time I didn't know what the value was.

12. I stated that I had purchased all of the items on the eBay website. Van Kempen Seket turned on the computer and then after a minute or so he told me to type my eBay password into the computer. He spent several minutes looking at my eBay account then he gave me a sheet of paper, I thought it was from the recycling, it had already been used on the other side. He instructed me to make a list of the items and the price to the nearest dollar. I could not see the computer screen and Van Kempen Seket did not position the monitor for me to look at the information on my eBay account.

21. ...the statement he (Mr. Van Kempen Seket) made about the watch being pushed up my arm was also false.

22. Van Kempen Seket stated that I continued to make false statements and that is also untrue.

[8] On April 26, 2010, the Plaintiff made a written request for a Minister's decision pursuant to subsection 129(1) of the Act. In a letter dated May 19, 2010, the CBSA Recourse Directorate informed the Plaintiff that his request was accepted and his complaint was being considered.

[9] By letter dated October 20, 2011, the Minister found that the actions of the Plaintiff constituted a contravention of the Act under section 131 and that \$7,051.12 of the amount paid by the Plaintiff for the return of his goods was to remain held as forfeit pursuant to section 133. The Minister found that the \$4,000 initially declared by the Plaintiff was not considered in assessing the forfeit amount of \$8,655.44 against the Plaintiff. Accordingly, the Minister ordered the remittance of \$1,604.32 to the Plaintiff pursuant to section 132 of the Act. The Minister also noted in his decision:

It should be noted that the corrective nature of the Customs Act does not allow for cancellation or mitigation of an enforcement action issued based on the effort to correct the situation, miscommunication, lack of intent, or assurances that the incident will not occur again.

[10] The Plaintiff launched this action on January 16, 2012. In his pleadings he claims that the length of time that elapsed from the date on which he requested the Minister's decision pursuant to subsection 129(1) and when he received the Minister's decision constituted inordinate delay, prejudiced the Plaintiff, was a breach of the duty of procedural fairness, and that the Minister's decision was unreasonable in finding that the Plaintiff contravened the Act.

[11] On May 2, 2013, the Defendant brought its motion to strike the Plaintiff's statement of claim in its entirety. At a pre-trial conference on May 13, 2013, the motion was adjourned to the first day of trial.

B. *T-159-12*

[12] The parties agree that on May 6, 2010, the Plaintiff and his parents returned to Canada from the United States at the Pacific Highway port of entry in Surrey, British Columbia.

[13] According to the affidavit of Border Services Officer Michelle Stanworth, upon re-entry to Canada the Plaintiff declared that he was bringing goods valued at \$300 into Canada. However, according to the affidavit of Border Services Officer Anuraj Sangha, on a secondary examination it was determined that he was in fact bringing goods valued at \$7,819.62. A Brietling watch and various bicycle parts were seized as forfeit because they had not been declared. The Plaintiff subsequently paid \$5,128.48 for the return of the forfeited goods.

[14] In his affidavit, the Plaintiff characterizes his re-entry on May 6, 2010, as follows:

2. I went inside with my parents and presented myself at the counter with my documents. I spoke to BSO Sangha who asked me if I was bringing any goods with me. As I reported each item, BSO Sangha kept asking if I had anything else until I had declared all of the goods, including the Breitling watch. BSO Sangha said he wanted to make sure I had reported everything to save me money;
3. After declaring all of the goods I was subjected to a pocket search by BSO Sangha. The pocket search, which was witnessed by my parents, did not reveal any undeclared goods;
4. Prior to any search or seizure, I had declared all the goods I was importing;
5. After the pocket search, BSO Sangha said that the goods were seized because I hadn't declared a ruby pendant that was described in a receipt I had among my documents. That was the reason he gave for the seizure, he did not find any undeclared goods on my person or in the vehicle.

[15] The Plaintiff also states that he was not alert when he re-entered Canada, due to the effects of a morphine prescription.

[16] On May 18, 2010, the Plaintiff made a written request for a Minister's decision pursuant to section 129(1) of the Act. In a letter dated June 8, 2010, the CBSA Recourse Directorate informed the Plaintiff that his request was accepted and his complaint was being considered.

[17] By letter dated October 19, 2011, the Minister found that the actions of the Plaintiff constituted a contravention of the Act under section 131 and that the \$5128.48 was to be held as forfeit pursuant to section 133. The same rationale was applied in this decision as was applied in T-158-12.

[18] The Plaintiff launched this action on January 16, 2012. In his pleadings he claims that the length of time that elapsed from the date on which he requested the Minister's decision pursuant to subsection 129(1) and when he received the Minister's decision constituted inordinate delay, was a breach of the duty of procedural fairness, and that the decision was unreasonable in finding that the Plaintiff contravened the Act.

[19] On May 2, 2013, the Defendant brought its motion to strike paragraphs 1(b), 1(c), 9, 10, 17 and 19 to 22 of the Plaintiff's statement of claim. At a pre-trial conference on May 13, 2013, the motion was adjourned to the first day of trial.

II. Issues

[20] There are two categories of issues in this proceeding, (i) those brought by way of the Defendant's motions to strike the Plaintiff's claims, (ii) those in respect of the simplified trial.

[21] The issues raised by the Defendant's motions to strike are as follows:

A. *T-158-12*

[22] Should the Plaintiff's Statement of Claim be struck and his action dismissed accordingly?

[23] The Defendant argues that the Plaintiff's Statement of Claim should be struck pursuant to Rule 221(1)(a) of the Rules for failing to reveal a cause of action and pleading a cause of action over which the Court has no jurisdiction.

[24] The Defendant notes that section 135 of the Act provides for a statutory appeal of a decision under section 131. It does not provide an appeal mechanism for decisions under section 133, which relate to forfeiture amounts. Recourse for such decisions must be made via judicial review (*ACL Canada Inc v Canada (Minister of National Revenue)*, [1993] FCJ No 1048 at para 53 [*ACL Canada*]; *Time Data Recorder International Ltd v Canada (Minister of National Revenue)*, [1993] FCJ No 768 at para 22 [*Time Data Recorder*]). I agree.

[25] As such, the Defendant argues that portions of the claim relating to forfeiture ought to be struck.

[26] The Defendant also seeks to strike the remainder of the claim relating to section 131 of the Act, on the basis that the facts alleged, even if proven, would not reveal a cause of action.

[27] The Defendant notes that the Plaintiff agrees that he told Mr. Van Kempen Seket that the goods he brought into Canada were gifts. That statement, by the Defendant's own admission, was not true. Only after the Plaintiff was challenged was he subsequently honest about his declaration. Strict liability attaches to the obligations under sections 12 and 13 of the Act to make a truthful initial customs declaration (*He v Canada*, [2000] FCJ No 93 at paras 8-10; *House of Giftwares Ltd v Canada (Minister of National Revenue)*, [1998] FCJ No 1236 at para 9). As such, there is no basis for the Plaintiff's claim that the decision was incorrect.

[28] Even on secondary examination to verify Mr. Ward's declaration, Mr. Ward made false statements about the value of the goods in question and about the goods being gifts from his aunt to others. His aunt confirmed these allegations were untrue.

[29] Likewise, there are no material facts pleaded that would support the assertion that the delay in the Minister rendering a decision prejudiced the Plaintiff or constituted a breach of natural justice. The failure of the Plaintiff to provide such facts shows that there is no reasonable cause of action and his claim must be dismissed (*Meigs v Her Majesty the Queen*, 2013 FC 389 at para 7 [*Meigs*]; *Prue v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FCA 108).

[30] Finally, the Plaintiff argues that if his claim is deemed to be deficient, he should be allowed to amend his claim pursuant to Rule 75(1) and (2). He does not specify how his claim would be amended. Further, even if it was amended, it would not change the fact that Mr. Ward has no cause of action based on the evidence before me.

[31] The Plaintiff's claim is struck without leave to amend.

B. *T-159-12*

[32] Should paragraphs 1(b), 1(c), 9, 10, 17 and 19 to 22 be struck for failing to disclose a reasonable cause of action?

[33] The Defendant argues that paragraphs 1(b), 1(c), 9, 10, 17 and 19 to 22 of the Plaintiff's Statement of Claim should be struck pursuant to Rule 221(1)(a) of the Rules as failing to reveal a cause of action and pleading a cause of action over which the Court has no jurisdiction.

[34] As above with respect to T-158-12, the Defendant submits that section 135 of the Act provides for a statutory appeal of a decision under section 131 (*ACL Canada; Time Data Recorder*, above), not section 133, which is properly challenged by way of judicial review.

[35] As such, the Defendant seeks to strike paragraphs 1(b), (c), 9 and 10 of the Plaintiff's Statement of Claim, which concern the decision of the Minister pursuant to section 133 with respect to the \$5,128.48 in forfeit.

[36] The Defendant also seeks to strike paragraphs 17 and 19 to 22 regarding the alleged delay in issuing the Minister's decision, on the basis that they reveal no reasonable cause of action. Under Rules 174 and 181, the Plaintiff is required to plead material facts to support his claims (*Meigs* at para 7). However, there is no factual basis in the pleadings which demonstrate that the alleged delay was prejudicial, or constituted a breach of the rules of procedural fairness.

[37] The Plaintiff's argument with respect to this motion is identical to that of T-158-12, above.

[38] As such, I strike paragraphs 1(b), 1(c), 9, 10, 17 and 19 to 22, without leave to amend.

III. Trial issues

[39] The issues to be determined at trial, as stated by Prothonotary Lafrenière in the minutes of a pre-trial conference held on May 13, 2013, and November 5, 2013, are:

1. Whether the Defendant was correct to determine that the Plaintiff had contravened section 12(1) of the Customs Act?
2. Whether the time it took to complete the ministerial review and issue the decision constitutes inordinate delay, and therefore a breach of procedural fairness?
3. Whether this Court has jurisdiction in this proceeding to grant all the remedies sought in the prayer for relief.

IV. Analysis

A. *Evidence in respect of simplified trials*

(1) T-158-12

(a) *Byrl Ward Affidavit*

[40] This affidavit was filed with respect to T-159-12, but appears to relate to the events in T-158-12.

[41] Byrl Ward is the Plaintiff's mother. She states that in early 2010 the Plaintiff asked her to contact her sister, Marilynn Leckenby, to see if the Plaintiff could use Ms. Leckenby's United

States address to receive items he was purchasing on eBay, with the understanding that Ms. Ward would collect the goods for the Plaintiff in May, 2010. Ms. Leckenby later asked the Plaintiff to remove the items sooner than May, 2010.

[42] Ms. Ward states she has no other information concerning the events of April 23, 2010.

(b) *Christopher Ward Affidavit*

[43] The Plaintiff is a resident of Victoria, British Columbia.

[44] The Plaintiff states that in February and March, 2010, he purchased bicycle parts, a Rolex watch, shoes and some sunglasses on eBay. Due to shipping restrictions, he shipped these items to his aunt, Marilyn Leckenby, in Mt. Vernon, Washington, United States. He states that she did not have knowledge that he was using her address.

[45] The Plaintiff travelled to his aunt's house on April 22, 2010. His aunt asked him to remove the goods from her residence. As he suffers from post-chemotherapy cognitive impairment, which is a disability which effects planning, organization, memory and executive function, he put the Rolex watch on his wrist so he would not forget it.

[46] On April 23, 2010, the Plaintiff arrived in Sydney, British Columbia with his goods. Mr. Van Kempen Seket asked for his "paperwork" in a tone which the Plaintiff perceived as condescending. The Plaintiff took offence and became frustrated and annoyed with Mr. Van Kempen Seket's demeanour, and impulsively stated that his goods were gifts.

[47] Mr. Van Kempen Seket asked for the value of the goods but the Plaintiff did not know, stating it was around four thousand dollars. Mr. Van Kempen Seket stated that he needed to know the value and asked if there was someone who might have that information. The Plaintiff gave Mr. Van Kempen Seket Ms. Leckenby's phone number. Ms. Leckenby confirmed via telephone that the goods were not gifts.

[48] The Plaintiff then admitted to Mr. Van Kempen Seket that he had purchased the items on eBay. The Plaintiff alleges that Mr. Van Kempen Seket stated he had "one chance to clear things up" and told him to log on to his eBay account and make a list of the items and their value. The Plaintiff complied.

[49] Mr. Van Kempen Seket cross-referenced the list with the goods possessed by the Plaintiff. There were two items outstanding. The Plaintiff's property was subsequently seized.

[50] The Plaintiff alleges that Mr. Van Kempen Seket makes false statements in his Narrative Report.

(c) *Roger Van Kempen Seket Affidavit*

[51] Mr. Van Kempen Seket is a Border Services Officer in Sydney, British Columbia. He has been employed as an Officer since 2002. He was the Officer who interacted with the Plaintiff on April 23, 2010. He states that he seized the goods at issue because the Plaintiff made untrue statements about and failed to accurately report them.

[52] On April 23, 2010, the Plaintiff was given a primary examination by Mr. Van Kempen Seket. Mr. Van Kempen Seket noticed the Plaintiff had a large number of boxes and cartons on a dolly. Mr. Van Kempen Seket states that the Plaintiff initially declared the goods to have no value, as they were gifts from his aunt to other family members in Canada. He stated they contained used bicycle parts only. Upon further questioning, he stated that the goods were valued at \$4,000. He did not ask the Plaintiff for any written declaration forms, as at the Sydney re-entry point, Officers rely on verbal declarations.

[53] Mr. Van Kempen Seket then selected the Plaintiff for a secondary examination. He conducted the secondary examination, as no other Officer was available. During the secondary examination, the Plaintiff stated that his goods included bicycle parts, shoes and a watch. He repeated that the goods were gifts to others and had purchased nothing for himself. Mr. Van Kempen Seket stated that he would need to ascertain the value of the goods. The Plaintiff provided Mr. Van Kempen Seket with the telephone number of Ms. Leckenby.

[54] Mr. Van Kempen Seket spoke to Ms. Leckenby. She stated that the Plaintiff is her nephew and that she lets him ship goods that he purchases on eBay to her house, and that she did not give the items to the Plaintiff as a gift for him or anyone else.

[55] Mr. Van Kempen Seket informed the Plaintiff that Ms. Leckenby had provided information that was contrary to his declaration regarding the goods. The Plaintiff admitted to making false statements about the goods, that he was trying to avoid paying duties and taxes, that all the goods were intended for his use and that he had purchased them on eBay.

[56] The Plaintiff prepared a list of the goods with their corresponding values and Mr. Van Kempen Seket cross-referenced this list with the goods belonging to the Plaintiff. Mr. Van Kempen Seket added three items. The total value of this list was over \$19,000. He seized the goods because they had not been properly reported and because the Plaintiff had made false statements regarding the goods. The terms of release were set at \$8,655.44. The Plaintiff paid this amount and the goods were returned to him.

(2) T-159-12

(a) *Byrl Ward Affidavit*

[57] This affidavit was filed with respect to T-158-12, but appears to relate to the events in T-159-12.

[58] Byrl Ward is the Plaintiff's mother and was with the Plaintiff when he re-entered Canada at the Pacific Highway port of entry in Surrey, British Columbia on May 6, 2010.

[59] She states that she does not remember particulars of that day, except that there was a lengthy wait and the delay was stressful.

(b) *Christopher Ward Affidavit*

[60] The Plaintiff states that on May 6, 2010, he re-entered Canada from Washington State as a passenger in his parent's vehicle. At the time he was suffering from a viral infection and had been prescribed morphine for the pain. He and his parents were referred to a secondary

examination and he was asked by Border Services Officer Raj Sangha if he had goods to declare. The Plaintiff states that as he was reporting each item Mr. Sangha continually asked him if he had anything else to declare. This was done until he declared all of the goods, including a Brietling watch.

[61] The Plaintiff states that he declared all of the goods he was importing prior to the pocket search, and that after the pocket search, Mr. Sangha said that the goods were being seized because the Plaintiff had not declared a ruby pendent that was described in a receipt he was carrying.

(c) *Michelle Stanworth Affidavit*

[62] Ms. Stanworth is a Border Services Officer in Surrey, British Columbia. She has worked as an Officer since 2007. She was one of the Officers who interacted with the Plaintiff on May 6, 2010.

[63] Ms. Stanworth conducted the primary examination of the Ward Family on May 6, 2010. She states that Ms. Ward informed her that the total value of goods being brought into Canada was approximately \$300.

[64] Ms. Stanworth inputted the identification information provided by Ms. Ward and discovered that the Plaintiff had been the subject of a previous customs enforcement action or seizure. She asked each member of the family individually whether they had anything further to

declare. Each member of the family, including the Plaintiff, answered in the negative. She referred the Ward family to a secondary examination.

(d) *Anuraj Sangha Affidavit*

[65] Mr. Sangha is a Border Services Officer in Surrey, British Columbia. He has been employed as an Officer since 2007. He was one of the Officers who interacted with the Plaintiff on May 6, 2010. He states that he seized the goods at issue because the Plaintiff failed to report them.

[66] On May 6, 2010, the Plaintiff and his parents were given a secondary examination by Mr. Sangha.

[67] The Plaintiff produced a receipt for a Davis Wireless Vantage Vue Weather Station priced at \$300 USD.

[68] Mr. Sangha spoke to Byrl Ward, who informed Mr. Sangha that the Plaintiff had installed rims onto a bicycle frame in Washington State. The Plaintiff was informed of this, and admitted that he was also bringing bicycle rims into Canada which he had not declared. At that point, Mr. Sangha conducted a pocket search. This produced an owners manual for a Breitling watch. The Plaintiff admitted he was wearing the watch, which he had purchased from eBay and had shipped to his aunt's house. He admitted he had also not declared this watch.

[69] Mr. Sangha asked the Plaintiff if he possessed further undeclared items. The Plaintiff admitted that he was carrying software related to the weather station and a box containing additional bicycle parts.

[70] Mr. Sangha asked Mr. Ward to log into his eBay account and show the values of the Breitling watch and bicycle parts. Their total value was \$7,617. Mr. Sangha seized those items as they were undeclared. Mr. Sangha did not seize the Weather Station and its related software, as their value fell within the terms of a personal exemption which was in effect at that time.

[71] The terms of the release was \$5,128.46, and the applicable sales tax was \$547.37. Ms. Ward paid these amounts and the goods were returned to the Plaintiff.

[72] No cross-examinations were conducted during the course of the hearings before me. Mr. Ward started to cross-examine Mr. Van Kempen Seket, but indicated he could not focus and chose not to continue with his cross-examination and advised that he would not cross-examine the Defendant's other witnesses. He stated that he relied upon his affidavit evidence to support his claims.

[73] Given that I struck the Plaintiff's claim in T-158-12 in its entirety, I need not deal with the simplified trial evidence in this matter. However, even if I was to do so, I would find that Mr. Ward's action fails. He contravened sections 12 and 13 of the Act and the seizure and forfeiture under sections 110 and 122 and the subsequent decision of the Minister under section 133 was justified.

[74] Given that the Act was violated when the Plaintiff made a false declaration to the officer during the primary examination, the officer was not obliged to consider evidence in respect of the declaration made during secondary examination (*Trites v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 1365, at para 11). But here, Mr. Ward went further and made untrue statements during the secondary examination.

[75] Moreover, reasons for failing to report or the lack of intention to deceive is irrelevant when determining if a seizure is valid (*Kennedy v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 1196, at para 61).

[76] Likewise, given my findings above and having struck paragraphs 1(b), 1(c), 9, 10, 17 and 19 to 22 of action T-159-12, I find that action T-159-12 has no merit and the Plaintiff fails based on the evidence before me. Mr. Ward contravened sections 12 and 13 of the Act, by falsely declaring the value of the goods he brought into Canada, during both the primary and secondary examinations by Ms. Stanworth and Mr. Sangha.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Plaintiff's Statement of Claim in T-158-12 is struck, without leave to amend;
2. Paragraphs 1(b), 1(c), 9, 10, 17 and 19 to 22 of the Statement of Claim in the Plaintiff's action T-159-12 are struck, without leave to amend. The Plaintiff's action in T-159-12 is otherwise dismissed; and
3. Costs to the Defendant, to be assessed.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-158-12

STYLE OF CAUSE: CHRISTOPHER MYRON WARD v THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 9, 2014

JUDGMENT AND REASONS: MANSON J.

DATED: JUNE 13, 2013

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OWN HIS OWN BEHALF

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