

Federal Court



Cour fédérale

Date: 20181121

Docket: T-1975-17

Citation: 2018 FC 1170

Ottawa, Ontario, November 21, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

VINCENT DUTTON

Applicant

and

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

Respondent

JUDGMENT AND REASONS

[1] Vincent Dutton failed to report a boat he brought into Canada from the United States. It was seized, and Mr. Dutton paid duty owing and a penalty to have it released. He applied to the Minister under section 133 of the *Customs Act*, RSC 1985, c 1 (2nd Supp), asking that he use his discretion to waive the penalty. It is the decision of the Minister's delegate refusing to do so that is under review.

[2] The facts prior to the importation of the boat and the events upon its importation are taken from Mr. Dutton's affidavit and his submission to the Minister. They do not appear to be in dispute.

[3] Mr. Dutton decided to purchase and import a boat worth \$117,713.75 from the United States. The Applicant had never imported a boat by water before although he had imported a boat and other vehicles by land in the past. Prior to purchasing the boat, he conducted an internet search to determine the proper procedure. He found a Canada Border Services Agency [CBSA] webpage which identified Foran's Marine in Grimsby, Ontario, on the shore of Lake Ontario [the Marina] as a point of entry approved by the CBSA. The Marina was near Mr. Dutton's home and was where he generally docked his other boat.

[4] Mr. Dutton called the Marina and spoke with "Donato", a representative of the Marina. After explaining his intention to import the boat into Canada, Donato told him that if he docked the boat at the Marina, "he would take care of the rest of the procedures." Mr. Dutton understood this to mean that Donato would provide him with a duty form which he would then bring to CBSA to pay the duty on the boat. Before leaving for the United States, he phoned Donato again to confirm this plan.

[5] Mr. Dutton bought the boat and entered Canada by water on June 12, 2017. There were three passengers on the trip: his wife and two neighbours. He contacted Donato upon entering the Marina to tell him he had arrived. It had been planned that Mr. Dutton's son would pick him and his three passengers up and take them home, and then Mr. Dutton would return to the

Marina, pick up the paperwork and attend at CBSA. All of the purchase documents relating to the boat were left on board for Donato. Prior to leaving, Mr. Dutton informed the Marina that he would return within an hour and one-half, obtain the papers and proceed to pay the duties.

[6] While Mr. Dutton was gone, a CBSA Flexible Response Team [the Team] arrived at the Marina. One of the managers of the Marina told the Team that a boat had recently arrived from the United States. The Team made inquiries and learned that this boat had not been reported.

[7] The Team then called Mr. Dutton and asked when he would be returning to clear up the matter of the boat entering Canada. He told them that he had been planning to return to the Marina and would be there in 45 minutes. He and his wife then came to the Marina where they were questioned. They told the Team about their plan and prior discussions with Donato. The Team advised Mr. Dutton that the Marina was not “a proper authority to issue papers for the boat.” The Team determined that Mr. Dutton had contravened section 12 of the *Customs Act* which provides that all goods imported into Canada are to be reported at the nearest customs office at such time and in such manner as is prescribed. Section 3 of the *Reporting of Imported Goods Regulations*, SOR/86-873, provides that importers are required to report “without delay” after arrival in Canada.

[8] The boat was seized and then released by CBSA the same day on payment of the duty owed of \$15,302.79, and a penalty at Level 1 of \$14,125.65.

[9] The enforcement officer relied on the CBSA Enforcement Manual, Part 5, Chapter 2, *Traveller Seizures and Ascertained Forfeitures*, in selecting the penalty at Level 1. It provides at paragraphs 81 and 84:

81. Level 1 applies to violations of lesser culpability. The degree to which the importer carried out a scheme to contravene the *Customs Act* was not furthered beyond an initial ineffectual attempt. This level might generally be applied to offences of omission, rather than commission. Commission offences require more active involvement by the importer.

...

84. Level 1 is applied when:

- a) goods are not reported to CBSA or goods are reported but inaccurate information is given concerning acquisition, entitlements or description; and
- b) the goods are not concealed; and
- c) a full disclosure of the true facts concerning the goods is made at the time of the discovery.

[10] As provided for in sections 129 and 131 of the *Customs Act*, anyone who has had goods seized may request that the Minister “having regard to the circumstances” determine whether there was a contravention of the Act. If the Minister determines that there was a contravention, then pursuant to paragraph 133(1)(b) of the Act, “the Minister may, subject to such terms and conditions as the Minister may determine ... remit any portion of any money or security taken.”

[11] Mr. Dutton applied to the Minister pursuant to these provisions, asking that the penalty portion of the money paid be remitted because he always intended to pay duty on the boat and his actions leading to the penalty being imposed was based on incorrect information he was

given by the Marina. He submitted that the fine was not “warranted or reasonable under these circumstances.”

[12] The decision of the Minister’s delegate, in relevant part, is as follows:

As previously mentioned, [a]n “Agent” is considered in law to represent the principal, in such a way as to effect the principal’s legal position. However, the principal remains liable for any transactions completed on its behalf by its agents. Therefore, should an importer choose to use the services of an agent and that agent provides incorrect information, the importer remains fully liable, including responsibility for the payment of all duties, taxes, penalties and interest owing. In view of the above, the seizure is maintained in its entirety as it is in keeping with Agency’s guidelines for infractions of this nature. [emphasis added]

[13] The only issue before the Court is the reasonableness of the decision of the Minister’s delegate. For the reasons that follow, I find the decision unreasonable as the decision-maker failed to consider that some of or the entire penalty could be waived.

[14] I agree with counsel for the Respondent that “[u]nder section 133 the Minister is granted significant discretion in determining the amount of money for the return of goods.” I further agree with her that “[s]ubsection 117(1) and section 133 of the Act do not set out any statutory criteria imposing a specific amount of money for the return of seized goods; these sections only set out the maximum amount allowable for the return of seized goods.” However, as was candidly admitted to the Court, on a review of the penalty imposed, the Minister has discretion under the Act to waive all or some of that penalty considering all of the circumstances.

[15] In the case before the Court, it does not appear that the Minister's delegate understood that he or she had such discretion, or, if he or she did understand, then that option was not considered. In maintaining the penalty the decision-maker states only that "it is in keeping with Agency's guidelines for infractions of this nature." However, it is a guideline and it fails to address the basis of Mr. Dutton's appeal of the penalty – namely, that it was unreasonable in his particular circumstances as he always intended to declare the boat and pay the duty, and was under the mistaken belief that the Marina was taking care of the paperwork required for him to do so. It is not clear that his circumstances are captured by the description of Level 1 in the guideline. In any event, even if it is so captured, the Minister has discretion to reduce the Level 1 penalty.

[16] Whether Mr. Dutton's explanation is deserving of a reduction of penalty is a matter for the Minister to decide based on the reasonable use of discretion. It may be that the Minister will decide that notwithstanding his explanation, some penalty up to or at Level 1 is appropriate. In the decision under review, the only basis for maintaining and not reducing the penalty appears to be that Level 1 penalty is in keeping with the guidelines. However, simply stating that something is in keeping with the guidelines does not necessarily entail that the amount of penalty is appropriate in all the circumstances. If that were the case, then paragraph 133(1)(b) of the Act would have no meaning.

[17] For these reasons, the request that the penalty be reduced or waived entirely must be decided again, by a different Minister's delegate, if possible, after giving consideration to all of the circumstances of the case.

[18] If he had been successful, the Respondent did not seek costs. The applicant has represented himself. He was frank in acknowledging that it was his error and not that of the Marina that resulted in the actions of the customs officials. In the exercise of my discretion, no costs will be awarded.

JUDGMENT in T-1975-17

THIS COURT'S JUDGMENT is that the application is allowed, the Applicant's application for a reduction or elimination of the penalty imposed by the customs authority is to be reconsidered by the Minister in accordance with these Reasons, and no costs are ordered.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1975-17

STYLE OF CAUSE: VINCENT DUTTON v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 17, 2018

JUDGMENT AND REASONS: ZINN J.

DATED: NOVEMBER 21, 2018

APPEARANCES:

Vincent Dutton

APPLICANT
ON HIS OWN BEHALF

Sharon McGovern

FOR THE RESPONDENT

SOLICITORS OF RECORD:

- Nil -

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FOR THE RESPONDENT