

Federal Court



Cour fédérale

Date: 20101130

Docket: T-1395-08

Citation: 2010 FC 1208

Ottawa, Ontario, November 30, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

JOHN STARWAY

Plaintiff

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS AND
HER MAJESTY THE QUEEN**

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] John Starway is an irritable, irritating man. To this day he does not appreciate that it was not a good idea, while at the border crossing at South Junction, Manitoba, to tell the customs officer that he was stupid and did not know his job. Mr. Starway is both an American citizen and a permanent resident of Canada. He was driving an automobile with Minnesota licence plates. By the end of the encounter, the automobile was seized on the grounds that he had made an untrue statement with respect to its importation into Canada. Mr. Starway and his wife were driven to their home in

Sprague, Manitoba, by the Royal Canadian Mounted Police. The only issue in this trial is whether Mr. Starway made an “untrue statement” with respect to the automobile. I find that he did not, and so the contrary decision on behalf of the Minister is quashed.

THE FACTS

[2] Mr. and Mrs. Starway, American citizens both, were granted Canadian permanent resident status in 2006. As well, they still maintain premises in Minneapolis. They originally imported a number of vehicles, but not the 2000-Pontiac Grand Prix they were driving that fateful day, 19 June 2007. They began in Sprague and drove across the border to Roseau, Minnesota, to do some grocery shopping. They had brought the car into Canada less than 30 days before. At Emerson, Manitoba, the border crossing they used that time, they were informed that they could keep it in Canada for 30 days. No paper work was issued.

[3] They arrived at the border station at South Junction at about 1 p.m. Mr. Starway was driving. They were met by Customs Officer Ted Bennett. Both Mr. Starway and Officer Bennett agree that the initial exchange was non-confrontational, and that matters only heated up after Mr. Starway was directed to park the car and go into the Customs House. Although they both generally agree as to what happened overall, they disagree as to the precise sequence of events. This case turns on that sequence.

[4] I pause to mention that there were others who witnessed the encounter, at least in part – Mrs. Starway, another customs officer, and at least one RCMP officer. However, I am not prepared to draw any adverse inference from the fact that they were not called to testify at trial (see, for

example, *Abbott Estate v. Toronto Transportation Commission*, [1935] S.C.R. 671 and *Levesque v. Comeau*, [1970] S.C.R. 1010). Leaving aside Mr. Starway's fury at being called a liar, this is a simplified action with \$500 in dispute.

[5] According to Officer Bennett, a seasoned customs officer, the Starways stated that they had crossed over to Roseau for about two hours and had purchased \$30 of groceries. Since the car had Minnesota licence plates, he asked who the owner thereof was. Mr. Starway said that it was their vehicle and that he would be returning it to the United States later that day. Officer Bennett said he would permit them to bring their purchases to their residence in Canada and started to prepare a Canada Customs Report that could be shown to other law enforcement officers should the car be stopped in Canada.

[6] By this time they were inside the Customs House. Mr. Starway protested because he said, in no uncertain terms, he could bring the car to Canada for 30 days because he was an American citizen. At this stage, concerned that Mr. Starway was going to leave the car in Canada, Officer Bennett said he was withdrawing the offer to let him bring the groceries to Sprague, and that the car would have to be immediately returned to the United States. Mrs. Starway was then called in. She said this was unacceptable as she needed the car to go to Winnipeg to catch a flight to Kazakhstan the next day.

[7] It was at this point that Officer Bennett leaped at this apparent contradiction and seized the car for untrue statements. The Starways did not proffer a vehicle registration, but the insurance

certificate identified the insureds as Mrs. Starway and Olga Aidarkhanova, their daughter-in-law who lived in Steinbach, Manitoba.

[8] Officer Bennett concluded that the Starways were going to leave the vehicle with family members in Steinbach. Mr. Starway grabbed the form the officer had been preparing and demanded that he be shown the untrue statement, and demanded that Officer Bennett immediately fill out the narrative portion of the report. He refused.

[9] Officer Bennett fixed the value of the automobile at \$2,000 USD, the price Mrs. Starway said she had paid for it, and set the release amount at 40 percent thereof, i.e. \$858 CAD. The Starways refused to pay and were driven home by the RCMP as Mrs. Starway said she needed to take her blood pressure medicine.

[10] This was a day Officer Bennett will never forget. After he fixed the amount of the penalty, Mrs. Starway said she did not have that money on her and started to undress to prove the point. Various derogatory remarks were made about the Canada Border Services Agency and about Officer Bennett personally. Mrs. Starway offered to pray for him.

[11] Officer Bennett's testimony was consistent with the report he made later that day.

[12] Mr. Starway's evidence was also consistent with a letter of complaint he wrote that day and mailed the following day to the Honourable Stockwell Day, then Minister of Public Safety and Emergency Preparedness. Mr. Starway does not recall the precise exchange at the primary border

crossing but is adamant that matters only heated up after he had been directed to go into the Customs House. His wife remained in the car.

[13] What set Mr. Starway off, as he wrote to Minister Day, and as he repeated at trial, was that he was asked how it came about he had Canadian resident status. As per his letter, he answered: “How can you ask such stupid question? Don’t you know that Canadian law allows to have double citizenship.” English is not Mr. Starway’s mother tongue.

[14] He was then directed to go back to the car. He saw Officer Bennett speaking on the telephone. Officer Bennett called him back and apologized for raising the citizenship point.

[15] Mr. Starway is absolutely certain that it was only while in the Customs House and in the absence of his wife that Officer Bennett stated that the automobile had to be returned to the United States that day. Although he protested that he had been told that he could keep the automobile for 30 days, he reluctantly agreed. It was only afterwards that Mrs. Starway came into the Customs House. Mr. Starway had not had an opportunity to explain that he was obliged to return the automobile to the United States that day, before she blurted out they needed the car as Mr. Starway was going to drive her to the Winnipeg Airport, some 160 km away, the following day, to allow her to attend a funeral in Kazakhstan.

[16] It was at this point that Mr. Starway was accused of making an untrue statement. He demanded to know what that untrue statement was. He was not told. Officer Bennett concurs that he did not tell him what the untrue statement was, because he thought it was obvious.

[17] As between the two versions of events, I prefer Mr. Starway's. They began the day in Canada with the Pontiac and, whether or not that automobile, or another vehicle available at their home in Sprague, was going to be used to drive Mrs. Starway to the airport the following day, Mr. Starway did not have the initial intention of returning the automobile to the United States that day. He could not very well have brought it to Minneapolis. He would have had to leave it in a parking lot in Roseau. He was under the impression, wrongly it turns out, that he was entitled to keep the car in Canada for up to 30 days. However since he was under that impression why would he possibly volunteer to drive the automobile back to Minnesota and to leave it in a parking lot? It was only after Officer Bennett invoked the *Temporary Importation of Conveyances by Residents of Canada Regulations* that he agreed to return the car. That agreement was not made in Mrs. Starway's presence. Indeed, if, as Officer Bennett recalls, Mr. Starway volunteered on arrival at the border, in his wife's presence, to return the car to the United States that day, why would she later vehemently protest?

THE REVIEW PROCESS

[18] In order to obtain the release of the Pontiac, the Starways later paid the penalty of \$858 CAD. Section 13 of the *Customs Act* requires every person who reports goods to truthfully answer any question asked with respect thereto. This led to a seizure pursuant to section 110 of the Act.

[19] Mr. Starway submitted a Request to the Minister for a Decision pursuant to section 127 of the Act with respect to both the determination that there had been a contravention of the Act as well as the penalty imposed.

[20] On behalf of the Minister, it was determined:

After considering all of the circumstances, I have decided, under the provisions of section 131 of the *Customs Act*, that there has been a contravention of the *Customs Act* or Regulations in respect of the goods that were seized.

Under the provisions of section 133 of the *Customs Act*, \$536.06 of the amount received for the return of the seized goods shall be held as forfeit, and the balance of the amount of \$321.95 shall be remitted to the appellant.

[21] Mr. Starway then instituted this action pursuant to section 135 of the Act which reads:

135. (1) A person who requests a decision of the Minister under section 131 may, within ninety days after being notified of the decision, appeal the decision by way of an action in the Federal Court in which that person is the plaintiff and the Minister is the defendant.

(2) The *Federal Courts Act* and the rules made under that Act applicable to ordinary actions apply in respect of actions instituted under subsection (1) except as varied by special rules made in respect of such actions.

135. (1) Toute personne qui a demandé que soit rendue une décision en vertu de l'article 131 peut, dans les quatre-vingt-dix jours suivant la communication de cette décision, en appeler par voie d'action devant la Cour fédérale, à titre de demandeur, le ministre étant le défendeur.

(2) La *Loi sur les Cours fédérales* et les règles prises aux termes de cette loi applicables aux actions ordinaires s'appliquent aux actions intentées en vertu du paragraphe (1), sous réserve des adaptations occasionnées par les règles particulières à ces actions.

[22] In fact, there were two decisions on behalf of the Minister. One was that there was an infraction of the Act. That was decided in virtue of section 131 of the Act. The second decision was under section 133 of the Act, the decision that \$535.06 CAD would be held as forfeit.

[23] This action is limited to whether or not there was an infraction. To appeal the decision with respect to the amount of the penalty, Mr. Starway was required to apply for judicial review, a completely distinct procedure.

[24] The Act is somewhat unusual in that the issue of whether or not an offence was committed shall be determined *de novo* at a trial before this Court. Action must be commenced within 90 days. On the other hand, the reasonableness of the penalty imposed is subject to judicial review which must be taken within 30 days. Thus, if one intends to dispute the amount of the penalty one must apply for judicial review before it has been determined that an infraction was committed in the first place. This anomaly was clearly explained by Mr. Justice MacKay in *ACL Canada Inc. v. Canada (Minister of National Revenue-M.N.R.)* (1993), 68 F.T.R. 180, 107 D.L.R. (4th) 736. The two different forms of recourse are also found in the *Proceeds Of Crime (Money Laundering) And Terrorist Financing Act* and were reviewed in *Dokaj v. Canada (Minister of National Revenue-M.N.R.)*, 2005 FC 1437, [2006] 2 F.C.R. 152, and in *Tourki v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 50, 285 F.T.R. 291, confirmed by the Court of Appeal at 2007 FCA 186, [2008] 1 R.C.F. 331.

[25] Notwithstanding that this is a trial, the defendants submit that in order for the Minister's decision to be set aside, it must be shown that the decision was based upon a finding of fact that was perverse, capricious or not supported by the evidence, or that Officer Bennett did not have reasonable grounds to conclude that the Act had been contravened. Reliance was placed on the

decision of Mr. Justice Mackay in *Mattu v. Canada (Minister of National Revenue-M.N.R.)* (1991), 45 F.T.R. 190, [1991] F.C.J. No. 539 (QL), where he said at pp. 197-198:

Section 135 of the Customs Act does not set out in any detail the requirements or the nature of the appeal that is provided from the decision of the Minister, and those matters were not argued in this appeal. My interpretation of the section is that it provides for trial de novo in the sense that the court is not limited to consideration of evidence that was before the Minister. At the same time, as in the case of appeals from other administrative decisions or decisions of quasi-judicial bodies established by statute this court will not readily vary the decision appealed from unless it is persuaded that the Minister or his agents failed to observe a principle of natural justice or failed to act within his or her statutory discretion, or that the decision is based on an error in law, or is based on a finding of fact that is perverse or capricious or without regard to the evidence before the Minister.

[26] Two years later, however, in *ACL Canada*, referred to above, Mr. Justice Mackay noted that his remarks in *Mattu* were *obiter*.

[27] In accordance with section 135 of the Act, this is an ordinary action. The only special rule imposed is that the issue is limited to whether Mr. Starway made an untrue statement. The amount of the penalty is not in issue. This is a trial, not a paper review of someone else's decision by way of judicial review. The issue is not whether the Minister's decision was reasonable. Parliament enacted a special provision so that a judge at trial, following examination of witnesses and cross-examination in open court, could determine whether or not the *Customs Act* was infringed. I prefer the evidence of Mr. Starway and so conclude that there was no infraction. Furthermore, the record before the Minister's representative was not the same record which was before me. Although some documents were given exhibit numbers for identification purposes only, as I made clear at trial,

statements found in the pre-trial memoranda would not be considered at trial unless introduced by an appropriate witness.

[28] The next issue is the imposition of the penalty, not the amount thereof. The defendants submit that at best I can only declare that there was no infringement of the Act. I cannot order that the money be returned. In *Samson v. Canada (Attorney General)*, 2008 FC 557, [2008] F.C.J. No. 699 (QL), which dealt with the *Customs Act*, and in *Tourki*, above, which dealt with similar provisions under the *Proceeds of Crime (Money Laundering) and Terrorists Financing Act*, I stated that if it were determined that no offence had been committed, the penalty would fall, and so a judicial review of the amount thereof would become moot. Those remarks were *obiter*, but I believe they were correct. Since there was no infraction of the *Customs Act*, it follows that the defendants cannot keep the amount forfeited. Ultimately, there cannot be a forfeiture without an infraction (*Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3).

[29] The sum forfeited of \$536.05 CAD should be returned, with such interest as authorized by law.

[30] Mr. Starway is entitled to his costs. Since he is not a lawyer, they shall be limited to reasonable disbursements. However those disbursements shall not include those arising from the serving and filing of a notice of a constitutional question. Mr. Starway is of the view that his constitutional rights and those of his wife were violated. Even if they were, and ultimately that was not in issue before me, Mr. Starway misunderstood the application of section 57 of the *Federal*

Courts Act. It applies if a statute, or regulation, is alleged to be unconstitutional. No such allegation was made with respect to the *Customs Act* and Regulations thereunder.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The *Customs Act* was not infringed.
2. The decision on behalf of the Minister dated 11 June 2008 is set aside.
3. The sum of \$536.05 declared forfeited as a result of the infraction shall be returned to Mr. Starway, together with such interest as authorized by law.
4. The whole with costs, limited to reasonable disbursements.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1395-08

STYLE OF CAUSE: John Starway v. MPSEP and HMQ

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: November 16, 2010

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

DATED: November 30, 2010

APPEARANCES:

John Starway

FOR THE PLAINTIFF
(ON HIS OWN BEHALF)

John A. Faulhammer

FOR THE DEFENDANTS

SOLICITORS OF RECORD:

N/A

FOR THE PLAINTIFF
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