Federal Court  Cour fédérale

Date: 20110315

Docket: T-761-09

Citation: 2011 FC 310

Ottawa, Ontario, March 15, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

ALAIN SEBAG, JOSEPH YOSSI CASTIEL,
MOCHE CASTIEL, ISAAC CASTIEL,
SIMON CASTIEL, 2756-2487 QUÉBEC INC.,
LOCATION AUTO IMPÉRIAL INC.,
9113-9279 QUÉBEC INC.,
1230588 ONTARIO INC.

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS
THE MINISTER OF NATIONAL REVENUE

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a judicial review of a decision dated July 2, 2009, rendered by Danielle Houde, Agente principale (Agent), Division des services commerciaux, Canada Border Services Agency (CBSA), informing the Applicants' lawyer that the Applicants' drawback files were closed.

I. The Facts

[2] The Applicants are a group of private exporters dealing in the purchase and export of automobiles in the Canadian export industry. They are not responsible for the importation of the vehicles to Canada.

[3] In order to obtain a reimbursement from the CBSA of the custom duties, sales and excise taxes paid by them, the Applicants must obtain a K32A form from the companies who imported the vehicles to Canada.

[4] On January 27, 2009, the CBSA informed the Applicants of their right to file the completed K32A forms. As such, around March 3, 2009, the Applicants sent letters to various automobile companies requesting that they complete these forms. Most companies replied that they had no obligation to submit such forms; only BMW complied with the request and sent the K32A form to the Applicants. It was related to the export of a 2003 Mini Cooper.

II. Decision of the Review Tribunal

[5] The decision was rendered by the Agent on July 2, 2009. According to this decision, the Applicants had to submit the K32A forms, necessary to their drawback reimbursement application, before June 12, 2009. Having not done so, nor forwarded the requested information in the case of the 2003 Mini Cooper, the agent informed the Applicants that their drawback files were closed.

III. Arguments of the Parties

(a) Applicants' position

[6] Section 119 of the *Customs Tariff*, SC 1997, c 36, creates an obligation on exporters to provide a Certificate of Importation (K32A) in order to benefit from the drawback. The Applicants submit that there is no legal means available to the exporter to enforce this obligation on the importing or intermediate entities. They submit that the Court must interpret the terms of the combined drawback legislation using the contextual approach and declare the Applicants' right to the drawback. If not, the Applicants petition the Court to declare the law void for vagueness as it imposes an obligation beyond the control of its beneficiaries.

[7] The Applicants submit that section 9(1) of the *Goods Imported and Exported Refund and Drawback Regulations*, SOR/96-42, does not outline the obligation of the importers and intermediaries towards the exporters. The right of access to drawback is left solely at the discretion and cooperation of the entities not involved in the export process. This provides an advantage to entities that act both as importers and exporters of goods. They submit that a legal analysis would be that the entity that carries the cost of the duty tax upon export would have the right to claim drawbacks to avoid double taxation in the foreign market.

[8] They also submit that there is no obligation of cooperation from the importers or intermediaries. As such, the end-user must carry the cost of double taxation (Canadian duty tax and

the tax of his country). They add that the importers and intermediaries will not cooperate with independent exporters because of the tight regulations of the automobile industry by international automobile manufacturing firms. The exporter is put at a disadvantage, even if the importers cannot benefit from the claim. Hence the legislation is not enforceable by the beneficiaries of the law.

[9] They also argue that the law is applicable in other industries where importers are not in direct competition with the exporters and provide the necessary documents as a professional courtesy.

[10] The Applicants submit that the facts in the present case can be distinguished from those in the case of *9058-3956 Québec Inc v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 4, 2006 FCJ No 45 (QL), appealed at 2006 FCA 363 (leave to appeal to the Supreme Court refused, [2006] CSCR no 503), relied on by the Respondents.

[11] Finally, based on section 15(1) of the *Canadian Charter of Rights and Freedoms*, they argue that legislation must be enacted to ensure that anyone subject to the law may have equal access or ability to benefit from the law. The Applicants submit that they cannot benefit from the law since private exporters are treated differently than entities acting both as importers and exporters of vehicles. The Applicants rely on the Federal Court decision in *Pineview Poultry Products Ltd v Canada*, [1994] 2 FC 475, [1994] FCJ No 78 (QL), in support of this position that the Applicant corporations could entertain a challenge under section 15(1) of the *Charter*.

(b) Respondents' position

[12] The Respondents argue that the appropriate standard of review is that of correctness.

[13] The Respondents discuss the standing of Messrs. Sebag, Castiel, Castiel, Castiel and Castiel and state that since they are not subject to the decision, they do not have the standing to file a judicial review.

[14] With regards to the interpretation of the legislation and the legality of the decision, the Respondents argue that this issue has already been decided by the Federal Court of Appeal in *9058-3956 Québec Inc*, above. Hence, the Applicants' argument with regards to the vagueness of section 119 has already been decided by the Federal Court of Appeal. The Respondents also submit that the Applicants did not raise any arguments explaining how section 119 of the *Customs Tariff*, section 5 of *the Goods Imported and Exported Refund and Drawback Regulations* or the decision infringed section 7 of the *Charter*.

[15] As for the argument related to section 15 of the *Charter*, the Respondents argue that this section offers no protection to corporations. Furthermore, since the individual Applicants have no standing, they cannot claim rights under the *Charter* or as shareholders.

[16] Finally, the Respondents argue that the Court cannot declare that importers or intermediaries must provide documents, as this would be an *ex parte* injunction contrary to the rule of *audi alteram partem* since these intermediaries are not parties in this application and have not been served.

IV. Points in Issue

[17] This case raises the following issues:

A. *Did the Agent err in deciding to close the Applicants' drawback files due to the non-filing of the documents required under section 119 of the Customs Tariff and sections 5 and 9 of the Goods Imported and Exported Refund and Drawback Regulations?*

B. *Is the obligation of sole exporters to obtain such documents contrary to sections 7 and 15(1) of the Charter?*

V. Analysis

A. *Standard of review*

[18] In *9058-3956 Québec Inc*, above, Justice Rouleau of the Federal Court discussed the standard of review in a similar case. At paragraphs 25 to 29, he stated that:

> In light of the pragmatic and functional tests as reiterated in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, it is possible to determine that the standard applicable to the CBSA's decision is that of correctness.
>
> First, the Customs Tariff does not contain a privative clause that could be a basis for with-drawing the CBSA's decision from the scope of judicial review.
>
> Next, the Court's expertise is like that of the CBSA with regard to the legislative interpretation of the provisions of the Customs Tariff and the related Regulations which prove to be relevant to this matter.
>
> With regard to the issue of whether the Customs Tariff is a polycentric statute, Shore J. establishes the following in *A & R Dress Co. Inc. v. Canada (Minister of National Revenue)*, 2005 FC 681, [2005] F.C.J. No. 861 (QL) at paragraph 15:
>
> The Customs Tariff provides for duties imposition and duties relief. Section 109 and following of the Customs Tariff provide for duties relief in respect of obsolete and surplus goods. This is not a polycentric issue, where competing rights are at stake. It is a question of whether these sections entitle an entity to a refund. This factor points to a low deferential standard of review.

> Although this matter involves a drawback application under another provision of the Customs Tariff, this passage is nonetheless applicable to the facts of this case.

[19] Hence, the applicable standard of review is that of correctness.

B. ***The obligation of the sole exporters to obtain drawback documents***

[20] Section 119 of the *Customs Tariff* reads as follows:

An application under section 110 or 113 must be accompanied by a waiver, in the prescribed form, from every other person eligible to claim a drawback, refund or remission of the duties in respect of which the application is made, waiving that person's right to apply for the drawback, refund or remission.	Les demandes présentées en vertu des articles 110 ou 113 comportent, en la forme prescrite par le ministre de la Sécurité publique et de la Protection civile, la renonciation par laquelle toute autre personne admissible au drawback, au remboursement ou à la remise des droits y renonce.
[My emphasis.]	[Je souligne.]

[21] Sections 5 and 9 of the *Goods Imported and Exported Refund and Drawback Regulations* read as follows:

5. An application for a drawback under this Part may be made where	5. Une demande de drawback aux termes de la présente partie peut être présentée lorsque les conditions suivantes sont réunies :
(a) the goods were exported or deemed to have been exported before the application for drawback is made; and	a) les marchandises sont exportées ou réputées l'être avant la présentation de la demande;
(b) the applicant provides a waiver from all other persons	b) le demandeur fournit une renonciation au bénéfice du

entitled to claim a drawback, refund or remission of the duties, waiving their right to do so.	drawback, d'un remboursement ou d'une remise des droits par toute personne ayant droit de réclamer ce bénéfice.
[…]	[…]
9. (1) Subject to subsection (2), a drawback may be claimed by any person who is the importer or exporter of the imported or exported goods, or is the processor, owner or producer of those goods between the time of their direct shipment to Canada and their export or deemed export.	9. (1) Sous réserve du paragraphe (2), un drawback peut être demandé par toute personne qui est l'importateur ou l'exportateur des marchandises importées ou exportées ou qui en est le propriétaire, le transformateur ou le producteur entre le moment de leur expédition directe vers le Canada et celui de leur exportation ou exportation réputée.
(2) In the case of the goods described in section 10, a drawback may be claimed only by the importer of the Goods.	(2) Seul l'importateur des marchandises visées à l'article 10 peut demander un drawback à leur égard.

[22] The Applicants submit that the exporters do not possess legal means to enforce these provisions, as they do not impose an obligation on the importers or intermediaries to provide the required documents. A similar issue was addressed in the decision *9058-3956 Québec Inc*, above. In this case, the factual situation is relatively identical: the appellants were not entitled to a drawback as they did not submit the K32A forms. Justice Rouleau of the Federal Court explained the purpose of the K32A forms at paragraph 11:

> Form K32-A is the form in which the other persons eligible for the drawback waive that entitlement. In this case, the other persons eligible for the drawback are the importers of those vehicles.

[23] To analyse the issue, Justice Rouleau offered a legislative history of the relevant provisions and concluded at paragraphs 44 to 46 that:

> In light of this administrative interpretation, the applicants appear to be wrong in believing that they are the only ones entitled to claim a drawback, alleging that by purchasing the vehicles from the hands of importers, they waived the rights of other persons eligible for the drawback. The Regulations do not contain any provision allowing a drawback to be granted to the buyer who is un-able to obtain a notice of waiver. In short, it is the standing of the person that seems to give rise to the entitlement to the drawback claim, not the right to ownership.
>
> Therefore, the meaning given to the legislative text suggests that the applicant, whether ex-porter, importer, owner, processor or producer, must provide a waiver from any other person entitled to claim the drawback, regardless of the right of ownership in the exported property.
>
> In this matter, the applicants could not show that the CBSA's decision was incorrect considering the applicable law. Based on that, the CBSA's decision is therefore upheld, the Court having no other grounds for believing that the CBSA's interpretation of the provisions involving the persons eligible for entitlement to the drawback is unreasonable.

[24] This decision was upheld at the Court of Appeal, where Justice Décary concluded at paragraphs 4 and 5:

> Mr. Justice Rouleau of the Federal Court upheld the Agency's decision (2006 FC 4). The impugned decision is well founded. The sections in question are clear. If the appellant companies are unable to produce a drawback waiver issued by the importer, their drawback claims do not fulfill the conditions and cannot be accepted.
>
> Counsel for the appellant companies is asking the Court to interpret section 119 of the Tariff and section 5 of the Regulations as meaning that only the person entitled to the drawback, so counsel argues, is required to submit the waiver. However, the purpose of these two provisions is clearly to determine who is the sole person entitled to the drawback. The suggested interpretation renders the two provisions meaningless.

[25] It is clear from that decision that section 119 of the *Customs Tariff* and sections 5 and 9 of the *Goods Imported and Exported Refund and Drawback Regulations* require any exporter, whether or not importer in the first place, to provide the CBSA with K32A forms in order to be eligible to a drawback. In my opinion, the provisions are clear and the Applicants had to submit the required documents in order to receive a drawback. Having not done so, or having failed to provide the additional information requested in the case of the 2003 Mini Cooper, the decision of the CBSA to close their drawback files was correct.

[26] Furthermore, the Applicants have failed to convince this Court that the facts underlying their application can be distinguished from those in *9058-3956 Québec Inc*, above.

C. *The Charter arguments and the standing of the shareholders*

[27] Section 15 of the *Charter* provides that:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[28] We must therefore determine if the *Charter* applies in this case. In *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, Justice LaForest, dissident, stated at paragraph 101 that:

> The appellant also submitted that the impugned legislation infringes on its s. 15 Charter rights by imposing an interdiction not found in other jurisdictions in Canada, and by discriminating against print media and between newspapers in general circulation and professional journals. Since s. 15 is limited to individuals, it does not apply to corporations like the appellant.

[29] This question was discussed in Peter Hogg, *Constitutional Law of Canada*, loose-leaf (Toronto: Carswell, 2007) at chapter 37. According to Hogg, the position as to whether "individual" includes corporation is unclear. Furthermore, the French version uses "personne" which could encompass corporations. With regards to the position of the Canadian courts, Hogg states at page 37-5 that:

> At the time of writing, the Supreme Court of Canada has decided two cases where corporations have invoked s. 15; finding against the equality claim on other grounds, the Court studiously refused to decide this issue, which may indicate that the Court has some doubt as to the answer. Lower courts have held that s. 15 does not extend to corporations.

[30] Hogg also discusses the issue of standing, where he mentions at page 59-3 that:

> The question whether a person has "standing" (or locus standi) to bring legal proceedings is a question about whether the person has a sufficient stake in the outcome to invoke the judicial process. The question of standing focuses on the position of the party seeking to sue, not on the issues that the lawsuit is intended to resolve.

[31] He adds at page 59-4 that:

> Where a constitutional issue arises in the course of ordinary civil or criminal litigation, a question of standing is rarely controversial. The validity of a statute (or some other official instrument or act) must be determined in order to resolve the issues between the parties. It goes without saying that only the party who would be affected by the application of the statute has any right to raise the issue of its constitutionality. That person has standing to attack the validity of the statute.

[32] The situation is different if the sole purpose of the action is to challenge the constitutionality of a statute. In this case, a person will have standing if "an individual is 'exceptionally prejudiced' by the statute, that is the statute applies to him or her differently from the public generally, then the individual has standing to bring a declaratory action to challenge the validity of the statute" (page 59-5).

[33] In this case, I believe that the Applicants, Messrs. Sebag, Castiel, Castiel, Castiel and Castiel have standing in the proceedings, as the constitutional issue arises in the course of civil proceedings (see *Pineview Poultry Products Ltd*, above). However, this determination is not central to the case, because whether they have standing or not, it is my opinion that the Applicants were treated equally to other Canadians and that section 119 of the *Customs Tariff* and sections 5 and 9 of the *Goods Imported and Exported Refund and Drawback Regulations* are consistent with section 15 of the *Charter* and are not unconstitutional.

[34] Therefore this application for judicial review is dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, the whole with costs jointly and severally against the Applicants.

"André F.J. Scott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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