

Federal Court



Cour fédérale

Date: 20110510

Docket: T-565-10

Citation: 2011 FC 539

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, May 10, 2011

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

**JACQUES GERMAIN - ARTS
ETHNOGRAPHIQUES INC.**

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of a decision of the Canada Border Services Agency (the CBSA), dated March 17, 2010, confirming the applicant's notice of assessment of a penalty in the amount of \$5,000 on the ground that it did not report that it had in its possession an ivory statuette valued at US\$25,000 in accordance with the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) (the Act), and the *Reporting of Imported Goods Regulations*, SOR/86-873.

THE FACTS

[2] On September 18, 2008, Mr. Germain and his spouse arrived at the Pierre Elliott Trudeau Airport aboard a flight from Paris. They submitted a joint declaration card to the customs officer in the primary inspection line, in which Mr. Germain reported that the value of the goods purchased or received abroad was \$500; his spouse declared an amount of \$400.

[3] They were then referred to the secondary inspection line in order for their baggage to be inspected and the value of the goods reported to be verified. Mr. Germain then showed the customs officer a CITES (Convention on International Trade in Endangered Species) export permit issued by Belgian authorities, authorizing the exportation of a statuette made of elephant ivory from the Democratic Republic of the Congo. He requested that the permit be stamped by the CBSA, which the customs officer refused to do. The CBSA informed Mr. Germain that he had to obtain a CITES import permit from the Canadian authorities.

[4] At Mr. Germain's request, a customs superintendant came to the secondary line of inspection. He then admitted that he had bought the statuette for US\$25,000. Noting that the goods were commercial in nature and that their existence or value had not been reported on a declaration card at the nearest customs office, the customs officer issued a [TRANSLATION] "notice of assessment of a penalty" in the amount of \$5,000.

[5] On September 30, 2008, Mr. Germain filed with the Minister an application for a review of the notice of assessment of a penalty under section 129 of the Act. On January 9, 2009, under section 130 of the Act, the adjudicator requested that Mr. Germain provide him with the proof of purchase for the statuette in order to determine whether the amount of the penalty had been correctly calculated. On January 26, 2009, he forwarded to the adjudicator the proof of purchase for the statuette dated June 15, 2006, which confirmed that the value of the object was US\$25,000.

[6] At the end of the adjudication process, the Minister informed the applicant of the decisions rendered by letter dated March 17, 2010. He determined, under section 131 of the Act, that the Act or the regulations were contravened. He also decided to uphold the penalty of \$5,000 under section 133 of the Act. On April 13, 2010, Mr. Germain filed this application for judicial review of that decision.

[7] Mr. Germain's argument can be summarized as follows: he acted in good faith and verbally reported to the customs officers that he had in his possession an ivory statuette. He did not clearly understand that he had to state that he was in possession of the statuette in writing in the customs declaration.

[8] For his part, the respondent argues that the CBSA's response to Mr. Germain's application for administrative review was made up of two separate decisions. The first is the decision that states that section 131 of the Act was contravened. The second is the decision to uphold the \$5,000 penalty under section 133.

[9] He maintains that the applicant cannot challenge the decision made under section 131 of the Act because it can be challenged only by way of an action. Judicial review is therefore not the appropriate means for challenging a decision under that section, and only the decision to apply section 133 of the Act may be reviewed. However, there is nothing in the evidence or the applicant's arguments that would make it possible to challenge the legality of the penalty imposed. I agree with that view.

[10] Section 131 of the Act, which deals with the Minister's decision following an administrative review, contains a privative clause in its subsection (3):

Judicial review

131. (3) The Minister's decision under subsection (1) is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 135(1).

Recours judiciaire

131. (3) La décision rendue par le ministre en vertu du paragraphe (1) n'est susceptible d'appel, de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues au paragraphe 135(1).

[11] Subsection 135(1) provides that any challenge with regard to section 131 must be done by way of an action, not judicial review:

Federal Court

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

Cour fédérale

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

of an action in the Federal Court in which that person is the plaintiff and the Minister is the defendant.

décision, en appeler par voie d'action devant la Cour fédérale, à titre de demandeur, le ministre étant le défendeur.

[12] *Nguyen v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 724, [2009] FCJ No. 884, at paragraph 20, confirms that decisions made under sections 131 and 133 of the Act are distinct decisions that must be challenged separately. The decision under section 131 can be appealed only by way of an action, while the decision under section 133 can be challenged only by way of judicial review.

[13] The letter sent to Mr. Germain by the CBSA in reply to his application for administrative review, dated March 17, 2010, clearly stated that he had to choose between those two types of recourse, depending on which decision he wanted to challenge:

[TRANSLATION]

...

To appeal a decision under section 131, you may commence an action with the Federal Court in accordance with section 135 of the *Customs Act*. Such an application to the Court must be made within 90 days of the mailing of that decision.

To appeal a decision under section 133, you may file an application for judicial review with the Federal Court in accordance with subsection 18.1(1) of the *Federal Courts Act*. Such an application to the Court must be made within 30 days of the mailing of that decision.

...

[14] In this case, the applicant chose to challenge the Minister's decision before this Court by way of judicial review. Mr. Germain commenced this type of recourse with a notice of application, which also referred exclusively to section 133 of the Act. Therefore, it is only the CBSA's decision made under that section that is the subject of this judicial review.

[15] The decision under section 133 is dependent on the statement of contravention before the Court. In fact, if the Minister decides under section 131 that section 12 of the Act was contravened, he may impose a fine or any other applicable relief.

[16] According to *Nguyen, supra*, at paragraph 23, it is for the applicant to demonstrate that the decision made by the Minister under section 133, which concerns only the amount of the request for payment, is unreasonable. However, Mr. Germain presented no arguments or evidence showing that the amount of the penalty was unjustified or unreasonable. His reasons for challenging the decision relate only to the decision under section 131 of the Act, on which, for reasons stated above, the Court does not have the power to intervene as part of this judicial review. He did not discharge his burden of proving that the penalty of \$5,000 did not comply with the Act.

[17] The invoice that he provided, in fact, confirms that the unreported statuette was valued at US\$25,000. The \$5,000 penalty imposed by the CBSA and confirmed in administrative review is lower than the maximum penalty authorized by section 109.1 of the Act, which is \$25,000, and corresponds to 20% of the value for duty of the unreported statuette for a first contravention.

[18] Therefore, the applicant did not demonstrate that the penalty amount was unreasonable. For these reasons, the application for judicial review is dismissed without costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed without costs.

"Danièle Tremblay-Lamer"

Judge

Certified true translation
Margarita Gorbounova, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-565-10

STYLE OF CAUSE: JACQUES GERMAIN - ARTS
ETHNOGRAPHIQUES INC. v. AGC

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 9, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** TREMBLAY-LAMER J.

DATED: May 10, 2011

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