

Federal Court



Cour fédérale

**Date: 20131128**

**Docket: T-249-11**

**Citation: 2013 FC 1196**

**Ottawa, Ontario, November 28, 2013**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**PAUL I. KENNEDY**

**Plaintiff**

**And**

**CANADA (MINISTER OF PUBLIC SAFETY  
AND  
EMERGENCY PREPAREDNESS)**

**Defendant**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] On May 22, 2008, Paul Kennedy and Richard Hall presented themselves at the Douglas Port of Entry in Surrey, British Columbia. When Mr. Kennedy was asked if he had anything to declare, he responded that he did not.

[2] The Canada Border Services Agency (CBSA) subsequently determined that Mr. Kennedy had contravened section 12 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.) as a result of his

failure to declare the purchase of a 2008 Lexus automobile. As a consequence, the vehicle was seized and Mr. Kennedy was assessed a penalty of 25% of the value of the automobile or \$17,103.95. This decision was affirmed by the defendant Minister in a review under section 131 of the *Customs Act*.

[3] In accordance with the provisions of section 135 of the *Customs Act*, Mr. Kennedy appeals the Minister's contravention decision by way of this action. Mr. Kennedy maintains that he was entitled to state that he had nothing to declare, as he had not yet acquired legal title to the Lexus.

[4] For the reasons that follow, I have concluded that Mr. Kennedy was the beneficial owner of the vehicle in issue when he attempted to cross the border into Canada on May 22, 2008, and that the vehicle was being imported into Canada on his behalf. As a consequence, he had a duty to declare the purchase of the vehicle, which he admittedly did not do. Consequently, his appeal will be dismissed.

### **The Evidence**

[5] Two witnesses testified at the trial of this matter: Mr. Kennedy testified on his own behalf and Ajit Birak, a Border Services Officer (BSO) employed by the CBSA, testified on behalf of the Minister. At Mr. Kennedy's request, and with the consent of the Minister, the certified tribunal record from a related application (T-2094-10) was also introduced into evidence. The Minister accepted that these documents constituted the record that had been before the Minister

when the decision was made to confirm the CBSA's forfeiture decision, but did not necessarily accept the truth of the contents of each of the documents.

[6] Mr. Kennedy's case hinges on the sequence of events leading up to his presentation at the Douglas Port of Entry on May 22, 2008. Consequently it is necessary to have an understanding of the chronology of events as they relate to Mr. Kennedy's acquisition of the Lexus.

[7] While the parties may disagree as to the legal consequences flowing from these events, unless otherwise noted, I do not understand there to be any disagreement between them as to the sequence of events described in the next three sections of these reasons.

#### **The Events Leading up to May 22, 2008**

[8] Mr. Kennedy is a Canadian citizen living in Calgary. He wanted to purchase a 2008 Lexus LS 460 in the United States and to that end he enlisted the assistance of his friend, Mr. Hall to purchase a vehicle on his behalf as Lexus U.S. evidently will not sell vehicles to Canadians. Mr. Hall is an American citizen who lives in Portland, Oregon.

[9] On April 10, 2008, Mr. Hall emailed Mr. Kennedy advising that he had located a potentially suitable vehicle in Eugene, Oregon, providing Mr. Kennedy with information about the car. Mr. Kennedy was interested in the vehicle, and an exchange of emails between the two men ensued. Mr. Kennedy sought information with respect to particulars of the purchase, including pricing information, information regarding any recalls that may have been issued with respect to the vehicle model, and specific options that he wished to have included on the car.

[10] On April 16, 2008, the car dealership in Oregon emailed Mr. Hall advising that the total purchase price for the vehicle would be \$69,348.00.

[11] Mr. Hall signed a letter to Mr. Kennedy dated April 23, 2008 which stated, in part, that “This letter confirms my sale to you of a 2008 Lexus LS 460 VIN #JTHBL46FX 850 7377 upon receipt of your wire transfer of \$69,500 USD”. The remainder of the letter discussed Mr. Hall’s plans to deliver the vehicle to Mr. Kennedy in Oregon in mid-May, 2008.

[12] Mr. Kennedy testified that he had prepared this document himself to provide evidence of the reason why he had sent funds to Mr. Hall in order to protect himself in the event that something happened to Mr. Hall after the funds were sent and before the deal was completed.

[13] On April 28, 2008, Mr. Kennedy wired the sum of \$69,500 USD to Mr. Hall as payment for the vehicle.

[14] On May 7, 2008, Mr. Hall emailed Mr. Kennedy advising him that the dealer had received the money and would be sending some paperwork to Mr. Hall to fill out. Mr. Hall expected the deal to be completed once he had returned the paperwork to the dealer, although he was unsure as to when title to the vehicle would be transferred to him. Mr. Hall went on to state “[i]n the meantime, I need to write up a sale document, Bill of Sale”.

[15] Later that day, Mr. Kennedy emailed Mr. Hall. The material portions of this email state “[s]o if you wouldn’t mind doing the following: 1. fax a copy of the bill of sale to U.S. customs and border protection with the vehicle export worksheet ... please attend asap because they need 24 hours. 2. Please courier original Bill of Sale to me ... If and when title appears we can arrange to get it somehow ... Also, when you deliver the doc[ument]s to the dealer please advise him that I will pick up the car on your behalf ...”.

[16] According to Mr. Kennedy’s testimony, Mr. Hall took possession of the car that same day. As Mr. Kennedy put it at trial, “May 7 was actually the purchase date of the vehicle”. I do not understand there to be any dispute that Mr. Hall bought the car using the funds sent to him by Mr. Kennedy.

[17] It appears that Mr. Hall was provided with temporary registration papers for the car by the dealer on May 7, 2008, with the formal title documents to follow at a later date.

[18] On May 10, 2008, Mr. Hall emailed Mr. Kennedy providing the material that he said he would be faxing to U.S. Customs. Attached to this email was a signed, undated letter to Mr. Kennedy from Mr. Hall which stated:

Please consider this document as our original Bill of Sale regarding one 2008 Lexus 460 automobile. For due consideration, you have purchased from me one LS 460 VIN number JTHBL46FX8507378. The purchase was completed in full and no money is due for this purchase.

[19] Over the next few days more emails were exchanged between Mr. Kennedy and Mr. Hall dealing with arrangements for Mr. Kennedy to take possession of the vehicle. In his emails,

Mr. Hall explained the delays that he was experiencing in acquiring the title documents for the car, making several references in these emails to the need for title documentation for the car for customs purposes.

[20] In particular, on May 12, 2008, Mr. Hall emailed Mr. Kennedy advising that he had received the documentation from the Lexus dealer, including an application for title to the car. Mr. Hall informed Mr. Kennedy that he did not think that the title would be in either Mr. Hall's or Mr. Kennedy's hands that week. Mr. Hall further advised Mr. Kennedy that his review of "the material from the customs folks" indicated that "you MUST have the title to import the car ... so, I don't see this happening this week" (emphasis in the original).

[21] On or shortly before May 21, 2008, Mr. Kennedy flew from Calgary to Portland Oregon in order to meet with Mr. Hall and take possession of the car.

### **The First Attempt to Bring the Car into Canada**

[22] On May 21, 2008, Mr. Kennedy and Mr. Hall drove the Lexus to the Douglas Port of Entry. Mr. Kennedy entered the CBSA office and spoke to Border Service Officer Michelle Pele.

[23] Officer Pele was not called as a witness. It appears that she no longer works for the CBSA and could not be located. However, Mr. Kennedy read a statement prepared by Officer Pele with respect to her encounter with him into the record. This statement provides:

I, Michelle Pele, a BSO Port Douglas, was working May 21st, 2008, in full uniform. KENNEDY approached the counter and provided identification and a bill of sale for a new Lexus car he was driving. KENNEDY stated he was borrowing it from a friend

for a week or so. The vehicle did not have a Licence plate on it. After further questioning, KENNEDY admitted that Lexus Inc. would not sell new cars to Canadian Citizens so his friend in Oregon purchased the car for KENNEDY and was waiting for the title to arrive. KENNEDY stated that he had wired the money to Oregon in order for his friend to purchase the vehicle for him. I explained that in order for a Canadian citizen to import a car, he was required to have the Title. Thus KENNEDY stated that he would have to wait for the title and then import it at a later date. KENNEDY also questioned if U.S. residents were able to drive vehicles into Canada. I provided phone numbers for a storage facility in Blaine and KENNEDY stated he would go back to Seattle and meet with his friend and figure out what to do.

[24] Mr. Kennedy did not take issue with the accuracy of Officer Pele's description of their encounter other than to clarify that the "Bill of Sale" referred to related to the sale of the Lexus to Mr. Hall by the dealer and that the vehicle had a temporary Oregon plate. Notably, Mr. Kennedy did not deny having initially told Officer Pele that he was "borrowing [the car] from a friend for a week or so", a statement that was clearly untrue

[25] Mr. Kennedy testified that although it is not mentioned in her statement, he provided Officer Pele with a "permission to drive the car" document from Mr. Hall, and that he explained to her what he was trying to do, given that he did not yet have title to the car.

[26] Mr. Kennedy provided a somewhat confusing description of what he was told by BSO Pele, testifying that "ultimately [Officer Pele] acknowledged that naturally [sic] U.S. citizens were not able to drive cars into -- into Canada -- or were allowed. She had denied me entrance into Canada because she said Canadian -- Canadian citizens are not allowed to drive U.S.-registered vehicles in Canada".

[27] After they were turned away from the Canadian border, Mr. Kennedy and Mr. Hall returned to the United States for the night.

### **The Events of May 22, 2008**

[28] Mr. Kennedy and Mr. Hall returned to the Douglas Port of Entry the following day. They presented themselves to the Customs booth that was staffed by Border Services Officer Dana Leblanc. BSO Leblanc did not testify, but a copy of a narrative report prepared by her was introduced into evidence by Mr. Kennedy. I do not understand Mr. Kennedy to take issue with the accuracy of BSO Leblanc's record of their encounter at the primary inspection point.

[29] According to BSO Leblanc's report, the following exchange took place:

BSO LEBLANC asked subject HALL (driver) for their identification. Subject HALL passed me one Canadian and one American passport. BSO LEBLANC asked subject HALL "where are you going?"

Subject HALL stated "they were going to Vancouver."

BSO LEBLANC asked subject KENNEDY "where do you live?"

Subject KENNEDY "Calgary."

BSO LEBLANC "How long have you been in the US?"

Subject KENNEDY "A few days."

BSO LEBLANC asked subject HALL "When are you returning to the US?"

Subject HALL stated "I am flying back to Oregon tomorrow to see my wife."

BSO LEBLANC "What are you going to do with your car, because your passenger is not allowed to be driving it here in Canada."



Subject HALL “Oh, I guess I will just leave it at the airport and pick it up in a week when I come back.”

BSO LEBLANC to subject HALL “Let me get this straight, you just drove up from Oregon and you[’re] going to return tomorrow to Oregon and you[’re] going to leave your car at the airport.”

Subject HALL “Yes.”

BSO LEBLANC to subject KENNEDY, “Sir did you purchase anything in the US that you are bringing back into Canada.”

Subject KENNEDY “No.”

...

BSO LEBLANC “Any gifts or anything that is going to remain in Canada?”

Subject HALL “No.”

Subject KENNEDY “No”

...

[30] BSO Leblanc then gave a referral slip to Mr. Kennedy and Mr. Hall and sent them to the CBSA office for a secondary inspection. The two men were met at the counter by Border Services Officer Birak.

[31] BSO Birak was the only witness to testify on behalf of the Minister. His recollection of events was refreshed by his hand-written notes regarding his encounter with Mr. Kennedy and Mr. Hall and by a narrative report documenting the seizure of the Lexus.

[32] Mr. Kennedy has attempted to challenge the reliability of BSO Birak’s records, alleging that they were prepared long after the events in issue. In support of this contention, Mr. Kennedy

points to answers to undertakings given by the Minister in relation to the examination for discovery of Josée Laurin, the head of the Recourse Directorate, who was produced as the Minister's representative for the purposes of discovery. These answers indicate that BSO Birak prepared his narrative report "a few days after the seizure" and that he made his hand-written notes on July 9, 2008.

[33] In contrast, BSO Birak testified that he prepared both his narrative report and his hand-written notes on the same day as his encounter with Mr. Kennedy, noting that both documents are dated May 22, 2008. He further explained that the "July 9, 2008" date appearing on his hand-written notes refers to the date on which the notes were photocopied.

[34] Mr. Kennedy then put the answers to undertakings given on the examination for discovery of Josée Laurin (who was produced on behalf of the Minister) to BSO Birak. These answers appeared to contradict BSO Birak's testimony as to the timing of the preparation of the notes. At this point, BSO Birak appeared to be genuinely confused. He stated that he had no idea who Josée Laurin was, and was emphatic that no one had ever asked him about the timing of the preparation of his notes following Ms. Laurin's examination for discovery. Counsel for the Minister was also unable to shed any light on the issue.

[35] I accept BSO Birak's testimony that his narrative report and his hand-written notes were prepared on May 22, 2008. BSO Birak testified in a forthright manner, and his evidence is supported by the dates on the documents themselves.

[36] I would further note that, in any event, there is very little disagreement between Mr. Kennedy's version of events and that recounted by BSO Birak.

[37] BSO Birak testified that the referral slip that had been prepared by BSO Leblanc had the number "77" written on it, which told him that he should call BSO Leblanc in the booth for further information. From his subsequent conversation with BSO Leblanc, BSO Birak understood that she had concerns about the story being told by Messrs. Kennedy and Hall.

[38] BSO Birak testified that after speaking with BSO Leblanc, he asked Mr. Hall what was going on. Mr. Hall answered that he might stay in Canada for one day, or that he might go fishing and fly back home afterwards. BSO Birak testified that he asked Mr. Hall why he would fly home, leaving his car in Canada, to which Mr. Hall responded "I live in Oregon, and that's where my wife is".

[39] According to BSO Birak, he then asked Mr. Kennedy to explain the purpose of their trip. Mr. Kennedy explained that he and Mr. Hall were friends, and that he had flown to Portland to visit Mr. Hall.

[40] Concerned that the story that the two men were telling him was not making a lot of sense, BSO Birak advised them that he was going to look in the car. At this point, BSO Birak, Mr. Kennedy and BSO Valhrach went out to the Lexus.

[41] Recalling Mr. Hall's mention of a fishing trip, BSO Birak asked Mr. Kennedy why there was no fishing equipment in the car, to which Mr. Kennedy responded that "the [guides] will supply us [with] that when we -- if we do go". At this point, BSO Valhrach told Mr. Kennedy that nothing he was saying made sense.

[42] BSO Birak then asked Mr. Kennedy whether he was buying the car from Mr. Hall. According to BSO Birak, Mr. Kennedy responded by saying "I can't afford it right -- I don't have the money right now, but I -- but I will be buying it maybe next year." Mr. Kennedy has not denied that he said this to BSO Birak.

[43] BSO Birak testified that he then left Mr. Kennedy with BSO Valhrach and returned to the office.

[44] In the course of his testimony in chief, Mr. Kennedy referred to a narrative report prepared by BSO Valhrach. This document states that Mr. Kennedy verbally admitted to BSO Valhrach that he had "purchased the Lexus from Mr. Hall for \$70,000 USD via wire transfer". In his testimony, Mr. Kennedy denied having made any such admission.

[45] I note that this appears to be the first time that Mr. Kennedy has denied having made this admission. Numerous letters were sent by Mr. Kennedy's counsel to the CBSA's Recourse Directorate during the internal appeals process. While these letters address the allegations against Mr. Kennedy at great length, nowhere does counsel take issue with the admission attributed to Mr. Kennedy by BSO Valhrach.

[46] Although I was advised at the commencement of the trial that BSO Valhrach would be testifying on behalf of the Minister, he was not in fact called as a witness and no explanation was provided for this change in strategy. In the circumstances, I am prepared to give Mr. Kennedy the benefit of the doubt and find that it has not been established that he made the admission attributed to him.

[47] BSO Birak testified that upon returning to the office, he asked Mr. Hall how much Mr. Kennedy had paid him for the car, to which Mr. Hall reportedly responded that Mr. Kennedy “wired \$70,300. He wired it to me last week”.

[48] At that point, BSO Valhrach returned to the office with a binder full of documents which Mr. Kennedy acknowledges had been located in the car. These documents included correspondence between Mr. Hall and Mr. Kennedy regarding the purchase of the vehicle and the Bill of Sale sent to Mr. Kennedy by Mr. Hall on May 10, 2008 confirming the sale of the vehicle by Mr. Hall to Mr. Kennedy.

[49] BSO Birak then informed Mr. Kennedy that he was seizing the vehicle “for non-report”. BSO Birak also read Mr. Kennedy his rights and cautioned him that he could be facing criminal charges. BSO Birak advised Mr. Kennedy of his right to counsel and Mr. Kennedy indicated that he did not want to talk to a lawyer at that time.

[50] BSO Birak then completed the documentation relating to the seizure of the vehicle, and assessed a “Level 1” penalty of \$17,103.95, which was 25 percent of the value of the vehicle.

[51] After BSO Birak completed the paperwork, Mr. Kennedy stated that “I made a mistake. I shouldn't have done this. At least I'm not a drug-smuggler”. Once again, Mr. Kennedy has not denied making this statement.

[52] Mr. Kennedy then paid the \$17,103.95 penalty in order to secure the release of the vehicle, and Mr. Kennedy and Mr. Hall left the office and returned to the United States.

[53] Mr. Kennedy testified that Mr. Hall received the formal title documents for the vehicle on June 11, 2008, and that Mr. Hall then conveyed the legal title to the vehicle to Mr. Kennedy on June 20, 2008. It is Mr. Kennedy's position that he did not own the car until June 20, 2008, with the result that he had no duty to report the purchase of the vehicle on May 22, 2008.

[54] Mr. Kennedy was subsequently charged with several criminal charges as a result of the events of May 22, 2008. According to the decision of the Provincial Court judge presiding at Mr. Kennedy's criminal trial in British Columbia, he was charged with attempting to smuggle into Canada goods subject to duty, the evasion or attempt to evade the payment of duties under the *Customs Act* and the making of a false or deceptive statement. Mr. Kennedy was acquitted of all charges.

## Analysis

[55] Section 11 of the *Customs Act* specifies that every person arriving in Canada shall answer truthfully any questions asked by border officials.

[56] The relevant provisions of section 12 of the *Customs Act* provide that:

12. (1) Subject to this section, all goods that are imported shall, except in such circumstances and subject to such conditions as may be prescribed, be reported at the nearest customs office designated for that purpose that is open for business.

(3) Goods shall be reported under subsection (1)

(a) in the case of goods in the actual possession of a person arriving in Canada, or that form part of the person's baggage where the person and the person's baggage are being carried on board the same conveyance, by that person or, in prescribed circumstances, by the person in charge of the conveyance

...

(c) in any other case, by the person on behalf of whom the goods are imported.

12. (1) Sous réserve des autres dispositions du présent article, ainsi que des circonstances et des conditions prévues par règlement, toutes les marchandises importées doivent être déclarées au bureau de douane le plus proche, doté des attributions prévues à cet effet, qui soit ouvert.

(3) Le déclarant visé au paragraphe (1) est, selon le cas :

a) la personne ayant en sa possession effective ou parmi ses bagages des marchandises se trouvant à bord du moyen de transport par lequel elle est arrivée au Canada ou, dans les circonstances réglementaires, le responsable du moyen de transport

...

c) la personne pour le compte de laquelle les marchandises sont importées

[57] Section 2 of the *Customs Act* states that “import” means “to import into Canada.” The section further defines “goods” as including “conveyances”.

[58] Subsection 110(1) of the Act provides that liability is established and a seizure will be lawful where an Officer “believes on reasonable grounds” that the Act or its regulations have been contravened in respect of goods.

[59] In an action under section 135 of the *Customs Act*, the onus is on the plaintiff to establish, on a balance of probabilities, that the seizures were unlawful: *He v. Canada* (2000), 182 F.T.R. 85, [2000] F.C.J. No. 93, at para. 8.

[60] A contravention of section 12 of the *Customs Act* occurs where an incorrect declaration is made on behalf of an importer. The reason for the error is irrelevant: *H.B. Fenn and Co. v. Canada*, (F.C.T.D.) (1992), 53 F.T.R. 7, [1992] F.C.J. No. 204.

[61] The good faith of the importer is also irrelevant: the Act is contravened when an incorrect declaration or no declaration is made, even though there may be a lack of intent to mislead customs officials: see, for example, *Trites v. Minister of Public Safety and Emergency Preparedness*, 2011 FC 1365, 400 F.T.R. 275, at para. 18; *Zeid v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 539, 326 F.T.R. 219 at para. 53; *Hoang v. Canada (Minister of National Revenue)*, 2006 FC 182, 287 F.T.R. 103 at para. 28; *He*, above at para. 8, *Marstar Canada Inc. v. Canada*, 158 F.T.R. 226, [1998] F.C.J. No. 1296, at para. 4.



[62] The Minister asserts that Mr. Kennedy was in actual possession of the Lexus at the time that he presented himself at the Douglas Port of Entry on May 22, 2008 and that he contravened subsection 12(3)(a) of the *Customs Act* when he failed to declare it. In the alternative, the Minister asserts that the automobile was being imported into Canada by Mr. Hall on Mr. Kennedy's behalf, with the result that Mr. Kennedy was obligated to report the importation of the vehicle under subsection 12(3)(c) of the Act.

[63] Mr. Kennedy denies that he contravened the provisions of section 12 of the *Customs Act* as a result of his failure to declare the purchase of a 2008 Lexus automobile on May 22, 2008. According to Mr. Kennedy, as of May 22, 2008, he had not yet completed the purchase of the car, he did not yet own the car, and he did not have title to the car. Mr. Hall was the registered owner of the automobile, and was entitled to bring the car into Canada and to store it there. As a consequence, Mr. Kennedy says that he had no obligation to report the vehicle at the border crossing.

[64] Mr. Kennedy also relies on the principles of issue estoppel, *res judicata* and abuse of process, submitting that this Court is bound by the findings of fact made by the Provincial Court judge in acquitting him of the criminal charges relating to his failure to declare the car. In particular, Mr. Kennedy relies on the trial judge's finding that he had no obligation to declare the Lexus as the purchase transaction had not yet been completed.

[65] Dealing with this last argument first, it is clear that a contravention finding under section 12 of the *Customs Act* is a civil proceeding and as such is quite different from a criminal charge relating to unlawful importation under the *Criminal Code*. The parties are not the same, different issues arise, the onus of proof is different and a different standard of proof applies (proof on a balance of probabilities in this case and proof beyond a reasonable doubt in the criminal case). There are, moreover, different requirements insofar as the question of intent is concerned. The evidence that was before the Provincial Court judge may also have been different than the evidence that was before me.

[66] As a consequence, I am not persuaded that I am bound by the findings of fact made by the trial judge in Mr. Kennedy's criminal trial: see *Time Data Recorder International Ltd. v. Canada (Minister of National Revenue)*, (1997), 211 N.R. 229, 2 T.T.R. (2d) 122 (F.C.A.) at paras. 10-15.

[67] As I understand Mr. Kennedy's position, it is that he did not intend to improperly smuggle the car into Canada. Rather, Mr. Hall was bringing the vehicle into Canada where it would be stored until such time as the transaction between Mr. Hall and Mr. Kennedy could be completed. At that time, Mr. Kennedy would return to the border and declare the vehicle.

[68] It is evident from the exchange of emails between Mr. Kennedy and Mr. Hall and other documents found in the car on May 22, 2008 that inquiries had been made as to the proper procedure to lawfully import an automobile into Canada. I am thus prepared to accept that it is indeed possible that Mr. Kennedy intended to return to the border once he had obtained legal title

to the vehicle and to declare the purchase of the car at that time. That did not, however, relieve him of his statutory obligations under section 12 of the *Customs Act*.

[69] By May 22, 2008, Mr. Hall had acquired the Lexus (subject only to receiving formal title documentation). Mr. Hall had purchased the vehicle on Mr. Kennedy's behalf, at Mr. Kennedy's direction, using funds provided by Mr. Kennedy. Upon taking possession of the vehicle on May 7, 2008, Mr. Hall then issued a Bill of Sale to Mr. Kennedy in which he acknowledged that Mr. Kennedy had purchased the Lexus from him and that he had been paid in full for the vehicle.

[70] While Mr. Kennedy referred to this document as being merely a "draft" there is nothing on the face of the document or in Mr. Hall's covering email that would suggest that the document was only a draft. To the contrary, Mr. Hall's statement in his email that he would be faxing the document to "Customs" suggests that the document was precisely what it purports to be – a Bill of Sale recording the conveyance of the Lexus from Mr. Hall to Mr. Kennedy, and Mr. Hall's acknowledgement of the receipt of payment in full for the vehicle.

[71] This should be contrasted with the situation that confronted the Court in *Abdelseed v. Canada (Border Services Agency)*, 2013 FC 581, [2013] F.C.J. No. 636. There, the would-be purchaser of the vehicle in issue had not yet paid for the vehicle. Rather, he had put the purchase funds into trust, pending the lifting of a lien on the vehicle, on the basis that the money would revert to him if the lien was not lifted within a specified period of time. The Court was, moreover, satisfied that the lifting of the lien constituted a true condition precedent to the completion of the sale.

[72] The vehicle in *Abdelseed* was being brought into Canada by a driver employed by the would-be vendor in order to provide comfort to Mr. Abdelseed that the vehicle would be available if the lien was lifted. The driver of the vehicle was not Mr. Abdelseed's agent or representative. In contrast, in this case, Mr. Hall was clearly assisting Mr. Kennedy in bringing the Lexus into Canada, entirely for Mr. Kennedy's benefit.

[73] Another distinction between the two cases is that, unlike Mr. Kennedy, Mr. Abdelseed was not the proposed purchaser of the vehicle in question - it was to be purchased by a company operated by him. Furthermore, the reasons in *Abdelseed* are very clear that the decision turned on the unique facts of that case: see para. 57.

[74] In this case, I am satisfied that at the time that Mr. Kennedy and Mr. Hall presented themselves to the Douglas Port of Entry on May 22, 2008, Mr. Kennedy was the beneficial owner of the vehicle: see *Cowan v. Minister of Finance, N.S.* [1977] CTC 230, 78 DLR (3d) 66, at 85, affd. (1978), 89 DLR (3d) 426, at 433-34. Mr. Hall was, moreover, clearly attempting to bring the vehicle into Canada on Mr. Kennedy's behalf.

[75] As a result, Mr. Kennedy had a duty to declare the vehicle and he did not.

[76] This finding is sufficient to dispose of this action. However, given Mr. Kennedy's insistence that he did nothing wrong, his claim that he has been badly treated by the Recourse

Directorate, and his request that I deliver “a scolding letter” to the Recourse Director, I think it appropriate to comment further on the evidence before me.

[77] Not only does this evidence establish that Mr. Kennedy did not declare the vehicle when he was obliged to do so, it also demonstrates that both Mr. Kennedy and Mr. Hall attempted to mislead border officials as to the real reason for their entry into Canada and the true nature of their arrangements regarding the vehicle.

[78] Mr. Kennedy has not denied that on May 21, 2008, he initially told Officer Pele that he was “borrowing [the car] from a friend for a week or so”. This statement was clearly untrue.

[79] When Mr. Kennedy then told BSO Pele what he was really trying to do with the car, he was told that he could not bring the Lexus into Canada without a title document. Mr. Hall and Mr. Kennedy then presented themselves at the border the following day with a new story.

[80] On May 22, 2008, BSO Leblanc asked Mr. Hall and Mr. Kennedy if either of them had “any gifts or anything that is going to remain in Canada”, to which both men answered “no”. This was not true, as on Mr. Kennedy’s own evidence, the plan was for the Lexus to be left in Canada until such time as he could get the title document for the car.

[81] Mr. Hall told BSO Birak (in Mr. Kennedy’s presence) that he might stay in Canada for a day, or that he might go fishing, and that he would then fly back home leaving his car in Canada. When asked why he would leave his car in Canada, neither Mr. Hall nor Mr. Kennedy said

anything about the sale of the Lexus to Mr. Kennedy or the need for a title document. Instead, Mr. Hall told BSO Birak “I live in Oregon, and that’s where my wife is”.

[82] When BSO Birak later asked Mr. Kennedy why there was no fishing equipment in the car, Mr. Kennedy still did not tell BSO Birak what was really going on with the car. Instead he endeavoured to perpetuate the fishing story, stating that “the [guides] will supply us [with] that when we – if we do go”.

[83] Most importantly, Mr. Kennedy did not deny that when BSO Birak asked him point-blank whether he was buying the car from Mr. Hall, he responded by saying “I can't afford it right – I don't have the money right now, but I -- but I will be buying it maybe next year.” This was patently false and was clearly a further attempt by Mr. Kennedy to conceal the true nature of his arrangement with Mr. Hall with respect to the acquisition of the vehicle.

[84] Finally, Mr. Kennedy himself recognized on May 22, 2008 that he had acted improperly in failing to declare the vehicle. This is evident from his statement to BSO Birak that “I made a mistake. I shouldn't have done this. At least I'm not a drug-smuggler”.

[85] As a consequence, there is no merit to Mr. Kennedy’s claims of mistreatment. He is the author of his own misfortune.

## **Conclusion**

[86] For these reasons, I find that Mr. Kennedy was the beneficial owner of the Lexus when he attempted to cross the border into Canada on May 22, 2008, and that the vehicle was being imported into Canada on his behalf. He thus had a duty to declare the purchase of the vehicle which he admittedly did not do. Consequently, his appeal will be dismissed.

## **Costs**

[87] Given the result, the Minister would ordinarily be entitled to his costs.

[88] I am, however, very troubled by the fact that answers to undertakings given on the examination for discovery of the Minister's representative were apparently provided to Mr. Kennedy without anyone verifying that these answers were in fact true. As was noted earlier, Mr. Kennedy was informed of the dates on which BSO Birak's notes were purportedly prepared without anyone ever verifying the accuracy of that information with BSO Birak himself. Moreover, according to BSO Birak's testimony, the answers provided were incorrect.

[89] Counsel for the Minister was at a loss to explain how this occurred and recognized that it was a matter that the Court might wish to consider in relation to the issue of costs. I agree. The provision of answers to undertakings given on an examination for discovery is not a matter to be taken lightly, and a party is required to ensure that the answers provided are accurate. For whatever reason, that did not happen here.

[90] As a consequence, in the exercise of my discretion, no order of costs will be made.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** the action is dismissed.

"Anne L. Mactavish"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-249-11

**STYLE OF CAUSE:** PAUL I. KENNEDY v CANADA (MINISTER OF  
PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS

**PLACE OF HEARING:** CALGARY, ALBERTA

**DATE OF HEARING:** OCTOBER 9, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:**

MACTAVISH J.

**DATED:** NOVEMBER 28, 2013

**APPEARANCES:**

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