

Federal Court



Cour fédérale

Date: 20131218

Docket: T-951-13

Citation: 2013 FC 1260

Ottawa, Ontario, December 18, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

HOWARD POUNALL

Applicant

and

**CANADA BORDER SERVICES AGENCY AND
MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a judicial review of a decision holding that a) the Applicant had contravened the *Customs Act*, RSC, 1985 c 1 (2nd Supp) (or Regulations) in respect to seized goods [the contravention decision] and b) the amount of \$4,045.45 received from the Applicant for the return of the seized goods shall be held as forfeit in accordance with section 133 of the *Customs Act* [the forfeiture decision].

[2] The Applicant represented himself in this judicial review. That choice, to be self-represented, while one that the Applicant is entitled to make, was not his best choice. His real complaint was the contravention decision; however, any challenge to that decision must be by action in the Federal Court within ninety days of the decision. There has been no action filed and time for filing has long since expired (see relevant legislation as Schedule A to this decision).

II. BACKGROUND

[3] The facts of this case are a little difficult to discern as the Applicant has advanced several versions of events.

[4] The Applicant contended that he had agreed with a California vendor to purchase a 2007 BMW for \$17,750. On August 5, 2011, the Applicant paid the final amount due. However, on August 6, the vehicle was vandalized and aside from scratches, the hood was severely damaged.

[5] The Applicant claimed that the vendor then agreed to reduce the price of the car by \$5,500 to \$12,250 – the amount claimed upon entry to Canada. The Applicant was unable to explain why the vendor, who had received full payment, would reduce the price of the car when legal ownership had passed to the Applicant.

[6] At the port of entry, the Canada Border Services Agency [CBSA] searched the car and found two “documents” – a bill of sale for \$12,250 and a purchase agreement which provided for a deposit of \$6,500 with a provision to pay an additional \$11,250.

A review of his cell phone showed text messages indicating that the Applicant had paid the vendor \$6,500 in cash and \$11,250 by wire transfer.

[7] The Applicant also claimed that he had paid \$750 for repair of the hood, \$1,800 for new tires and \$100 for window tinting. These items were seized for failure to report them. Terms of release were set as a Level 2 violation with payment of \$1,057.05 (40% of undeclared value).

The car itself was seized based on the difference between amount paid (\$17,750) and amount declared (\$12,250). Terms of release based on a Level 3 violation were \$2,988.40 (55% of undeclared value).

[8] The Applicant paid the total amount assessed of \$4,045.45. The Applicant signed a declaration admitting the essential facts described above.

[9] The Applicant filed two requests for Ministerial review but received no response to either request. Only after pursuing the matter further and filing another request for review did CBSA respond. The initial response that the Applicant was out of time was reversed upon reconsideration.

[10] The Applicant made submissions to the reviewing official largely directed to his frustration at commencing a review as well as outlining his difficulties crossing into Canada since the contravention as he is now always subject to secondary screening.

In subsequent submissions the Applicant challenged the CBSA officers' description of events at the border and claimed that he had received a refund from the vendor for the damage done to the car.

[11] The impugned Minister's decision upheld the initial conclusion by the CBSA officers that the Applicant had failed to report the items of hood repair, tires and window tinting and that the Applicant had under-reported the purchase price of the car.

[12] In this judicial review the Applicant claimed that there had been breach of natural justice and that the decision was based on erroneous findings of fact made in an inaccurate and capricious manner.

[13] The real issues are whether this Court, on judicial review, can determine matters which are based on the merits of the contravention decision and whether there was a breach of natural justice.

III. ANALYSIS

[14] The standard of review for both issues is correctness.

[15] While the Applicant made no submissions on the Court's jurisdiction, it has been determined in numerous decisions of this Court that the issue of contravention can only be challenged by way of an action whereas the issue of penalty are determined by judicial review (see *Mohawk Council of Akwesasne v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1442, 422 FTR 272, and *Nguyen v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 724, 347 FTR 283 [*Nguyen*]). In *Nguyen*, at paragraph 20, Justice Shore succinctly described the matter as follows:

No such statutory right of appeal exists with respect to Ministerial decisions taken under s. 133 of the Act. Section 133 of the Act

provides that where the Minister finds under s. 131 of the Act that a contravention of the Act has occurred, the Minister may impose a penalty or other applicable remedial action such as the return of goods on receipt of an amount of money. Accordingly, a determination made pursuant s. 133 of the Act may often be dependent on a finding of a contravention of the Act. Nevertheless, the two decisions are separate and distinct, and must be challenged separately. The determination made pursuant to s. 131 of the Act in respect of a contravention of s. 12 of the Act may only be appealed by way of an action to this Court. Meanwhile, a determination made pursuant s. 133 of the Act regarding the release of the goods may be challenged only by way of an application for judicial review in accordance with s. 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

[16] The Applicant's challenge in these proceedings is to the contravention decision and as such, must be dismissed as he has failed to bring an action in this Court as required.

[17] The Applicant has not requested an order relieving against the 90-day limitation period in subsection 135(1) in which to commence an action. To the extent that the Court could of its own motion grant some discretionary relief, I am not inclined to do so because, based on the record, there is no basis to challenge the contravention decision. Further, the Applicant was advised of his rights and chose not to exercise them. The fact that he is a self-represented litigant is no excuse – the law applies equally to all persons and there is no exception for someone who wants to represent themselves.

[18] The Applicant complains that he was denied natural justice because the two requests for Ministerial review were not responded to within 30 days. His claim is essentially one of a legitimate expectation to receive a response within 30 days.

[19] There is no question that CBSA failed to respond to the first two requests for Ministerial review. However, there is no such 30-day time limit on a response.

[20] Further, the Applicant has not shown any real prejudice for the delay caused in failing to respond to the Applicant's request for Ministerial review. Unlike other breaches of procedural fairness where prejudice is presumed (e.g. failure to give notice), the type of breach the Applicant alleges does not raise a presumption of prejudice – prejudice would have to be established. Absent prejudice, there is no meaningful remedy that a court could order other than to repeat the process of review based on the same record with the same inevitable result.

IV. CONCLUSION

[21] Therefore, this judicial review will be dismissed. In recognition of the Respondent's delay, it is fairer to not award costs against the Applicant as an indication that the Respondent should examine the reasons for the earlier failures to respond to the Applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed
without costs.

"Michael L. Phelan"

Judge

SCHEDULE A*Customs Act, RSC, 1985 c 1 (2nd Supp)*

110. (1) An officer may, where he believes on reasonable grounds that this Act or the regulations have been contravened in respect of goods, seize as forfeit

(a) the goods; or

(b) any conveyance that the officer believes on reasonable grounds was made use of in respect of the goods, whether at or after the time of the contravention.

(2) An officer may, where he believes on reasonable grounds that this Act or the regulations have been contravened in respect of a conveyance or in respect of persons transported by a conveyance, seize as forfeit the conveyance.

(3) An officer may, where he believes on reasonable grounds that this Act or the regulations have been contravened, seize anything that he believes on reasonable grounds will afford evidence in respect of the contravention.

(4) An officer who seizes goods or a conveyance as forfeit under subsection (1) or (2) shall take such measures as are reasonable in the

110. (1) L'agent peut, s'il croit, pour des motifs raisonnables, à une infraction à la présente loi ou à ses règlements du fait de marchandises, saisir à titre de confiscation :

a) les marchandises;

b) les moyens de transport dont il croit, pour des motifs raisonnables, qu'ils ont servi au transport de ces marchandises, lors ou à la suite de l'infraction.

(2) L'agent peut, s'il croit, pour des motifs raisonnables, à une infraction à la présente loi ou à ses règlements du fait d'un moyen de transport ou des personnes se trouvant à son bord, le saisir à titre de confiscation.

(3) L'agent peut, s'il croit, pour des motifs raisonnables, à une infraction à la présente loi ou à ses règlements, saisir tous éléments dont il croit, pour des motifs raisonnables, qu'ils peuvent servir de moyens de preuve de l'infraction.

(4) L'agent qui procède à la saisie-confiscation prévue au paragraphe (1) ou (2) prend les mesures convenables, eu égard aux circonstances, pour aviser

circumstances to give notice of the seizure to any person who the officer believes on reasonable grounds is entitled to make an application under section 138 in respect of the goods or conveyance.

de la saisie toute personne dont il croit, pour des motifs raisonnables, qu'elle a le droit de présenter, à l'égard des biens saisis à titre de confiscation, la requête visée à l'article 138.

130. (1) Where a decision of the Minister under section 131 is requested under section 129, the President shall forthwith serve on the person who requested the decision written notice of the reasons for the seizure, or for the notice served under section 109.3 or 124, in respect of which the decision is requested.

130. (1) Le président signifie sans délai par écrit à la personne qui a présenté la demande visée à l'article 129 un avis des motifs de la saisie, ou des motifs de l'avis prévu aux articles 109.3 ou 124, à l'origine de la demande.

(2) The person on whom a notice is served under subsection (1) may, within thirty days after the notice is served, furnish such evidence in the matter as he desires to furnish.

(2) La personne visée au paragraphe (1) dispose de trente jours à compter de la signification de l'avis pour produire tous moyens de preuve à l'appui de ses prétentions.

(3) Evidence may be given under subsection (2) by affidavit made before any person authorized by an Act of Parliament or of the legislature of a province to administer oaths or take affidavits.

(3) Les moyens de preuve visés au paragraphe (2) peuvent être produits par déclaration sous serment faite devant toute personne autorisée par une loi fédérale ou provinciale à faire prêter serment et à recevoir les déclarations sous serment.

131. (1) After the expiration of the thirty days referred to in subsection 130(2), the Minister shall, as soon as is reasonably

131. (1) Après l'expiration des trente jours visés au paragraphe 130(2), le ministre étudie, dans les meilleurs délais possible en

possible having regard to the circumstances, consider and weigh the circumstances of the case and decide

l'espèce, les circonstances de l'affaire et décide si c'est valablement qu'a été retenu, selon le cas :

(a) in the case of goods or a conveyance seized or with respect to which a notice was served under section 124 on the ground that this Act or the regulations were contravened in respect of the goods or the conveyance, whether the Act or the regulations were so contravened;

a) le motif d'infraction à la présente loi ou à ses règlements pour justifier soit la saisie des marchandises ou des moyens de transport en cause, soit la signification à leur sujet de l'avis prévu à l'article 124;

(b) in the case of a conveyance seized or in respect of which a notice was served under section 124 on the ground that it was made use of in respect of goods in respect of which this Act or the regulations were contravened, whether the conveyance was made use of in that way and whether the Act or the regulations were so contravened; or

b) le motif d'utilisation des moyens de transport en cause dans le transport de marchandises ayant donné lieu à une infraction aux mêmes loi ou règlements, ou le motif de cette infraction, pour justifier soit la saisie de ces moyens de transport, soit la signification à leur sujet de l'avis prévu à l'article 124;

(c) in the case of a penalty assessed under section 109.3 against a person for failure to comply with subsection 109.1(1) or (2) or a provision that is designated under subsection 109.1(3), whether the person so failed to comply.

c) le motif de non-conformité aux paragraphes 109.1(1) ou (2) ou à une disposition désignée en vertu du paragraphe 109.1(3) pour justifier l'établissement d'une pénalité en vertu de l'article 109.3, peu importe s'il y a réellement eu non-conformité.

(d) [Repealed, 2001, c. 25, s. 72]

d) [Abrogé, 2001, ch. 25, art. 72]

(1.1) A person on whom a notice is served under section 130 may notify the Minister, in writing, that the person will not be furnishing evidence under that section and authorize the Minister to make a decision without delay in the matter.

(2) The Minister shall, forthwith on making a decision under subsection (1), serve on the person who requested the decision a detailed written notice of the decision.

(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).

133. (1) Where the Minister decides, under paragraph 131(1)(a) or (b), that there has been a contravention of this Act or the regulations in respect of the goods or conveyance referred to in that paragraph, and, in the case of a conveyance referred to in paragraph 131(1)(b), that it was used in the manner described in that paragraph, the Minister may, subject to such terms and conditions as the Minister may determine,

(1.1) La personne à qui a été signifié un avis visé à l'article 130 peut aviser par écrit le ministre qu'elle ne produira pas de moyens de preuve en application de cet article et autoriser le ministre à rendre sans délai une décision sur la question.

(2) Dès qu'il a rendu sa décision, le ministre en signifie par écrit un avis détaillé à la personne qui en a fait la demande.

(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).

133. (1) Le ministre, s'il décide, en vertu des alinéas 131(1)a) ou b), que les motifs d'infraction et, dans le cas des moyens de transport visés à l'alinéa 131(1)b), que les motifs d'utilisation ont été valablement retenus, peut, aux conditions qu'il fixe :

(a) return the goods or conveyance on receipt of an amount of money of a value equal to an amount determined under subsection (2) or (3), as the case may be;

a) restituer les marchandises ou les moyens de transport sur réception du montant déterminé conformément au paragraphe (2) ou (3), selon le cas;

(b) remit any portion of any money or security taken; and

b) restituer toute fraction des montants ou garanties reçus;

(c) where the Minister considers that insufficient money or security was taken or where no money or security was received, demand such amount of money as he considers sufficient, not exceeding an amount determined under subsection (4) or (5), as the case may be.

c) réclamer, si nul montant n'a été versé ou nulle garantie donnée, ou s'il estime ces montant ou garantie insuffisants, le montant qu'il juge suffisant, à concurrence de celui déterminé conformément au paragraphe (4) ou (5), selon le cas.

(1.1) If the Minister decides under paragraph 131(1)(c) that the person failed to comply, the Minister may, subject to any terms and conditions that the Minister may determine,

(1.1) Le ministre, s'il décide en vertu de l'alinéa 131(1)c) que la personne ne s'est pas conformée, peut, aux conditions qu'il fixe :

(a) remit any portion of the penalty assessed under section 109.3; or

a) remettre à la personne une portion de la pénalité établie en vertu de l'article 109.3;

(b) demand that an additional amount be paid.

b) réclamer une somme supplémentaire.

If an additional amount is demanded, the total of the amount assessed and the additional amount may not exceed the maximum penalty that could be assessed under

Toutefois, la totalité de celle-ci et de la somme établie ne doit pas dépasser le montant maximal de la pénalité qui peut être établie en vertu de l'article 109.3.

section 109.3.

(2) Goods may be returned under paragraph (1)(a) on receipt of an amount of money of a value equal to

(2) La restitution visée à l'alinéa (1)a peut, s'il s'agit de marchandises, s'effectuer sur réception :

(a) the aggregate of the value for duty of the goods and the amount of duties levied thereon, if any, calculated at the rates applicable thereto

a) soit du total de leur valeur en douane et des droits éventuellement perçus sur elles, calculés au taux applicable :

(i) at the time of seizure, if the goods have not been accounted for under subsection 32(1), (2) or (5) or if duties or additional duties have become due on the goods under paragraph 32.2(2)(b) in circumstances to which subsection 32.2(6) applies, or

(i) au moment de la saisie, si elles n'ont pas fait l'objet de la déclaration en détail ou de la déclaration provisoire prévues au paragraphe 32(1), (2) ou (5), ou si elles sont passibles des droits ou droits supplémentaires prévus à l'alinéa 32.2(2)b dans le cas visé au paragraphe 32.2(6),

(ii) at the time the goods were accounted for under subsection 32(1), (2) or (5), in any other case; or

(ii) au moment où elles ont fait l'objet de la déclaration en détail ou de la déclaration provisoire prévues au paragraphe 32(1), (2) ou (5), dans les autres cas;

(b) such lesser amount as the Minister may direct.

b) soit du montant inférieur que le ministre ordonne.

(3) A conveyance may be returned under paragraph (1)(a) on receipt of an amount of money of a value equal to

(3) La restitution visée à l'alinéa (1)a peut, s'il s'agit de moyens de transport, s'effectuer sur réception :

(a) the value of the conveyance at the time of seizure, as determined by

a) soit de leur contre-valeur, déterminée par le ministre, au moment de la saisie;

the Minister; or

(b) such lesser amount as the Minister may direct.

(4) The amount of money that the Minister may demand under paragraph (1)(c) in respect of goods shall not exceed an amount equal to the aggregate of the value for duty of the goods and the amount of duties levied thereon, if any, calculated at the rates applicable thereto,

(a) at the time of seizure or of service of the notice under section 124, if the goods have not been accounted for under subsection 32(1), (2) or (5) or if duties or additional duties have become due on the goods under paragraph 32.2(2)(b) in circumstances to which subsection 32.2(6) applies; or

(b) at the time the goods were accounted for under subsection 32(1), (2) or (5), in any other case.

(5) The amount of money that the Minister may demand under paragraph (1)(c) in respect of a conveyance shall not exceed an amount equal to the value of the conveyance at the time of seizure or of service of the notice under section 124, as

b) soit du montant inférieur que celui-ci ordonne.

(4) Le montant susceptible d'être réclamé en vertu de l'alinéa (1)c) ne peut, s'il s'agit de marchandises, dépasser le total de leur valeur en douane et des droits éventuellement perçus sur elles, calculés au taux applicable :

a) au moment de la saisie ou de la signification de l'avis prévu à l'article 124, si elles n'ont pas fait l'objet d'une déclaration en détail ou d'une déclaration provisoire prévues au paragraphe 32(1), (2) ou (5), ou si elles sont passibles des droits ou droits supplémentaires prévus à l'alinéa 32.2(2)b) dans le cas visé au paragraphe 32.2(6);

b) au moment où elles ont fait l'objet de la déclaration en détail ou de la déclaration provisoire prévues au paragraphe 32(1), (2) ou (5), dans les autres cas.

(5) Le montant susceptible d'être réclamé en vertu de l'alinéa (1)c) ne peut, s'il s'agit de moyens de transport, dépasser leur contre-valeur, déterminée par le ministre, au moment de la saisie ou de la signification de l'avis prévu à

determined by the Minister.

(6) For the purpose of calculating the amount of money referred to in subsection (2) or (4), where the value for duty of goods cannot be ascertained, the value of the goods at the time of seizure or of service of the notice under section 124, as determined by the Minister, may be substituted for the value for duty thereof.

(7) If an amount of money is demanded under paragraph (1)(c) or (1.1)(b), the person to whom the demand is made shall pay the amount demanded together with interest at the prescribed rate for the period beginning on the day after the notice is served under subsection 131(2) and ending on the day the amount has been paid in full, calculated on the outstanding balance of the amount. However, interest is not payable if the amount demanded is paid in full within thirty days after the notice is served.

(8) [Repealed, 1992, c. 28, s. 27]

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

l'article 124.

(6) Dans les cas où, pour les calculs visés au paragraphe (2) ou (4), il est impossible d'établir la valeur en douane des marchandises, on peut y substituer leur valeur, déterminée par le ministre, au moment de la saisie ou de la signification de l'avis prévu à l'article 124.

(7) Les personnes à qui une somme est réclamée en application des alinéas (1)c) ou (1.1)b) versent avec la somme réclamée des intérêts au taux réglementaire, calculés sur les arriérés pour la période commençant le lendemain de la signification de l'avis prévu au paragraphe 131(2) et se terminant le jour du paiement intégral de la somme. Toutefois, aucun intérêt n'est exigible si la pénalité est payée intégralement dans les trente jours suivant la signification de l'avis.

(8) [Abrogé, 1992, ch. 28, art. 27]

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

the plaintiff and the Minister is the defendant.

d'action devant la Cour fédérale, à titre de demandeur, le ministre étant le défendeur.

(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.

(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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-951-13

STYLE OF CAUSE: HOWARD POUNALL v CANADA BORDER SERVICES
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PLACE OF HEARING: CALGARY, ALBERTA

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

DATED: DECEMBER 18, 2013

APPEARANCES:

Howard Pounall

FOR THE APPLICANT
(ON HIS OWN BEHALF)

James Elford

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Howard Pounall
Calgary, Alberta

FOR THE APPLICANT
(ON HIS OWN BEHALF)

William F. Pentney
Deputy Attorney General of Canada
Edmonton, Alberta

FOR THE RESPONDENTS