Federal Court  Cour fédérale

Date: 20170320

Docket: 17-T-4

Citation: 2017 FC 301

Ottawa, Ontario, March 20, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

TAMBA THOMAS

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER

[1] The Applicant is seeking an extension of time to commence judicial review proceedings in connection with his efforts to have goods seized by the Respondent under the *Customs Act*, RSC, 1985, c 1 (2nd Supp) (the Act), released.

[2] In order to be successful, the Applicant must establish that (i) he had a continuing intention to pursue the underlying judicial review proceeding; (ii) a reasonable explanation for the delay in doing so exists; (iii) his position in the underlying judicial review proceeding has

some merit, and (iv) no prejudice to the Respondent arises from the delay (*Canada (Attorney General) v Hennelly*, [1999] 167 FTR 158, 89 ACWS (3d) 376 (FCA) at para 3 [*Hennelly*]; *Canada (AG) v Larkman*, 2012 FCA 204 at para 61 [*Larkman*]; *Doray v Canada*, 2014 FCA 87 at para 2).

[3] The relevant facts can be summarized as follows. The Applicant is a diamond merchant and a resident of Australia. On November 11, 2009, he entered Canada from the United States at the Lacolle (Quebec) border crossing point on a Greyhound bus. Upon indicating he was a diamond merchant, he was asked by a customs agent if he was carrying any valuable goods or diamonds. He said no.

[4] Upon a search of the Applicant's backpack, four uncut - or rough - diamonds, totalling 28.14 carats, were found. The diamonds were seized by the customs agent for not having been reported contrary to section 12 of the Act and a number of documents the Applicant was carrying with him, including three (3) Kimberley Process Certificates, were retained for further investigation.

[5] The Applicant challenged the seizure through an administrative ministerial review process, claiming that the diamonds' presence in his backpack was a mistake and demanding that the diamonds be released to him for return to the United States. On November 24, 2011, a Minister's delegate determined, pursuant to sections 131 and 133 of the Act, that a contravention to the Act had occurred and that the diamonds were to be returned to the Applicant upon receipt of an amount of $4,950.00 to be held as forfeit.

[6] However, the Minister's delegate specified that the diamonds were currently being held as evidence for pending criminal charges, which meant that they could not be returned to the Applicant as long they would be required for these proceedings. At that time, the Applicant was facing charges under the Act as well as under section 14 of the *Export and Import of Rough Diamonds Act* SC 2002, c 25 (the *Diamonds Act*) which provides that every person importing rough diamonds must ensure that, on import, the diamonds "are in a container that meets the requirements of the regulations and are accompanied by a Kimberley Process Certificate that (a) was issued by a participant; (b) has not been invalidated by the participant; and (c) contains accurate information" and are not parcelled "with diamonds excluded from the definition rough diamond or with anything else".

[7] In 2012, the Applicant brought an action under section 135 of the Act disputing the seizure of the diamonds, the penalty assessed and the Minister's ability to release the diamonds. On August 28, 2013, the Court (Justice André Scott, as he then was) dismissed the Applicant's action on the ground that, any challenge to the conditions set for release of goods seized under the Act had to be brought by means of a judicial review application pursuant to section 133 of the Act (Docket: T-655-12). There was no appeal of that decision and no judicial review proceedings challenging the conditions set for the release of the seized diamonds was brought by the Applicant in the wake of Justice Scott's decision.

[8] On September 2, 2016, the Applicant was acquitted of all charges laid against him by a judge of the Quebec Court who also ordered the release of the seized diamonds and documents. On October 20, 2016, the Applicant inquired with the customs agent who had seized the diamonds in 2009, David de Repentigny, about the release of the diamonds. Mr. de Repentigny

informed the Applicant the same day that he would verify the requirements for the release of the diamonds, noting that as far as he was concerned, the goods were "still under customs seizure" and that in addition to the penalty, the Canadian customs authorities would "need a certificate of exportation from the United States and a Certificate of importation from Canada".

[9] In an undated letter attached to an email dated October 22, 2016, Mr. de Repentigny informed the Applicant that the diamonds were "ready to be released for exportation". The letter also provided as follows :

> "Since you do not have an American Kimberly export certificate, I have consulted the recourse division and the terms of release for exportation have been set to $4950.00 Canadian. The goods are currently at the port of entry of St-Bernard-de-Lacolle, Quebec and will need to be exported immediately after release. […]
>
> […]
>
> You are responsible for the exportation of the goods to the United-States of America; the Canada Border Services Agency is not accountable once the goods are released."

[10] A series of exchanges between the Applicant, Mr. de Repentigny, a manager at the Corporate Affairs Branch of the Canada Border Services Agency, Jean-Marc Dupuis, and the Kimberly Process Office of Canada at Natural Resources Canada, ensued. These exchanges can be summarized as follows:

a) On November 22, 2016, in an email to the Applicant, Mr. de Repentigny reiterated that the diamonds "may be returned for export against a payment of $4,950.00";

b) On November 23, 2016, in an email to Mr. Dupuis, the Applicant confirmed what was apparently said to him by Mr. Dupuis in an earlier conversation: that upon paying the penalty of $4,950.00, he could "choose to keep **[**his goods**]** in Canada or

do whatever else [he] want[s]" without having to export them first to the United States and asked whether this "administrative process" overrode the order made by the Quebec Court that the seized diamonds and Kimberly Process Certificates be released to him;

c) The same day, the Applicant wrote to Mr. de Repentigny telling him what he had allegedly been told by Mr. Dupuis; he also mentioned that the penalty was excessive "after everything [he had] been through";

d) On December 5, 2016, the Applicant followed up on his email of November 23, 2016 to Mr. de Repentigny requesting from him confirmation of Mr. Dupuis's instructions that he "can pick up the diamonds in Canada"; he also asked to whom he could speak to regarding the penalty as the court, in his criminal case, had the "mandate to order the release of the diamonds to [him] without any further penalty" as per the *Diamonds Act*;

e) On December 10, 2016, Mr. de Repentigny informed the Applicant that the diamonds were never considered as imported into Canada, that they were seized and that terms of release for exportation were being offered to him; he added that there was nothing else that could be done for the Applicant regarding the release of the diamonds;

f) On December 12, 2016, the Applicant sought the assistance of the Kimberly Process Office of Canada at Natural Resources Canada, with which he had had previous communications regarding the release of the diamonds with respect to the position of the Canadian Customs authorities communicated to him by Mr. de Repentigny on December 10; the Applicant expressed concerns that since the seized diamonds were rough diamonds, a new Kimberly Process Certificate as well as

tamper proof would be required in order for the diamonds to be exported to the United States, two things, he said, which could not be achieved while the diamonds remain with Customs; he added that, paying the fine of $4,950.00 would not assist him in this regard as he would still be "in limbo";

g) On December 23, 2016, the Kimberly Process Office of Canada sent this response to the Applicant:

> Thank you for your e-mail of December 11, 2016. We have been in contact with the Canada Border Services Agency (CBSA) and there is agreement that since the rough diamonds were seized by the CBSA at the border, the rough diamonds did not actually enter Canada (i.e., they were not imported). Rough diamonds may only enter Canada with a valid Kimberley Process Certificate. As a result, when the rough diamonds are released through the CBSA's administrative process, they cannot be exported and must be returned to the United States (the country from which they came).
>
> Unfortunately, the Canadian Kimberley Process Office (KPO) is unable to issue a Canadian Kimberley Process Certificate for the rough diamonds because they did not actually enter Canada. They were detained prior to entering Canada and only rough diamonds deemed to have been imported can be exported.
>
> With respect to your question on tamper proofing, subsection 9(1) of the *Export and Import of Rough Diamonds Regulations* states that "A container to be used for the export (or import) of rough diamonds must be so constructed that the container, when sealed, cannot be opened without showing evidence of having been opened."
>
> In an effort to facilitate the transfer of these rough diamonds to the United State, we have contacted the U.S. Department of State and U.S. Customs and Border Protection and we have explained that:
>
> > The rough diamonds were seized by the Canada Border Services Agency, prior to entering Canada, in November of 2009;
> >
> > The rough diamonds are being released into your custody; and

> The rough diamonds will not be accompanied by a Canadian Kimberley Process Certificate because they were never imported to Canada.
>
> The response from U.S. officials was that the rough diamonds cannot be accepted onto their territory because they left the United States without proper authority (i.e., there was no U.S. Kimberley Process certificate issued for their export). It is our understanding that if the diamonds were to be returned to the United States, they would be confiscated.

[11] The Applicant's motion record for leave to extend the time to commence judicial review proceedings against the terms of release of the seized diamonds that were communicated to him following his acquittal of the criminal charges was filed on January 16, 2017. The Applicant's affidavit and written submissions in support of his motion are prolix but, what is at the heart of his claim against these terms of release can, in my view, be summarized as follows:

a) The terms of release set out in Mr. de Repentigny October 22, 2016 email, including the penalty of $4,950.00, are unfair, unreasonable and inconsistent with those set out in the original decision made by the Minister's delegate on November 24, 2011 and, are *ultra vires* and contemptuous of the Quebec Court's acquittal decision ordering the immediate release of the seized diamonds and documents to the Applicant;

b) The October 22, 2016 decision purports that the seized goods are not considered to have been imported into Canada even though the Applicant was told during the phase of the administrative review process, that led to the November 2011 decision, that the goods were imported into Canada as they were transported within Canada to adduce evidence in the criminal matter;

c) Requiring that the diamonds be only released for export to the United States is a new condition not contemplated by the November 2011 decision and is akin to total

> forfeiture of the diamonds as, even if they are released upon payment of the penalty, they cannot enter Canada nor can they enter the United States without being seized.

[12] The Applicant contends that the October 22, 2016 decision only came to his attention on November 21, 2016 leaving him insufficient time to clarify the decision, seek legal advice and prepare an application for judicial review.

[13] Turning now to the *Hennelly* criteria, I am satisfied that the Applicant has shown a continuing intention to pursue the underlying judicial review proceeding. It is clear from the record before me that that once acquitted of the charges laid against him, the Applicant contacted the Canadian Customs authorities in order to organize the release of the diamonds, sought some clarification about the terms of release communicated to him by Mr. de Repentigny on October 22, 2016, particularly in light of Mr. Dupuis's alleged instructions, and sought the views and assistance of the Kimberly Process Office of Canada as to what these terms of release meant for the faith of the seized diamonds once released by the Canadian Customs authorities.

[14] I believe it is fair to say that it is only on December 23, 2016, when the Kimberly Process Office of Canada responded to his inquiries, that the Applicant got the full picture of what the terms of release set out on October 22, 2016 meant for him. It is also fair to say that the Applicant's intention to seek the release of the seized diamonds and documents has been continuous from the moment these goods were seized. The Applicant cannot be faulted in this regard for not pursuing his legal recourses before this Court following Justice Scott's decision of August 28, 2013 as, he was told at the time by the Canadian Customs authorities that the diamonds could not be released in any event as they were required as exhibits for the pending

criminal proceedings. As we have seen, these proceedings only came to a close in September 2016.

[15] I am also satisfied, for the same reasons that, although the Applicant only reacted to Mr. de Repentigny's October 22, 2016 email in the second half of the month of November, and that he waited until January 16, 2017 to file his motion record, there is a reasonable explanation for the delay.

[16] The Respondent claims that the terms of release set out in October 22, 2016 simply reiterate those outlined by the Minister's delegate on November 24, 2011 and that, therefore, the *Hennelly* criteria can only be assessed against the Minister's delegate's decision, with the result that none of these two *Hennelly* factors can be held to have been satisfied in the present case.

[17] I am not convinced that the October 2016 terms of release are a mere reiteration of the November 2011 decision. What is clear though is that, the October 2016 terms of release were set out in a different context, that of the Applicant's acquittal of the criminal charges laid against him under the *Diamonds Act* and also, according to the record before me, under the Act. Also, there is no reference in the November 2011 terms of release to what appears to be a condition that, the diamonds only be released for export to the United States, leading to the conundrum the Applicant allegedly finds himself in. In addition, the assurances Mr. Dupuis allegedly gave to the Applicant on that particular issue raise some concerns that may need to be addressed.

[18] This also leads me to conclude that the Applicant's position in the underlying judicial review proceeding is not devoid of any merit and satisfies, as a result, the third *Hennelly* criteria.

It seems to me that contrary to what was the case in November 2011, the current terms of release requires some analysis of the interplay between the enforcement of the Act, the *Diamonds Act* and the outcome of the criminal proceedings, including the effect of the Quebec Court's acquittal decision ordering the immediate release of the seized diamonds and documents to the Applicant. For instance, to the extent the Applicant was acquitted of the charges laid against him under the Act, this begs the question, among others, as to why the Applicant should still pay a penalty for the release of the seized diamonds. This is probably what the Applicant means when he claims that the current terms of release are *ultra vires* of the Quebec Court's decision.

[19] I find that the underlying judicial review proceeding raises issues which are better left for the application judge to decide as he/she will benefit, at that stage, from a full evidentiary record and more fulsome arguments.

[20] Finally, I am satisfied that no prejudice to the Respondent arises from the delay.

[21] The case law makes it clear that the underlying consideration when weighing the *Hennelly* factors is that justice must be done between the parties, which means that in certain circumstances, an extension of time will still be granted even if one of the criteria is not satisfied (*Canada (Minister of Human Resources Development) v Hogervost*, 2007 FCA 41, at para 33; *Strungmann v Canada (Citizenship and Immigration)*, 2011 FC 1229, at para 9). This signals a somewhat relaxed and facts-specific approach to the *Hennelly* factors.

[22] Here, I find that the Applicant, after having been told by the criminal court that he had done nothing wrong when he crossed the border with the seized diamonds in 2009 and who finds

himself in some sort of helpless situation where he is allegedly doomed to have his diamonds seized by the American authorities the moment they are released by the Canadian Customs authorities, after having paid a penalty he claims he should no longer have to pay given his acquittal, should have his "day in Court".

[23] The Applicant is seeking his costs "on a solicitor and own client basis". However, according to rule 410(2) of the *Federal Courts Rules*, SOR/98-196, the costs of a motion for an extension of time shall, unless the Court orders otherwise, be borne by the party bringing the motion. Given the particular circumstances of this case and considering that the Respondent is not seeking its costs, I find that each party shall bear the costs of the motion.

THIS COURT ORDERS that:

1. The motion for an extension of time is granted;
2. The Applicant is to file and serve his notice of application for judicial review within 15 days of the date of the present order; and
3. No costs.

"René LeBlanc"

Judge