

Federal Court



Cour fédérale

**Date: 20180809**

**Docket: T-523-16**

**Citation: 2018 FC 820**

**St. John's, Newfoundland and Labrador, August 9, 2018**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**GAETANO CRAIG GAGLIANO**

**Applicant**

**and**

**HON. RALPH GOODALE, MINISTER OF  
PUBLIC SAFETY & EMERGENCY  
PREPARDNESS, HOUSE OF COMMONS,  
OTTAWA, ONTARIO**

**Respondents**

**JUDGMENT AND REASONS**

**I. INTRODUCTION**

[1] Mr. Gagliano (the “Applicant”) seeks judicial review of the decision, dated February 29, 2016, by Mr. Jeffrey Strickland, Senior Program Advisor, (the “Senior Program Advisor”), Appeals Division, of the Recourse Directorate of the Canada Border Services Agency (the

“CBSA”). In that decision, the Senior Program Advisor determined, pursuant to section 131 of the *Customs Act*, R.S.C. 185, c.1 (2<sup>nd</sup> Supp.) (the “Act”) had been contravened, and that pursuant to section 133 of the Act, the sum of \$7,563.33 paid by the Applicant to recover possession of a diamond ring shall be held as forfeit.

[2] By Application for Judicial Review dated March 28, 2016, the Applicant seeks the following relief:

1. Request for the ‘Decision’ in the above noted matter, be reversed, and the full amount of the forfeiture returned, for the item “Diamond Ring”
2. This matter, of seizure, be stricken from the record of Gaetano Gagliano.

## II. **BACKGROUND**

[3] The following facts are taken from the affidavit of the Applicant, sworn on April 26, 2016, and the affidavit of Tara-Lee Fraser, filed on behalf of the Minister of Public Safety and Emergency Preparedness (the “Respondent” or the “Minister”). Reference to the affidavits includes reference to exhibits attached to those affidavits. The exhibits include notes from CBSA officers and agents, as well as the transcript of the cross-examination of Ms. Fraser.

[4] The Applicant is a Canadian citizen. He is a frequent traveller and a holder of a Nexus Card.

[5] On June 25, 2015, the Applicant went to New York City where he made a down payment on a diamond ring. The ring was intended to be an engagement ring.

[6] Upon his return to Canada, through Pearson International Airport, the Applicant was selected for secondary screening by a Border Service Officer (“BSO”). In the course of that process, he asked about his exemptions for a return trip within 24 hours. The Applicant declared \$200.00 on his Customs Declaration card, form E311.

[7] When questioned about his purchases, the Applicant said that he had bought some jeans, for cash, and that he did not have receipts. He also said that he had commissioned the creation of a diamond engagement ring valued between \$19,000.00 and \$22,000.00 and that the ring would be ready in 4 to 6 weeks.

[8] The information provided by the Applicant about his purchases was incorrect. Following a search of his luggage, clothing, including a woman’s skirt, was found with price tags attached, together with receipts of purchase. A “look out” for the ring was placed on his file. The Applicant paid \$637.35 to obtain release of the goods, on June 25, 2015.

[9] The engagement ring eventually crossed the border in the possession of the Applicant’s friend in late August 2015. The ring was not declared and no duty was paid.

[10] On August 31, 2015, the Applicant again entered Pearson International Airport. He was returning from a trip to Europe. On the return travel, he transited the United States on his way

back to Canada. The diamond ring was in his possession when he entered the United States, enroute to Canada.

[11] The Applicant used the electronic check-in kiosk at the Toronto airport to submit his E311 primary declaration card. He did not declare the ring at this primary checkpoint.

[12] The Applicant was sent to secondary screening due to the notation that was placed on his file after the enforcement action in June. The diamond ring was discovered in his possession during the secondary screening.

[13] The ring was seized because it had not been reported pursuant to section 12 of the Act.

[14] The ring was valued at \$25,211.10. The terms of release were assessed as a Level I infraction. The Applicant was assessed 30% of the value of the ring, that is the amount of \$7,653.33, in order to recover possession of it.

[15] On September 13, 2015, the Applicant requested a review of the seizure terms, as well as review of the penalty. He made his request pursuant to subsection 129 (1) of the Act which provides as follows:

**Request for Minister's decision**

**129 (1)** The following persons may, within 90 days after the date of a seizure or the service of a notice, request a decision of the Minister under section

**Demande de révision**

**129 (1)** Les personnes ci-après peuvent, dans les quatre-vingt-dix jours suivant la saisie ou la signification de l'avis, en s'adressant au ministre par

131 by giving notice to the Minister in writing or by any other means that is satisfactory to the Minister:

écrit, ou par tout autre moyen que celui-ci juge indiqué, présenter une demande en vue de lui faire rendre la décision prévue à l'article 131:

**(a)** any person from whom goods or a conveyance is seized under this Act;

**a)** celles entre les mains de qui ont été saisis des marchandises ou des moyens de transport en vertu de la présente loi;

**(b)** any person who owns goods or a conveyance that is seized under this Act;

**b)** celles à qui appartiennent les marchandises ou les moyens de transport saisis en vertu de la présente loi;

**(c)** any person from whom money or security is received pursuant to section 117, 118 or 119 in respect of goods or a conveyance seized under this Act; or

**c)** celles de qui ont été reçus les montants ou garanties prévus à l'article 117, 118 ou 119 concernant des marchandises ou des moyens de transport saisis en vertu de la présente loi;

**(d)** any person on whom a notice is served under section 109.3 or 124.

**d)** celles à qui a été signifié l'avis prévu aux articles 109.3 ou 124.

[16] In requesting a review of the seizure terms, the Applicant submitted that he had been forthcoming in dealing with the BSO at Pearson International Airport and he did not attempt to conceal the ring. He also claimed that the BSO assured him that if he were honest about who initially brought the ring into Canada, he would not be penalized.

[17] On October 6, 2015, Ms. Tracy Bangs, a Senior Appeals Officer, sent the Applicant a "Notice of Reasons". This was an interim step prior to a final decision on the appeal.

[18] The letter was signed by Ms. Tracey Bangs, Senior Appeals Officer, Recourse Directorate of the CBSA. Ms. Bangs advised the Applicant that the letter should be regarded as the “written Notice of reasons for Action” as required by section 130 of the Act. Ms. Bangs further said that she was enclosing a copy of the relevant section of the Act Timelines, and conditions”, together with a copy of the Narrative Report regarding the enforcement action.

[19] In those Reasons, Ms. Bangs said that the Applicant had not listed the ring on his E311 primary declaration card upon arrival at Pearson International Airport. Since the ring was in his possession at that time and was not declared, this failure to report was a contravention of the Act.

[20] Ms. Bangs further noted that had it not been for the previous enforcement action and the flagging of the Applicant for secondary screening, the ring would not have been declared or discovered.

[21] The Applicant was given the opportunity to file more supporting documentation prior to a decision being made on his appeal. If no further information was provided, a decision would be made on the basis of the information then on file.

[22] Further, Ms. Bangs included in her letter a table setting out the three levels of infractions pursuant to section 12 of the Act, as well as the penalties for each level of infraction.

[23] Subsequently, Ms. Bangs prepared a “Case Synopsis and Recommendation”, dated February 16, 2016. She reviewed the facts and the Applicant’s position. She characterized the

matter as a failure to report the importation of goods as required by section 12 of the Act. She observed that the goods could have been seized at level 2 due to the prior enforcement action in June 2015.

[24] Ms. Bangs recommended that the penalty be maintained at level 1, although a level 2 penalty was “duly warranted”.

[25] The Applicant did not provide more information or documents in response to the letter of October 6, 2015, and the decision of February 29, 2016 was made on the basis of the information then at hand.

[26] She also recommended that the sum of \$7,563.33 paid by the Applicant to recover possession of the ring “shall be held as forfeit.”

[27] By letter dated February 29, 2016, the Senior Program Advisor, Appeals Division Records Directorate, sent the Applicant the Ministerial decision on his appeal.

[28] In that decision, the Senior Program Advisor decided that pursuant to section 131 of the Act, there had been a contravention of the Act “in respect of the goods that were seized”, that is the diamond ring. He further decided that pursuant to section 133 of the Act, the amount of \$7,563.33 “shall be held as forfeit”.

[29] The Senior Program Advisor reviewed the facts as presented by the Applicant, including his intention to declare the ring upon entry into Canada. The Senior Program Advisor noted that in spite of that intention, the Applicant did not declare the “importation of the ring” on his Customs Declaration Card.

[30] The Senior Program Advisor observed that although given the opportunity to produce evidence that the ring had been lawfully imported on a previous occasion, the Applicant did not present evidence in that regard.

[31] The Senior Program Advisor also acknowledged the Applicant’s reference to a statement from a CBSA Officer that no penalty would be imposed for importation of the ring but subsequently that Officer changed his mind.

[32] The Senior Program Advisor said that “as the evidence confirms that the ring was not reported, and would not have been accounted for had you not been referred for a secondary examination, the officer was authorized under section 110 of the [Act] to seize such goods.”

[33] The Senior Program Officer further commented that the Officer’s decision to seize the ring followed the secondary examination and “did not impact, your decision to not report importation of the ring”.

[34] The decision of the Senior Program Officer included the following paragraphs:

To appeal the decision made pursuant to section 131, you may file an action in the Federal Court, in accordance with section 135 of



the *Customs Act*. You must file your action within 90 days of the date of mailing this decision.

To appeal the decision made pursuant to section 133, you may appeal this decision by way of an application for judicial review under section 18.1(1) of the *Federal Courts Act*. An application to the Court must normally be filed within 30 days of the date of the mailing of this decision.

### III. **STATUTORY CONTEXT**

[35] The decision under review arises from the undeclared importation of goods into Canada by the Applicant. Certain sections of the Act are relevant, as follows:

#### **Report**

**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.

#### **Time and manner of report**

**(2)** Goods shall be reported under subsection (1) at such time and in such manner as the Governor in Council may prescribe.

#### **Who reports**

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

**(a)** in the case of goods in the actual possession of a person arriving in

#### **Déclaration**

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

#### **Modalités**

**(2)** La déclaration visée au paragraphe (1) est à faire selon les modalités réglementaires de temps et de forme fixées par le gouverneur en conseil.

#### **Déclarant**

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

**a)** la personne ayant en sa possession effective ou parmi ses bagages des

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;

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;

...

**(b)** in the case of goods, other than goods referred to in paragraph (a) or goods imported as mail, on board a conveyance arriving in Canada, by the person in charge of the conveyance; and

...

**b)** le responsable du moyen de transport arrivé au Canada à bord duquel se trouvent d'autres marchandises que celles visées à l'alinéa a) ou importées comme courrier;

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

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

### **Goods returned to Canada**

### **Marchandises qui reviennent au Canada**

**(3.1)** For greater certainty, for the purposes of the reporting of goods under subsection (1), the return of goods to Canada after they are taken out of Canada is an importation of those goods.

**(3.1)** Il est entendu que le fait de faire entrer des marchandises au Canada après leur sortie du Canada est une importation aux fins de la déclaration de ces marchandises prévue au paragraphe (1).

...

### **Written report**

...

### **Déclaration écrite**

**(6)** Where goods are required by the regulations to be reported under subsection (1) in writing, they shall be

**(6)** Les déclarations de marchandises à faire, selon les règlements visés au paragraphe (1), par écrit sont à établir en la

reported in the prescribed form containing the prescribed information, or in such form containing such information as is satisfactory to the Minister.

...

### **Return of goods seized**

**117 (1)** An officer may, subject to this or any other Act of Parliament, return any goods that have been seized under this Act to the person from whom they were seized or to any person authorized by the person from whom they were seized on receipt of

**(a)** an amount of money of a value equal to

**(i)** 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, 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

forme, ainsi qu'avec les renseignements, déterminés par le ministre ou satisfaisants pour lui.

...

### **Mainlevée**

**117 (1)** L'agent peut, sous réserve des autres dispositions de la présente loi ou de toute autre loi fédérale, restituer les marchandises saisies en vertu de la présente loi au saisi ou à son fondé de pouvoir :

**a)** ou bien sur réception :

**(i)** soit du total de la valeur en douane des marchandises et des droits éventuellement perçus sur elles, calculés au taux applicable :

**(A)** au moment de la saisie, s'il s'agit de marchandises qui 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 de marchandises passibles des droits ou droits supplémentaires prévus à l'alinéa 32.2(2)b) dans le cas visé au paragraphe 32.2(6),

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

**(B)** au moment où les marchandises 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,

**(ii)** such lesser amount as the Minister may direct; or

**(ii)** soit du montant inférieur ordonné par le ministre;

...

...

### **Request for Minister's decision**

### **Demande de révision**

**129 (1)** The following persons may, within 90 days after the date of a seizure or the service of a notice, request a decision of the Minister under section 131 by giving notice to the Minister in writing or by any other means that is satisfactory to the Minister:

**129 (1)** Les personnes ci-après peuvent, dans les quatre-vingt-dix jours suivant la saisie ou la signification de l'avis, en s'adressant au ministre par écrit, ou par tout autre moyen que celui-ci juge indiqué, présenter une demande en vue de lui faire rendre la décision prévue à l'article 131 :

**(a)** any person from whom goods or a conveyance is seized under this Act;

**a)** celles entre les mains de qui ont été saisis des marchandises ou des moyens de transport en vertu de la présente loi;

**(b)** any person who owns goods or a conveyance that is seized under this Act;

**b)** celles à qui appartiennent les marchandises ou les moyens de transport saisis en vertu de la présente loi;

**(c)** any person from whom money or security is received pursuant to section 117, 118 or 119 in respect of goods or a

**c)** celles de qui ont été reçus les montants ou garanties prévus à l'article 117, 118 ou 119 concernant des

conveyance seized under this Act; or

marchandises ou des moyens de transport saisis en vertu de la présente loi;

(d) any person on whom a notice is served under section 109.3 or 124.

d) celles à qui a été signifié l'avis prévu aux articles 109.3 ou 124.

#### **Notice of reasons for action**

#### **Signification du président**

**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.

#### **Evidence**

#### **Preuve**

(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.

#### **Evidence**

#### **Affidavit**

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.

#### **Decision of the Minister**

#### **Décision du ministre**

**131 (1)** After the expiration of

**131 (1)** Après l'expiration des

the thirty days referred to in subsection 130(2), the Minister shall, as soon as is reasonably possible having regard to the circumstances, consider and weigh the circumstances of the case and decide

**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;

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

### **Exception**

**(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.

### **Notice of decision**

**(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.

### **Judicial review**

**(3)** The Minister's decision

trente jours visés au paragraphe 130(2), le ministre étudie, dans les meilleurs délais possible en l'espèce, les circonstances de l'affaire et décide si c'est valablement qu'a été retenu, selon le cas:

**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;

**d)** [Abrogé, 2001, ch. 25, art. 72]

### **Exception**

**(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.

### **Avis de la décision**

**(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.

### **Recours judiciaire**

**(3)** La décision rendue par le

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).

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).

### **Where there is contravention**

**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,

**(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;

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

**(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

### **Cas d'infraction**

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

**b)** restituer toute fraction des montants ou garanties reçus;

**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

sufficient, not exceeding an amount determined under subsection (4) or (5), as the case may be.

celui déterminé conformément au paragraphe (4) ou (5), selon le cas.

### **Powers of Minister**

### **Pouvoirs du ministre**

**(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 section 109.3.

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.

### **Return of goods under paragraph (1)(a)**

### **Restitution des marchandises**

**(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

**(i)** au moment de la saisie, si elles n'ont pas fait l'objet de la déclaration en



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

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

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

...

**Amount demanded in respect of goods under paragraph (1)(c)**

**(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

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)** 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)** soit du montant inférieur que le ministre ordonne.

...

**Réclamation: marchandises**

**(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

become due on the goods under paragraph 32.2(2)(b) in circumstances to which subsection 32.2(6) applies; or

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

**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.

...

...

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

**(8)** [Abrogé, 1992, ch. 28, art. 27]

### **Federal Court**

### **Cour fédérale**

**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 the plaintiff and the Minister is the defendant.

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

### **Ordinary action**

### **Action ordinaire**

**(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.

[36] The combined effect of the provisions cited above is to impose an obligation upon a person entering Canada to declare goods sought to be imported; see section 12. The failure to declare goods may lead to seizure of those goods as forfeit; see section 110. Goods that have been seized may be returned upon payment of duty or a lesser amount as directed by the Minister; see subsection 117 (1).

[37] A person may request review of a seizure by the Minister; see subsection 129 (1). The Minister is authorized to determine if the Act has been contravened; see section 131. If the Minister determines that the Act has been contravened, he or she may determine the penalty. A decision setting a penalty can be judicially reviewed before the Federal Court; see section 133. A decision of the Minister that the Act has been contravened can be appealed, upon the commencement of an action by statement of claim; see section 135.

#### IV. **SUBMISSIONS**

##### A. *The Applicant's submissions*

[38] The Applicant is self-represented. In his Memorandum of Fact and Law, he focuses on the issue of contravention of the Act, as addressed in section 131 of the Act. He submits that this finding was unreasonable since he intended to declare the ring, it was not concealed in his luggage and he was assured on August 31, 2015 that if he were honest, no penalty would be imposed.

[39] The Applicant further argues that the declaration card E311 is intended to capture purchases made on a specific trip and since he had not purchased the ring on his European trip, his entry into Canada following that trip was not the proper time to report the ring.

[40] Finally, the Applicant submits, relying on subsection 32.2 (1) of the Act, that he believed he had a period of 90 days from the time his friend brought the ring into Canada without declaring it, to correct the error of non-declaration.

[41] By letter dated April 3, 2018, the Applicant made further submissions. Among other things, he raised the argument of not understanding the scope of judicial review. He also argued that the failure of the Respondent to produce the “primary screening officer” or the “secondary screening officer” for cross-examination was improper and interferes with his ability to establish his Claim for recovery of the penalty that he had paid.

[42] The Applicant also took issue with what he characterized as the Respondent’s reliance upon the creation of a “pattern of deceit” about his intentions not to declare the ring upon his return from the European trip in September 2015.

[43] The final arguments set out in the Applicant’s letter of April 3, 2018, read as follows:

- The Government makes no attempt to respond to the primary fact, which the Ministry apparently relied upon, to deny the Ministerial Decision, which was not having the ring reported on the E311 card (from a different trip). The Ministry fully acknowledges during cross-examination, that the E311 card is intended ONLY for purchases on that specific trip, regarding those specific destinations and pertaining to the specific purchases during that specific time period. The ring,

having been purchased on a separate trip, one month earlier, in the United States, was not eligible to be reported on the E311 card returning from Europe.

- At no point does the Government reconcile their denial of my appeal, based on their stance regarding the E311 card, which they later acknowledge to be incorrect.
- Finally, it is endlessly frustrating as a private citizen, that the central premise of the Attorney General's argument, on behalf of the Government, is that despite the multiple unanswered and unchallenged procedural missteps of the Border Patrol Officers in enforcing seizure, they submit that my appeal lacks validity based on a procedural misstep to have requested a Judicial Review. In other words, the Government can make 5 errors in applying legislation, but if a citizen makes a single error in attempting to challenge those 5 errors... then the challenge is defunct and the Government goes unchecked.

**B. *ii) The Respondent's Submissions***

[44] The Respondent submits, in response to the initial Memorandum of Fact and Law filed by the Applicant, that the decision in question, that is the imposition of a penalty pursuant to section 133, can only be challenged by way of judicial review. He argues that the submissions of the Applicant about the interactions with the CBSA personnel are irrelevant.

[45] Insofar as the Applicant appears to be challenging the finding by the Minister that he, the Applicant, contravened the Act, the Respondent contends that this finding can only be challenged pursuant to section 135, that is by way of an action commenced by a statement of claim. He argues that the Applicant did not do so but rather commenced an application for judicial review relative only to the penalty that was imposed.

[46] Further, the Respondent submits that the decision, to impose a penalty, is a discretionary decision that is reviewable on the standard of reasonableness, as discussed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

[47] The Respondent acknowledged receipt of a copy of the Applicant's further submissions and by letter dated April 30, 2018, advised that he would not be filing any submissions in reply.

V. **DISCUSSION AND DISPOSITION**

[48] The first issue to be addressed here is the nature of this proceeding.

[49] The Applicant filed an application for judicial review on March 30, 2016, seeking reversal of the penalty that he paid to recover possession of the diamond ring that was forfeited on August 31, 2015.

[50] This means that the Applicant seeks review of the decision made pursuant to section 133 of the Act. His application for judicial review refers to the decision made on February 29, 2016. However, the submissions made by the Applicant suggest that he is also seeking review of the decision to find a contravention of the Act, a decision made pursuant to section 131.

[51] The Applicant pleads that he was honest about the ring when questioned at the secondary screening and that he relied on the "promise" of the BSO that he would not be penalized if he were honest about the first importation of the ring into Canada by his friend.

[52] In his further submissions of April 3, 2018, the Applicant argues that he was deprived of the opportunity to cross-examine the primary and secondary screening officers. He argues, again, that he was not required to report the ring on the E311 form since that form required reporting only of goods purchased on the trip that he was making at that time, and the ring had not been purchased on that trip.

[53] The submissions of the Applicant, as expanded in his letter of April 3, 2018, purport to challenge the finding of the Minister that he had contravened the Act. The statutory scheme does not allow such a challenge to be made by way of a judicial review. Pursuant to section 135 of the Act, that finding can only be challenged by way of an action.

[54] The statutory scheme of the Act, about the different processes to be followed when challenging a finding of a contravention or a penalty, was reviewed in detail in *ACL Canada Inc. v. The Queen in right of Canada et al* (1993), 107 D.L.R. (4<sup>th</sup>) 736 at pages 755 to 757. I refer to the following passages:

In this case, each of the two decisions of the Minister dated May 6, 1988, contained a decision pursuant to s. 131 that the *Act* had been contravened, and a decision pursuant to s. 133 that a portion of the amount previously paid by ACLC should be remitted and the balance held as forfeit. Does s. 135, providing an appeal from the decision of the Minister by one who requested a decision under s. 131, preclude appeal of the determination under s. 133, as the defendants here contend? In my opinion, the answer to this question is yes, for the following reasons. In s. 135 Parliament has provided for an appeal in relation to the decision of the Minister made under s. 131, a section which provides for a decision only with respect to the issue of whether there has been a contravention of the *Act* or the regulations.

...

In my view, Parliament has insulated from appeal the penalty imposed in the event there is found to be a contravention of the *Act*. That may seem surprising since the penalty will often be the primary concern of the person whose goods are seized under the *Act* or who is served with a notice and demand for payment under s. 124.

...

This does not mean that the discretion vested in the Minister in relation to penalties is unlimited. The *Act* and regulations specify maximum penalties, and the determination of a penalty will not be beyond the jurisdiction of the court in terms of remedies for judicial review of administrative decisions, primarily in regard to the duty of fairness. In the result, I am persuaded that, while the court has no jurisdiction under s. 135 to review the penalty imposed where there is an infraction of the *Act*, it does have jurisdiction, under ss. 18 and 18.1 of the *Federal Court Act*, R.S.C. 1985, c. F-7, as amended by 1990, c. 8, ss. 4 and 5, to consider whether the discretion to impose penalties, consequent upon a contravention of the *Act*, has been exercised in accordance with the law.

[55] Section 129 allows an affected person to seek a decision from the Minister after seizure of goods. The delivery of a decision by the Minister opens up the possibility of further action by the person seeking a decision.

[56] If the Minister decides, pursuant to section 131 of the *Act*, that a contravention of the *Act* has occurred, the concerned person can challenge such finding by commencing an action pursuant to section 135 of the *Act*.

[57] When the Minister decides, pursuant to section 131 that a contravention of the *Act* has occurred, he can determine a penalty pursuant to subsection 133(1) of the *Act*. That subsection provides as follows;



**Where there is contravention      Cas d'infraction**

**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,

**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 :

[58] In such a case, the remedy available to a concerned person such as the Applicant is to seek judicial review of a decision about penalty, before the Federal Court. That is what the Applicant did.

[59] The processes set out in the Act for appealing a decision about the finding of a contravention and review of a penalty imposed in respect of a contravention were discussed by Justice Shore in *Nguyen v. Canada (The Minister of Public Safety and Emergency Preparedness)*, 2009 FC 724. I refer to paragraph 1 as follows;

The Applicant, Ms. Thi Ngoc Nguyen, seeks to challenge a decision taken under section 133 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) ("the Act"), whereby the Minister of Public Safety and Emergency Preparedness ("the Minister") requires payment of a specified amount of money before returning a seized diamond ring. The Applicant's arguments are all directed at challenging the decision under section 131 of the Act whereby the Minister found that Ms. Nguyen had contravened s. 12 of the Act by failing to report an alleged importation of a ring. Subsection 131(3) of the Act is a privative clause within the *Customs Act* that requires decisions made pursuant to s. 131 of the Act be subject to review only as described in

s.135(1) of the Act. Subsection 135(1) of the Act requires that a Minister's decision made under s.131 of the Act be appealed by way of an action. In other words, a decision made pursuant s. 131 of the Act must be challenged by way of action and not by way of application for judicial review.

[Emphasis in original]

[60] Further, at paragraph 20, Justice Shore said the following;

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.

[61] The Applicant pleads that he intended to declare the ring and that a CBSA Officer had agreed not to impose a penalty. On this basis, he seeks reversal of the monetary penalty.

[62] According to the decision in *Fenn (H.B) and Co. Ltd. v. Minister of National Revenue (Customs and Excise)* 53 F.T.R. 7, good intentions do not matter when it is a question of compliance with the statutory obligation to declare the importation of goods.

[63] The Applicant cannot by way of judicial review, challenge the finding that he had contravened the Act. That remedy is available only by way of an action, that is by issuance of a Statement of Claim within the timelines set out in the Act. The Applicant did not follow that process. The only question before the Court is the decision to impose a penalty, in the amount of \$7,563.33, to allow the Applicant to recover possession of the undeclared diamond ring.

[64] The decision to maintain the penalty is a discretionary decision reviewable on the standard of reasonableness.

[65] The Act imposes an obligation upon a person entering Canada to declare the acquisition of goods obtained outside the country, either by purchase or as a gift. The Act authorizes the imposition of a penalty if a contravention of the Act is established.

[66] The finding of a contravention cannot be addressed in the present application for judicial review.

[67] Insofar as the Applicant's arguments about the use of the E311 form are concerned, in my opinion, these arguments go to whether a contravention of the Act was established. For the reasons given in *Nguyen, supra*, those arguments cannot be considered and are not relevant to the issue at hand.

[68] The Applicant could only challenge the finding of a contravention by commencing an action pursuant to section 135 of the Act, that is by issuance of a Statement of Claim, leading to

a trial; see the decision in *Trites v. Canada (Minister of Public Safety and Emergency Preparedness)* (2011), 400 F.T.R. 267.

[69] The only issue before the Court is whether the Minister's decision to uphold the penalty of \$7,563.33 was reasonable.

[70] According to the decision in *Dunsmuir v. New Brunswick; supra*, a discretionary decision of an administrative decision-maker is subject to review on the standard of reasonableness. That standard requires that a decision be justifiable, transparent and intelligible, falling within a range of possible, acceptable outcomes that is defensible on the law and that facts; see *Dunsmuir, supra*, at para. 47.

[71] The Applicant here is challenging the reasonableness of the penalty that was imposed by the Senior Program Advisor, that is payment of the sum of \$7,653.33, representing 30% of the value of the undeclared diamond ring.

[72] The penalty was imposed because the Senior Program Advisor decided that the Act had been contravened by the undeclared importation of the diamond ring by the Applicant. He made that decision pursuant to section 131 of the Act and referred to that provision in the decision dated February 29, 2016.

[73] The Senior Program Advisor then determined, pursuant to section 133 of the Act, that the amount of \$7,563.33 "received for the return of the seized Diamond Ring shall be held a forfeit".

[74] The Senior Program Advisor proceeded to give reasons for his decision. In my opinion, those reasons meet the standards of intelligibility, justification and transparency having regard to the evidence that was before the Senior Program Advisor. The reasons meet the test in *Dunsmuir, supra*.

[75] In the circumstances, there is no basis for judicial intervention and this application for judicial review will be dismissed.

[76] The Respondent seeks costs.

[77] A Direction will be issued about a timeline for filing brief submissions on costs.

**JUDGMENT in T-523-16**

**THIS COURT'S JUDGMENT is that:** The application for judicial review is dismissed.

A Direction will be issued about a timeline for filing brief submissions on costs.

“E. Heneghan”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-523-16

**STYLE OF CAUSE:** GAETANO CRAIG GAGLIANO v. HON. RALPH GOODALE, MINISTER OF PUBLIC SAFETY & EMERGENCY PREPARDNESS, HOUSE OF COMMONS, OTTAWA, ONTARIO

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 23, 2017

**FURTHER SUBMISSIONS:** April 3, 2018; April 30, 2018

**JUDGMENT AND REASONS:** HENEGHAN J.

**DATED:** AUGUST 9, 2018

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