

Federal Court



Cour fédérale

Date: 20151218

Docket: T-385-14

Citation: 2015 FC 1395

Ottawa, Ontario, December 18, 2015

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

MASTER TECH INC.

Plaintiff

and

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Defendant

JUDGMENT AND REASONS

I. Overview

[1] In 2011, the plaintiff, Master Tech Inc, tried to export a set of machinery to Iran. When the machinery arrived at the border for export, the Canadian Border Services Agency (CBSA) detained the shipment pending an inquiry into whether export permits were required.

[2] CBSA then contacted various federal bodies with responsibilities for Canadian export laws. Those agencies advised CBSA that Master Tech had to supply further documentation before the machinery could be exported. CBSA then seized the goods on the basis that Master Tech had attempted to export them without proper authorization.

[3] In 2013, a delegate of the Minister found that Master Tech had contravened s 131 of the *Customs Act*, RSC 1985, c 1 (2nd Supp) (see Annex for all enactments cited) primarily on the basis that it had failed to acquire the necessary export license for the goods. The delegate ordered that the machinery be forfeited. Subsequently, on further review in 2014, the Minister conceded that there had been no contravention of the law relating to three of Master Tech's machines. In 2015, it made similar admissions relating to the fourth. The Minister has offered to return all of the machinery to Master Tech. However, the Minister maintains that the goods cannot be exported until the relevant federal agencies have authorized exportation.

[4] In this action, notwithstanding the Minister's concession, Master Tech seeks an order allowing its machinery to be exported. I have concluded that the order Master Tech seeks cannot be granted.

[5] There are two related issues:

1. Does the Federal Court have jurisdiction to order that the machinery can be exported?
2. Can CBSA refuse exportation until the responsible federal agencies give their permission?

II. Issue One – Does the Federal Court have jurisdiction to order that the machinery be allowed to be exported?

[6] Under the *Customs Act*, a CBSA officer may detain goods that are about to be exported until he or she is satisfied that regulations governing exports have been complied with (s 101). If the officer reasonably believes that there has been a contravention of the law, the officer may seize the goods as forfeit (s 110(1)). It then falls to the Minister to decide whether or not a contravention actually took place (s 131(1)(a)). If the Minister decides that there has been no contravention, he or she must authorize the removal of the goods from custody (s 132(1)(a)). If there has been a contravention, the Minister may return the goods on payment of a monetary penalty (s 133(1)(a)).

[7] The Minister's decision on the question of whether a contravention took place can be appealed to the Federal Court by way of an action (s 135)(1)). By this action, Master Tech purports to do just that. However, in an effort to settle this proceeding, the Minister has conceded that no contravention took place, and has invited Master Tech to pick up its machinery. In effect, therefore, there is no longer anything for Master Tech to appeal. Accordingly, the Court has no jurisdiction to grant any relief.

[8] Master Tech submits that the prevention of export is a kind of penalty that the Minister has no grounds to impose. However, since the Minister has conceded that it did not contravene any laws, Master Tech cannot be subjected to any penalties. Accordingly, in its view, the Minister can no longer detain the machinery; nor can the Minister refuse to allow it to be exported.

[9] I disagree with Master Tech's submissions.

[10] The denial of authority to export goods is not a penalty; rather, it is an exercise of CBSA's duty to ensure that export regulations have been complied with. In addition, a close review of the *Customs Act* and relevant regulations shows that neither CBSA nor the Minister of Public Safety can authorize exports when authorization is governed by another Act of Parliament. Accordingly, there is no basis for Master Tech's request for an order permitting the export of its machinery, even if the Court had jurisdiction to grant it, which it does not.

[11] Master Tech further submits that once the Minister concedes that there is no contravention, the *Customs Act* requires the Minister to "authorize the *removal from custody* of the goods" (my emphasis). In its view, this contrasts with the treatment of money or other security which the Minister must "*return*" (s 132(1)(a)). Master Tech suggests that "removal from custody" should be interpreted to mean, in these circumstances, removal from Canada – *ie*, exportation. It submits that if it simply meant that the Minister should return the goods to the owner, then the statute would use the same wording for both goods and money.

[12] I agree that the difference may be meaningful. For example, the wording may relieve the Minister from actually returning goods to their owner. Instead, as here, the Minister may simply allow the owner to retrieve them. However, in the absence of clearer statutory language, I cannot read into the words "removal of goods from custody" an obligation on the Minister to permit the exportation of those goods.

[13] In the alternative, Master Tech maintains that the Minister's concession amounts to a declaration that it has complied with export regulations and that its goods can now be shipped out of the country. If the Minister has reversed the original finding that it had failed to comply with export regulations, Master Tech reasons, this must mean that the goods are now cleared for export. It relies especially on the concession that the machines were not controlled at the time of export.

[14] I read the Minister's concession more narrowly. In letters to Master Tech, counsel for the Minister states:

In order to simplify the issues surrounding the Minister's finding of contraventions in relation to the four seized machines, the defendant admits, *for the purposes of the litigation*, that the following seized machinery . . . (the three machines) were not controlled by federal export regulations on July 6, 2011 when the defendant seized them for contraventions of s 95(1) of the *Customs Act*, RSC 1985, c 1 (2nd Supp) (the *Act*), that no contraventions arose in respect of them and that they were not properly subject to seizure. (My emphasis.)

[15] In my view, the Minister's concession is not that Master Tech has complied with export regulations and that the machinery can now be exported. The Minister has made no determination of exportability and has no authority to do so. Rather, the concession was made for a limited purpose, confined to the action before this Court. Master Tech was already advised by the bodies responsible for making a determination of exportability that it needed to obtain clearances to allow its goods to leave the country. The concession letters certainly do not contain an assertion that Master Tech no longer needs to obtain these clearances.

[16] This conclusion is supported by the evidence before me, which indicates that Master Tech has not fully complied with export regulations. The evidence shows:

- The Export Controls Division (TIE) of the Department of Foreign Affairs and Trade Development (DFATD) advised Master Tech that it did not need an export permit for its machinery. However, it also informed Master Tech that one of the machines was covered under the *Iran UN Regulations* and that two others were prohibited from export under the *Iran SEMA Regulations*. Master Tech applied for the necessary permits, but the Minister of Foreign Affairs denied them, concluding that there was insufficient documentation regarding the first machine and that there was an absolute prohibition relating to the other two. Master Tech did not seek judicial review of the Minister's decision. Before those machines can be exported, Master Tech must reapply for a permit.
- The Canadian Nuclear Safety Commission (CNSC) advised CBSA that Master Tech's fourth machine was likely controlled under the *Nuclear Non-proliferation Import and Export Control Regulations*, SOR-2000-210 (Schedule Part B, s B212(a)(2)(i)). Master Tech has not applied to the CNSC for a license to export that machine. Until it obtains that license, the machine cannot be exported.

[17] In response to this evidence Master Tech maintains that the Minister's concession binds these agencies, and in any case, the agencies have otherwise erred in their application of the export regulations. I do not agree. I have found that the Minister's concession had a limited scope and does not bind the federal agencies cited above. Further, this Court does not have

jurisdiction under a s 135 action to review the findings made by those agencies. A challenge to those findings should be brought by way of a judicial review.

[18] As neither CBSA nor the Minister of Public Safety can grant permission for exports. It follows that this Court cannot order the Minister to allow Master Tech to export its machinery.

III. Issue Two - Can CBSA refuse exportation until the responsible federal agencies give their permission?

[19] As explained above, it is not the respondent Minister who makes decisions about exportability. Those determinations fall to other decision-makers. The Minister's role is to ensure that the applicable regulations have been complied with before goods are exported; but the Minister does not have responsibility for those regulations or to decide whether their terms have been met.

[20] Therefore, the Minister can, indeed must, disallow exportation of Master Tech's machinery pending compliance with current export restrictions. That obligation is not inconsistent with the Minister's limited concession that Master Tech had not contravened any laws when it attempted to export its machinery in 2011.

IV. Conclusion and Disposition

[21] The Court cannot grant Master Tech an order requiring the Minister to allow its machinery to be exported. CBSA must refuse export until Master Tech has complied with the applicable regulations. Therefore, I must dismiss this action, with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The action is dismissed, with costs.

“James W. O’Reilly”

Judge

Annex

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

Detention of controlled goods

101. Goods that have been imported or are about to be exported may be detained by an officer until he is satisfied that the goods have been dealt with in accordance with this Act, and any other Act of Parliament that prohibits, controls or regulates the importation or exportation of goods, and any regulations made thereunder.

...

Seizure of goods or conveyances

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.

...

Decision of the Minister

131. (1) After the expiration of 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

Loi sur les douanes, LRC (1985), ch 1 (2e suppl)

Rétention des marchandises contrôlées

101. L'agent peut retenir les marchandises importées ou en instance d'exportation jusqu'à ce qu'il constate qu'il a été procédé à leur égard conformément à la présente loi ou à toute autre loi fédérale prohibant, contrôlant ou réglementant les importations ou les exportations, ainsi qu'à leurs règlements d'application.

[...]

Saisie des marchandises ou des moyens de transport

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

[...]

Décision du ministre

131. (1) Après l'expiration des 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;

Act or the regulations were so contravened;

(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

(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

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) 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.

Where there is no contravention

132. (1) Subject to this or any other Act of Parliament,

(a) where the Minister decides, under paragraph 131(1)(a) or (b), that there has been no contravention of this Act or the regulations in respect of the goods or conveyance referred to in that paragraph, or, under paragraph 131(1)(b), that the conveyance referred to in that paragraph was not used in the manner described in that paragraph, the Minister shall forthwith authorize the removal from custody of the goods or conveyance or the return of any money or security taken in respect of the goods or conveyance; and

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

Cas de non-infraction

132. (1) Sous réserve des autres dispositions de la présente loi ou de toute autre loi fédérale :

a) le ministre, s'il décide, en vertu des alinéas 131(1)a) ou b), que les motifs d'infraction ou, en vertu de l'alinéa 131(1)b), que les motifs d'utilisation des moyens de transport visés à cet alinéa n'ont pas été valablement retenus, autorise sans délai la levée de garde des marchandises ou moyens de transport en cause, ou la restitution des montants ou garanties qui en tenaient lieu

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 :

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;

...

Federal Court

135. (1) A person who requests a decision of the Minister under section 131 may, within ninety days after being notified of the decision, appeal the decision by way of an action in the Federal Court in which that person is the plaintiff and the Minister is the defendant.

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

[...]

Cour fédérale

135. (1) Toute personne qui a demandé que soit rendue une décision en vertu de l'article 131 peut, dans les quatre-vingt-dix jours suivant la communication de cette décision, en appeler par voie d'action devant la Cour fédérale, à titre de demandeur, le ministre étant le défendeur.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-385-14

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