

Federal Court



Cour fédérale

Date: 20121206

Docket: T-859-12

Citation: 2012 FC 1442

Ottawa, Ontario, December 6, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

**MOHAWK COUNCIL OF AKWESASNE, ON ITS
BEHALF AND ON BEHALF OF THE MOHAWKS
OF AKWESASNE, INCLUDING SANDRA BOOTS,
FREDERICK DAVID JOCK, DOROTHY COLE,
CLARISSA COOK, KATSITSIKWAS LAZORE,
CHARLES DELORMIER, SHAILEI S. SQUARE,
GERALD BRADLEY GEORGE,
PAULINE THOMPSON, LORENE H. HERNE,
MARK MITCHELL, FELICIA SUNDAY,
PAULINE LOIS TERRANCE,
LUCILLE ROUNDPOINT, CONNIE HALL,
BEVERLY TERRANCE, JOEY TEHORON:IO DAVID,
STEVEN THOMAS, KARAKWENTA LAZORE,
REGINA JACOBS, BARBARA BARNES,
BEVERLY THOMPSON, THERESA TERRANCE,
HARVEY BOOTS, CHELSEA RAE OAKES,
LARRY ARONHIAIES HERNE, MELVENA SWAMP,
STEPHANIE JOHNSON, JASON & TRACY LEAF,
WILFRED DAVID, NELSON LEAF,
BARRY CURTIS THOMPSON, ROBERT GILBO,
THERESA THOMPSON, ELIZABETH LAZORE,
DANIEL GARROW, DEBORAH L. DAVID,
WAYLON DAVID WHITE, KATHY HERNE,
ARLENE THOMAS, PAUL THOMAS,
ROSEMARY SQUARE, DAVID HERNE,
E. PELLETIER, DEBBIE FRANCIS,
TESS BENEDICT, COREY BOUGH,
KRISTIN AND KAREN COOK-FRANCIS,
RICHARD THOMPSON, KRISTIN RANSOM,
DONNA DELORMIER, STEVEN JOHNSON,**

**CARRIE LAZORE, HOLLEY BOOTS, IDA THOMAS,
OREN THOMPSON, ROXANNE BURNET,
OWEN LEAF, WARREN THOMPSON,
DAVID DELORMIER, MARGARET KING,
VERONICA JACOBS, CARL BERO,
EDITH MCDONALD, SUSAN BENEDICT-SQUARE,
DONALD DELORMIER, DONNA JOCKO,
TOBY ROUNDPOINT, ERIN ROURKE,
TAMMY LYNN DAVID,
JAKE AND FRENDA LAFRANCE, LARRY DAVID,
KRYSTAL BOOTS, JOEY DAVID,
DONALD DELORMIER,
DONNA MARIE THOMPSON RANSOM,
JASMINE BENEDICT, BRUCE TARBELL,
MICHAEL RANDY MITCHELL,
FREDERICK MITCHELL, DACY THOMPSON,
TIA THOMPSON, KIMBERLY JACOBS,
RONALD THOMPSON, WATHAHONNI MITCHELL,
CARRIE FRANCIS-SQUARE, MARIA COLON,
ALEXANDER DELORMIER, THERESA ADAMS,
JAKE LAFRANCE, SUSAN WHITE,
STEVEN JOHNSON, CARRIE DELORMIER,
JORDAN MITCHELL, MYRON CLUTE,
MARY FRANCIS, KIMBERLY AND TIA BURNS,
CECELIA CONNIE FRANCIS, EDWARD PORTER JR.,
ROXANNE PETERS, ORLANDA LAZORE,
VICTOR MARTIN, ABRAHAM GRAY,
BOBBY LAFFIN, BARRY BRADLEY,
LILA CALDWELL, LOUISE DIABO, LEIGHANN NEFF,
TIMOTHY KING, LORRAINE THOMPSON,
DEVON OAKES, JOHN PETERS, RACHEL SQUARE,
SEAN LEONARD, THOMAS JOHNSON,
JOHN FRANCIS, ROGER LAZORE,
HARLEY CHUBB, BRENDA DAVID**

Plaintiffs

and

**THE HONOURABLE VIC TOEWS,
IN HIS CAPACITY AS THE MINISTER OF PUBLIC
SAFETY AND EMERGENCY PREPAREDNESS
AND CANADA BORDER SERVICES AGENCY**

Defendants

REASONS FOR ORDER AND ORDER

[1] This is a joint motion under Rule 220(1) of the *Federal Court Rules*, SOR/98-106 (the “Rules”) for the preliminary determination of a question of law. The motion stems from two parallel proceedings brought by the Plaintiffs against the Defendants – one an action, the other an application – pertaining to the seizure of the Plaintiffs’ vehicles by the Canada Border Services Agency (CBSA) under the *Customs Act*, RSC 1985, c 1 (2nd Supp).

[2] In the action, the plaintiffs appeal, on the basis of section 135 of the *Customs Act*, the decisions of the Manager of the Appeals Division of the Recourse Directorate of the CBSA (the “Manager”) made pursuant to a request under section 131 of the *Customs Act*. In those decisions, the Manager confirmed that there was a contravention of the *Customs Act* in respect of the seized vehicles. In the application, the applicants seek judicial review of the decisions made by the Manager under section 133 of the *Customs Act* to maintain the amount of money paid for the return of the conveyance in each case. Both proceedings involve substantially the same questions of law and fact.

[3] For ease of reference in these reasons, the term “Plaintiffs” will be used to mean both the plaintiffs in the underlying action and the applicants in the underlying application.

[4] The parties have submitted an Agreed Statement of Facts and Common Questions of Law (the “Agreed Statement”). In accordance with Rule 220(2) and the Order rendered on

August 3, 2012, by Prothonotary Richard Morneau, the case upon which this motion is decided consists of the Agreed Statement and the parties' submissions.

I. Background

A. *The Parties*

(1) The Plaintiffs

[5] The Plaintiffs consist of 115 individual members of the Mohawks of Akwesasne and their elected community government, the Mohawk Council of Akwesasne (MCA). The MCA administers the local affairs of the Mohawks of Akwesasne and represents them in their dealings with government, including in the present proceedings.

[6] The Mohawks of Akwesasne are recognized as a "Band" in Canada, and the MCA as a "council of the band" under the *Indian Act*, RSC 1985, c I-5. Furthermore, the individual members of the Mohawks of Akwesasne are recognized as "Indians" under the *Indian Act*, and the group as an "aboriginal people" within the meaning of section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. They have reserve territory that spans across the Provinces of Ontario and Quebec (Reserve Nos. 59 and 15, respectively), and into the State of New York.

[7] The parties have agreed that, for the purposes of this preliminary determination, each Plaintiff was the lawful owner of a vehicle seized by the CBSA and that, at all material times, each was ordinarily a resident of the Canadian Reserves.

(2) The Defendants

[8] The Defendants consist of the Minister of Public Safety and Emergency Preparedness (the “Minister”) and one of the agencies under his purview, the CBSA. Among the CBSA’s responsibilities is the enforcement of its “program legislation,” which includes the *Customs Act*.

[9] The CBSA is comprised of six branches, the most pertinent of which, for our purposes, is the Corporate Affairs branch, of which the Recourse Directorate is a part. The Recourse Directorate is, in turn, composed of three divisions: (i) The Appeals Division; (ii) Litigation, External Recourse and Complaints Division; and (iii) Recourse Policy and Planning Division. The Appeals Division adjudicates disputes with respect to specified *Customs Act* enforcement actions, including seizures, ascertained forfeitures, and administrative monetary penalties. It is further responsible for addressing amounts assessed for the return of conveyances in the event of a contravention.

[10] The President of the CBSA manages the agency and all matters connected with it under the direction of the Minister. He executed publicly available delegation information documents in 2008 and 2010 that outlined the specific positions to which, and decisions for which, he delegated redress responsibilities on his behalf. The parties’ Agreed Statement asserts that the 2010 delegation information document indicates that the President of the CBSA intended to delegate whatever

authority he held to make decisions under the appeal process set out in sections 131 and 133 of the *Customs Act*.

(a) Geography and the Cornwall Port of Entry

[11] The geographical epicentre of the dispute lies in the corridor between Cornwall, Ontario and Rooseveltown, New York. Separating the two is the Saint Lawrence River, and between them is Cornwall Island. There are two bridges connecting Cornwall Island to the mainland on either side: the “Three Nations Bridge” connects Cornwall Island to the City of Cornwall to the north; and the “International Bridge” connects Cornwall Island to New York State to the south. Cornwall Island is entirely within Canada; the international boundary cuts across the International Bridge.

[12] As previously noted, the Mohawks of Akwesasne have reserve lands that span across both interprovincial and international boundaries. Reserve No. 15 in Quebec is comprised of two districts: “Tsi-Snaihne” (“the Chanail”) and St. Regis Village (“Kanatakon”). Cornwall Island (“Kawehnoke”) is entirely within Reserve No. 59 in Ontario. The only practical way to cross by land between Reserve Nos. 15 and 59 is by crossing the International Bridge into the United States. As the parties point out, the distance from Cornwall Island to St. Regis Village, crossing at the International Bridge, is 15 kilometres. Crossing at an alternative port of entry (POE) increases the distance between the two districts to approximately 130 kilometres.

[13] Until May 31, 2009, the Cornwall Island POE was located on the highway corridor on the Island, between the two bridges connecting it to the north and south shores of the Saint Lawrence

River. However, the Cornwall Island POE was closed by the CBSA on June 1, 2009, in response to opposition in the community to Parliament's initiative to equip CBSA officers with handguns. The CBSA had determined that the Cornwall POE officers would be issued handguns on June 1, 2009, and, following its closure, the Cornwall Island POE was relocated to the northern edge of the Three Nations Bridge, in the City of Cornwall. All travelers from the United States into Cornwall Island must report to the POE in the City of Cornwall, as must those traveling from Cornwall Island to the City of Cornwall, despite the fact that both points are within Canada. The POE in the City of Cornwall is roughly three kilometres north of Cornwall Island.

[14] The geographic nature of the reserve lands of the Mohawks of Akwesasne is such that its members are frequent crossers of the international boundary. The parties have acknowledged for the purposes of this motion that members of the Akwesasne community comprise up to 70% of the border traffic at the Cornwall POE. The parties have further acknowledged that the Cornwall POE is the eleventh busiest land border crossing in Canada in terms of the number of people processed annually. It has also been identified by the CBSA as a port with a high risk for illegal activities, such as smuggling.

(b) The Impugned Seizures

[15] Between July 13, 2009, when the POE in the City of Cornwall was opened, and September 16, 2009, the CBSA did not actively enforce the *Customs Act* requirement that individuals report to the POE in Cornwall. Instead, it carried out an evaluation process to measure the rate of compliance with the requirements. In the period from July 13, 2009, to August 31, 2009,

the CBSA determined that an average of 42% of vehicles traveling north from New York State across the International Bridge onto Cornwall Island failed to report to the Cornwall POE.

[16] On September 18, 2009, the CBSA began its active enforcement of the reporting requirement. This enforcement involved seizing vehicles that had allegedly been used to transport persons into Canada, who then failed to report to the POE. Between September 18, 2009, and April 30, 2010, a vehicle owned by each of the 115 individual plaintiffs was seized for failing to report to the POE, as required by the *Customs Act*.

[17] In most cases, the contravention of the reporting requirement was determined on the basis of a date- and time-stamped photograph of the vehicle taken by CBSA-owned cameras as it passed through United States Customs in Rooseveltown. The photographs captured the rear and driver's side of the vehicles, including the licence plates, without detecting the identity of the driver or clearly discerning the passengers or contents of the vehicles.

[18] When the same vehicle passed from Cornwall Island to the City of Cornwall through the POE, often hours or days later, the CBSA seized it as forfeit in accordance with sections 110 and 122 of the *Customs Act*. The agency released the vehicle when the driver or, more frequently, the MCA, paid a specified amount for its release. In most cases, this amount was set at \$1,000. Again in most cases, the vehicle owner, or the MCA on his or her behalf, pursued the statutory appeal mechanisms foreseen by the *Customs Act*.

(c) The Customs Act Appeal Process

[19] Sections 129 to 133 of the *Customs Act* establish the process by which to appeal, *inter alia*, an enforcement action taken by the CBSA. The client submits a written complaint, requesting a decision of the Minister with respect to the impugned action, and then receives a letter with the name and contact information of the adjudicator within the Appeals Division who has been assigned to their case. The adjudicator then reviews the action, and sends the client another letter with the reasons for the officer's actions and his or her reports. The client then has an opportunity to file further submissions before the final decision is made. The adjudicator takes all of the evidence and rules into consideration and makes a recommendation to another CBSA employee within the Appeals Division who has the delegated authority of the Minister to render the final decision.

[20] When the Minister decides under section 131 of the *Customs Act* that there has been a contravention of that Act, section 133 lays out the remedies he may pursue with respect to the enforcement action. Specifically, the Minister has discretion to: (a) return the conveyance on receipt of a certain amount of money; (b) remit any portion of any money or security taken; or (c) demand payment of an additional amount of money or security. Subsection 133(3) sets out that, if the CBSA returns the conveyance on receipt of an amount of money, the amount is to be either: (a) equal to the value of the conveyance at the time of seizure; or (b) such lesser amount as the Minister may direct. It should be noted that the *Customs Act* defines "conveyance" in subsection 2(1) as "any vehicle, aircraft or water-borne craft or any other contrivance that is used to move persons or goods."

[21] The appropriate recourse from a Minister's decision under section 133 is an application for judicial review. Section 135 of the *Customs Act* provides for an appeal by way of action to this Court of a Minister's decision under section 131 of the *Customs Act*.

[22] In the case at hand, the parties' Agreed Statement establishes that the following appeal process was essentially carried out in each Plaintiff's case (Agreed Statement at para 44):

- i. the vehicle (referred to under the *CA* as a "conveyance") was seized by a CBSA official at the POE in Cornwall at some point after it is alleged to have been used in contravention of s. 11 of the *CA* and the relevant provisions of the *Presentation of Persons (2003) Regulations*;
- ii. the driver/owner of the vehicle was given notice of the reason for seizure (a "Seizure Receipt"). The Seizure Receipt set out the various avenues of recourse for both the driver/owner and for anyone with a third-party interest in the vehicle;
- iii. the driver/owner was also given the opportunity to pay an assessed amount for the release of the vehicle - in most cases \$1,000.00.
- iv. upon payment of the assessed amount, the vehicle was released to the driver/owner.
- v. each driver/owner, or the MCA on the driver/owner's behalf, then filed an objection to the seizure and assessed amount pursuant to s. 129 of the *CA*;
- vi. an official from the CBSA Recourse Directorate then wrote to the objecting party and set out the process for review, identifying the Adjudicator assigned to the file;
- vii. later, the Adjudicator wrote to the objecting party to summarize his understanding of the basis for objection as well as the Adjudicator's preliminary assessment of the outcome. The Adjudicator provided the objector with a further opportunity to make submissions, within 30 days, regarding his preliminary findings;

- viii. the Adjudicator then had available to him any further submissions filed by the objector and made a recommendation to the Manager of the Appeals Division, Recourse Directorate;
- ix. the Manager of the Appeals Division, Recourse Directorate, then made a decision regarding the Adjudicator's recommendation;
- x. in all of the cases under consideration in this proceeding, the Manager of the Appeals Division, Recourse Directorate, decided to uphold the finding of a contravention and the determination of the amount paid for the release of the seized vehicle to be forfeit. He sent a formal letter to that effect to the objector. Each objector was sent a substantially identical letter. This letter outlined the appeal/judicial review process available to the objector in relation to a decision made under ss. 131 and 133 of the *CA*.

II. Issues

[23] The common questions of law to be determined in this motion are as follows:

A. Section 8 of the *Canadian Charter of Rights and Freedoms*:

1. Does the seizure of vehicles by the CBSA at the POE at Cornwall constitute an unreasonable interference with the Plaintiffs' privacy interest, if any, in the said vehicles such that it constitutes a violation of section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, 1982, c 11 (UK), Schedule B (*Charter*)?

2. Did the seizures of the Plaintiffs' vehicles by the CBSA at the POE at Cornwall otherwise constitute unreasonable seizures within the meaning of section 8 of the *Charter*?

B. Application of section 89 of the *Indian Act*:

3. Is a Plaintiff's vehicle protected from a seizure under the provisions of the *Customs Act*, on the facts of this case, by virtue of the prohibitions against any "charge, pledge, mortgage, attachment, levy, seizure, distress or execution" on personal or real property "situated on reserve", "in favour or at the instance of any person other than an Indian or a band" under section 89 of the *Indian Act*?

C. Delegation(s) to Impugned Decision-maker:

4. Did the CBSA official who made the final determination regarding a Plaintiff's appeals (i.e. of the finding that the vehicle was used in contravention of the *Customs Act* and the confirmation of forfeiture of the assessed amount held in exchange for the release of the vehicle) have properly delegated authority to make such a decision?

III. Analysis

A. *Section 8 of the Charter*

[24] Section 8 of the *Charter* states:

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Fouilles, perquisitions ou saisies

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

[25] A threshold question must be addressed before ascertaining whether the Plaintiffs' section 8 rights were infringed, namely whether their section 8 rights were engaged in this case at all.

Specifically, does the seizure of the Plaintiffs' vehicles pursuant to section 110 of the *Customs Act* constitute a "seizure" for the purposes of section 8 of the *Charter*?

[26] Section 110 of the *Customs Act* provides the basis for the CBSA's authority to seize:

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

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

reasonable grounds was made use of in respect of the goods, whether at or after the time of the contravention.

raisonnables, qu'ils ont servi au transport de ces marchandises, lors ou à la suite de l'infraction.

Seizure of conveyances

Saisie des moyens de transport

(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.

(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.

Seizure of evidence

Saisie des moyens de preuve

(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.

(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.

Notice of seizure

Avis de la saisie

(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 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.

(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 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.

[27] In accordance with the Supreme Court's finding in *Martineau v Canada (Minister of National Revenue)*, 2004 SCC 81, [2004] 3 SCR 737 at paras 27 and 54, the parties are agreed that the seizure provisions in section 110 of the *Customs Act* are civil in nature, rather than penal. The crux of their contestation is the scope of the context to which a section 8 seizure is limited: The Plaintiffs submit that a seizure within the meaning of section 8 is "any seizure that affects an individual's privacy interests, not just a seizure carried out as part of a criminal or administrative process or investigation" (Plaintiffs' Reply Submissions at para 5). The Defendants contend that *Charter* seizures are limited to criminal or administrative investigatory contexts.

[28] Constitutional law scholar Professor Peter Hogg defines "seizure" under section 8 of the *Charter* as "the actual taking away, by agents of the state, of things that could be used as evidence" (Peter Hogg, *Constitutional Law of Canada*, 5th ed, vol 2 (Toronto: Thomson Carswell, 2007) at 454). He goes on to state that a "seizure within the meaning of s. 8 is a seizure of property for investigatory or evidentiary purposes" (Hogg, above, at 454). The Quebec Court of Appeal is of the same view, finding that a mechanism in the *Controlled Drugs and Substances Act*, SC 1996, c 19 providing for the seizure of offence-related property did not engage section 8 of the *Charter* because the seizure was not done in the context of a criminal or administrative investigation (*R c Houle*, [2003] RJQ 436, 2003 CanLII 44810 (QC CA) at paras 92-93).

[29] The Plaintiffs champion a purposive and contextual approach to the definition of "seizure" for the purposes of section 8 of the *Charter*, relying on the Supreme Court's pronouncements in *Quebec (Attorney General) v Laroche*, 2002 SCC 72, [2002] 3 SCR 708, which the Defendants introduced in their submissions. The Court, in that case, canvassed the definitions given to section 8

seizures in years prior to its decision. In particular, Justice Lebel, writing for the majority, noted that the Supreme Court had previously found that “the essence of a seizure under s. 8 is the taking of a thing from a person by a public authority without that person’s consent” (*R v Dyment*, [1988] 2 SCR 417; *Laroche*, above, at para 52), and that a seizure is a “taking hold by a public authority of a thing belonging to a person against that person’s will” (*Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425; *Laroche*, above, at para 52).

[30] Justice Lebel continued in *Laroche*, above, by asserting that the context and the purpose of section 8 must be examined, else we “deprive it of part of its effect in numerous situations in which constitutional interests in privacy, not to mention the fundamental fairness of criminal procedure, are in issue” (*Laroche*, above, at para 53). What the Defendants point to, and the Plaintiffs acknowledge only halfway, is that the Supreme Court then discussed the permissible limits applicable to section 8 (at para 53):

[53] [...] Accordingly, if there is to be any limit on the definition of the word “seizure”, it must not relate to the process per se, but rather to the context in which it is carried out. The issues involved in interpreting and applying s. 8 are clearly explained in the following comments by S.C. Hutchison, J.C. Morton and M.P. Bury:

One limitation ought to be put on the scope of “seizure” under the Charter. The “enjoyment of property” as a specific right, as protected in the Canadian Bill of Rights, is not protected in the Charter. The prohibition of unreasonable search and seizure is designed to promote privacy interests and not property rights. Hence, Charter protections against unreasonable seizure should not apply to governmental actions merely because those actions interfere with property rights. Specifically, where property is taken by governmental action for reasons other than administrative or criminal investigation a

“seizure” under the Charter has not occurred. A number of cases illustrate this view of seizure. A detention of property, in itself, does not amount to a seizure for Charter purposes – there must be a superadded impact upon privacy rights occurring in the context of administrative or criminal investigation.

[Emphasis added by the Court in *Laroche*]

[31] While the Plaintiffs argue that the Supreme Court’s own words emphasize context over process, the particular context to be evaluated must, as a threshold matter, be one that involves administrative or criminal investigation. As both parties agree that the *Customs Act* provisions at issue constitute civil proceedings, this case does not meet even the basic threshold to engage section 8 of the *Charter*. As a result, I must answer the first two common questions of law in the negative.

B. *Section 89 of the Indian Act*

[32] The third common question of law raises the scope of the protection provided by section 89 of the *Indian Act* for the real and personal property of Indians situated on a reserve:

Restriction on mortgage, seizure, etc., of property on reserve

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

Inaliénabilité des biens situés sur une réserve

89. (1) Sous réserve des autres dispositions de la présente loi, les biens d’un Indien ou d’une bande situés sur une réserve ne peuvent pas faire l’objet d’un privilège, d’un nantissement, d’une hypothèque, d’une opposition, d’une réquisition, d’une saisie

ou d'une exécution en faveur ou
à la demande d'une personne
autre qu'un Indien ou une
bande.

[33] The Plaintiffs submit that section 89 should be construed broadly to include any seizure undertaken as a civil remedy, including government action to enforce such a civil remedy. The Defendants, for their part, contend that the protection afforded by section 89 was never meant as a broad exemption, but rather that it is directed at protecting Indian property from general creditor rights.

[34] I am not convinced that the section 89 protection extends to the seizures at issue under the *Customs Act*. The Supreme Court of Canada has held on more than one occasion that the purpose of the exemptions in sections 87, 88 and 89 of the *Indian Act* “was to preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of governments to tax, or creditors to seize” [emphasis added] (*Bastien Estate v Canada*, 2011 SCC 38, [2011] 2 SCR 710 at para 23; *McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58, [2006] 2 SCR 846 at para 27; *Williams v Canada*, [1992] 1 SCR 877). Chief Justice McLachlin opened the Court's judgment in *McDiarmid Lumber*, above, by stating that sections 89 and 90 of the *Indian Act*, “designed to prevent the erosion of property belonging to Indians *qua* Indians, confer immunity from seizure by creditors” [emphasis added] (see para 1).

[35] The Plaintiffs rely on *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 to support their proposition that section 89 applies to any seizure undertaken as a civil remedy. Specifically, they

point to Justice La Forest's concurring opinion in which he describes section 89 as weaving "another strand into the protection afforded property of natives by shielding the real and personal property of an Indian or a band situated on a reserve from ordinary civil process" (*Mitchell*, above, at para 82).

[36] Justice La Forest's opinion in *Mitchell*, however, when read in its entirety, indicates that his concept of "ordinary civil process" is not as broad as the Plaintiffs suggest. He describes the dual protections in sections 87 and 89 of the *Indian Act* as exemptions from taxation and distraint, respectively. He elaborates, describing that, in effect, "these sections shield Indians from the imposition of the civil liabilities that could lead, albeit through an indirect route, to the alienation of the Indian land base through the medium of foreclosure sales and the like" (*Mitchell*, above, at para 86).

[37] I am not satisfied that the CBSA's use of the civil remedies provided for in the *Customs Act* to enforce border legislation fits within the scope of section 89. Indeed, such action is distinct from the other mechanisms listed in section 89 of the *Indian Act*, including mortgages, levies and the execution of civil judgments.

[38] The purpose of the seizure regime under the *Customs Act* is not to distraint or to create a creditor's right in the conveyance, nor to create a tax that might be exempt under section 87 of the *Indian Act*. Instead, the purpose of the regime is to "maintain the effectiveness of customs requirements" (see *Martineau*, above, at para 60). Indeed, the attainment of the Act's objectives to regulate, oversee and control the cross-border movement of people and goods is dependent upon the

effectiveness of the voluntary or self-reporting system created under the *Customs Act* (*Martineau*, above, at paras 25-26). Given that the 42% rate of noncompliance with the reporting requirements that existed before the CBSA began enforcing the requirement decreased when the agency availed itself of the civil remedy provisions of the *Customs Act*, I am convinced that this action was successful in “maintaining the effectiveness of customs requirements.” Control over the mobility of persons and goods into a country has always been a “fundamental attribute of sovereignty” and it is widely recognized that the state is expected to execute this control for the general welfare (*Mitchell v Canada (Minister of National Revenue)*, 2001 SCC 33, [2001] 1 SCR 911 at para 160; *R v Simmons*, [1988] 2 SCR 495 at 528).

[39] As part of their oral submissions on *Charter* issues, the Plaintiffs suggest that the CBSA should use more intrusive enforcement mechanisms, such as criminal charges or administrative sanctions, to achieve the legitimate goal of maintaining border security. In my view, the use of a civil remedy to achieve this legitimate goal is a preferable enforcement option when compared to the more intrusive enforcement mechanisms suggested by the Plaintiffs, particularly given the sensitivity of the issues at hand. In my view, this discussion also serves to highlight the differences between the civil mechanisms protected in section 89 of the *Indian Act* and the civil remedies provided for in the *Customs Act*, which are designed solely for the purpose of enforcing border legislation.

[40] I find, therefore, that the seizures effected under the *Customs Act* are beyond the scope of the protections in section 89 of the *Indian Act*, and the conveyances at issue are not exempt from seizure. Given my finding on this question, there is no need to discuss the parties’ arguments with

respect to the ownership of the vehicles or their paramount location. The third common question of law is answered in the negative.

C. *Delegation(s) to Impugned Decision-Maker*

[41] The parties dispute whether the Manager had the authority to make decisions under sections 129 through 133 of the *Customs Act* on behalf of the Minister. Particularly, the contention is whether the President of the CBSA could, on behalf of the Minister, properly delegate to the Manager the authority to decide. I am satisfied that the President held the powers of the Minister in the appeals system at issue and that he was competent to delegate these powers to the Manager. I thus find that the Manager had the appropriate authority to make the impugned decisions.

[42] The *Canada Border Services Agency Act*, SC 2005, c 38 (*CBSAA*) grants the CBSA the authority to exercise the powers relating to its program legislation that are conferred on the Minister. The program legislation of the CBSA includes the *Customs Act* (see section 2 of the *CBSAA*):

Exercise of powers conferred
on Minister

12. (1) Subject to any direction given by the Minister, the Agency may exercise the powers, and shall perform the duties and functions, that relate to the program legislation and that are conferred on, or delegated, assigned or transferred to, the Minister under any Act or regulation.

Exercice de certaines
attributions du ministre

12. (1) Sous réserve des instructions que peut donner le ministre, l'Agence exerce les attributions relatives à la législation frontalière qui sont conférées, déléguées ou transférées à celui-ci sous le régime d'une loi ou de règlements.

Officers and employees

(2) An officer or employee of the Agency may exercise any power or perform any duty or function referred to in subsection (1) if the officer or employee is appointed to serve in the Agency in a capacity appropriate to the exercise of the power or the performance of the duty or function, and, in so doing, shall comply with any general or special direction given by the Minister.

Exception

(3) Subsection (1) does not include

(a) any power, duty or function of the Minister under this Act; or

(b) a power to make regulations.

Dirigeants et employés

(2) Les dirigeants ou employés de l'Agence ayant, au sein de celle-ci, la compétence voulue peuvent exercer les attributions visées au paragraphe (1); le cas échéant, ils se conforment aux instructions générales ou particulières du ministre.

Exclusion

(3) Sont exclus des attributions visées au paragraphe (1) :

a) les attributions conférées au ministre par la présente loi;

b) le pouvoir de prendre des règlements.

[43] In the absence of a direction from the Minister to the contrary, the agency is charged with exercising the powers and performing the functions and duties of the *Customs Act*. The President of the CBSA holds broad powers with respect to the Agency, as delineated by the *CBSAA*:

Role of President

8. (1) The President, under the direction of the Minister, has the control and management of the Agency and all matters connected with it.

Attributions du président

8. (1) Le président, sous la direction du ministre, est chargé de la gestion de l'Agence et de tout ce qui s'y rattache.

Rank of deputy head

(2) The President has the rank and all the powers of a deputy head of a department.

Rang et statut

(2) Le président a rang et statut d'administrateur général de ministère.

[44] As a first step, I am thus satisfied that, based on the statutory scheme, the President of the CBSA had the authority to exercise the powers conferred on the Minister to decide under sections 131 and 133 of the *Customs Act*.

[45] The *CBSAA* further grants the President the express authority to delegate any power that he or she holds:

Delegation by President

9. (1) The President may delegate to any person any power, duty or function that the President is authorized to exercise or perform under this Act or any other enactment.

Délégation par le président

9. (1) Le président peut déléguer à toute personne les attributions qu'il est lui-même autorisé à exercer sous le régime de la présente loi ou de tout autre texte législatif.

[46] The parties have agreed that the President intended to delegate whatever authority he had for dealing with decisions made pursuant to the appeal process under sections 131 and 133 of the *Customs Act*. Specifically, individuals holding Manager positions at the Recourse Directorate are listed as competent individuals to make these very decisions in the "Authorization to Exercise Powers or Perform Duties and Functions of the Minister of Public Safety and Emergency Preparedness under the *Customs Act*" (see Agreed Statement at 58, 81 and 85).

[47] Furthermore, the parties acquiesce in their Agreed Statement that the Recourse Directorate “provides the business community and individuals with a mechanism to seek a review of service-related complaints, trade decisions and enforcement actions taken by the CBSA” (Agreed Statement at para 17). The Manager of the Appeals Division of the Recourse Directorate of the CBSA was acting in a capacity appropriate to the exercise of the power in sections 129 through 133 of the *Customs Act*.

[48] The *Interpretation Act*, RSC 1985, c I-21 additionally supports the finding that the Manager had the authority to render decisions under sections 129 through 133 of the *Customs Act*.

Subsection 24(2) of the *Interpretation Act* states as follows:

Power to act for ministers

(2) Words directing or empowering a minister of the Crown to do an act or thing, regardless of whether the act or thing is administrative, legislative or judicial, or otherwise applying to that minister as the holder of the office, include

(a) a minister acting for that minister or, if the office is vacant, a minister designated to act in the office by or under the authority of an order in council;

(b) the successors of that minister in the office;

(c) his or their deputy; and

Exercice des pouvoirs ministériels

(2) La mention d'un ministre par son titre ou dans le cadre de ses attributions, que celles-ci soient d'ordre administratif, législatif ou judiciaire, vaut mention :

a) de tout ministre agissant en son nom ou, en cas de vacance de la charge, du ministre investi de sa charge en application d'un décret;

b) de ses successeurs à la charge;

c) de son délégué ou de celui des personnes visées aux alinéas a) et b);

(d) notwithstanding paragraph (c), a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.

d) indépendamment de l'alinéa c), de toute personne ayant, dans le ministère ou département d'État en cause, la compétence voulue.

[49] Framed in the words of the *Interpretation Act*, I find that the Manager was a person appointed to serve in a capacity appropriate to the doing of the act – namely the rendering of the impugned decisions.

[50] On the basis of these parallel grounds, I must answer the fourth and final question in the affirmative.

ORDER

THIS COURT'S ORDERS that and answers the common questions as follows:

1. The seizure of vehicles by the CBSA at the POE at Cornwall does not engage s. 8 of the *Charter*, and cannot, therefore, constitute a violation thereof.
2. See above.
3. A Plaintiff's vehicle is not protected from a seizure under the provisions of the *Customs Act*, on the facts of this case, by virtue of the prohibitions against any "charge, pledge, mortgage, attachment, levy, seizure, distress or execution" on personal or real property "situated on reserve", "in favour or at the instance of any person other than an Indian or a band under s. 89 of the *Indian Act*."
4. The CBSA official who made the final determination regarding a Plaintiff's appeals (i.e. of the finding that the vehicle was used in contravention of the CA and the confirmation of forfeiture of the assessed amount held in exchange for the release of the vehicle) had properly delegated authority to make such a decision.
5. Given the issues raised and the procedure followed by the parties, particularly their submission of an agreed statement of facts and law, there will be no order as to costs.
6. Finally, I am of the view that the Plaintiffs' claims should be dismissed insofar as they are advanced on the basis of the common issues addressed in these proceedings.
7. This Order applies *mutatis mutandis* to the application for judicial review and a copy will be placed on file in T-455-12.

" D. G. Near "

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-859-12

STYLE OF CAUSE: MOHAWK COUNCIL OF AKWESASNE ET AL v
MPSEP ET AL

PLACE OF HEARING: OTTAWA

DATE OF HEARING: OCTOBER 23, 2012

**REASONS FOR ORDER
AND ORDER BY:** NEAR J.

DATED: DECEMBER 6, 2012

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