Federal Court  Cour fédérale

Date: 20140715

Docket: T-854-12

Citation: 2014 FC 705

Ottawa, Ontario, July 15, 2014

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

THOMAS ZALMON DRUYAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Some items that Mr. Druyan (the applicant) was trying to import were detained under section 13 of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, SC 1992, c 52 [the Act]. He now applies for judicial review of that decision pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7.

[2] The applicant seeks an order setting aside the detention certificate, authorizing the importation of the goods and directing the respondent to release the goods to him. He also seeks costs.

I. Background

[3] Mr. Druyan is a collector of Inuit and Aboriginal art. He owns a large collection of Greenlandic Inuit tupilaks, which are figurines carved from a variety of materials but traditionally made using sperm whale ivory.

[4] On December 1, 2011, he purchased from an online auction in Denmark, ten tupilaks made from sperm whale ivory, two tupilaks made from caribou antler and one kayak figurine made from wood, seal leather and seal bone. They entered Canada sometime around January 5, 2012.

II. Decision

[5] On January 9, 2012, the items were inspected and detained by Officer Mahaffey of Environment Canada. Sperm whales, whose scientific names are *physeter macrocephalus* and *physeter catodon*, are an endangered species listed in Appendix I of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 UNTS 243, Can TS 1975 No 32 [the Convention]. Both Denmark and Canada have signed this treaty and Canada has implemented it by enacting the Act. In the ordinary course, article III of that

treaty requires that both the state of export and the state of import must issue a permit to allow the trade in any specimen of any species listed in Appendix I.

[6] In this case, there were no permits. However, the tupilaks were accompanied by a Danish-language document issued by the Danish Nature Agency, the Convention management authority in that country. The officer was not sure if this was a valid permit and so asked for advice from Jean-François Dubois, the National Inspections Coordinator Assistant of the Wildlife Enforcement Directorate Enforcement Branch of Environment Canada. He was told that it was not. Rather, it certified that the objects were pre-Convention, but Mr. Dubois said that the Act does not recognize that exemption. Mr. Dubois then asked Denmark whether the certificate was validly issued. He was informed that the document was intended for use within the European Union and was not a valid re-export permit.

[7] The applicant was informed about this in late March 2012 and he then sought to have an export permit retroactively issued by the Danish Nature Agency. He was told that it was impossible and he filed his notice of application in this Court on April 26, 2012.

III. Subsequent History

[8] On May 4, 2012, the caribou tupilaks and the wooden kayak were agreed to be released to the applicant, so only the sperm whale tupilaks remain in issue.

[9] As well, the Court process has been adjourned several times in order to allow the applicant to request a special import permit. In a letter dated June 19, 2013, a manager of

permitting at the Convention's management authority for Canada denied that request. She explained that the ordinary process was for import and export permits to be obtained before the items are exported. She acknowledged that section 6 of the *Wild Animal and Plant Trade Regulations*, SOR/96-263 [the Regulations] creates some exceptions, but that they do not apply to species listed in Appendix I of the Convention and so cannot be relied on to import sperm whale specimens. As well, she said that the Danish Nature Agency's authorization did not satisfy the requirements of the Convention, so section 6 was not engaged.

IV. Issues

[10] The applicant says there are four issues:

1. Did the wildlife officer err by exercising excessive zeal in the execution of his duties?
2. Did the wildlife officer err by failing to adopt a purposive interpretation of the governing legislation?
3. Did Environment Canada's manager of permitting err by failing to consider the applicant's application for a special import permit in good faith?
4. Even if the wildlife officer and the manager of permitting had not erred, should the Greenlandic Inuit carvings nonetheless be released to the applicant because "it is unreasonable to refuse [their] importation"?

[11] The respondent contends that the issues are these:

1. What is the applicable standard of review?

2. Did the wildlife officer act reasonably in investigating the shipment of artefacts and their accompanying documents?

3. Is the detention of artefacts justified?

4. Would Canada's international obligations under the Convention be breached by allowing the applicant to import the artefacts at issue?

[12] I would rephrase the issues as follows:

A. Should the style of cause be amended?

B. Can the special import permit decision be reviewed?

C. What is the standard of review for the detention decision?

D. Was the officer's decision to detain the items reasonable?

E. Was the officer's interpretation of the legislation reasonable?

F. What is the appropriate remedy, if any?

V. Applicant's Submissions

[13] The applicant argued that the officer was overzealous in his investigation and failed to respect the purpose of the legislation or recognize the consequences of his actions on the applicant (citing *R v Matson*, [1987] AJ No 645 (QL) at 45 and 46, 82 AR 86 and *Alberta (Minister of Public Works, Supply and Services) v Nilsson*, 1999 ABQB 440 at paragraph 107, 246 AR 201, aff'd 2002 ABCA 283, 220 DLR (4th) 474). In his view, the officer's investigation was inappropriate for several reasons.

[14] First, he says that the certificate accompanying the items complied with article VI(3) of the Convention and that the officer therefore erred by questioning its validity. He points out that the *Canada Border Services Agency Memorandum D19-7-1*, dated January 10, 2013, says at page 5 that Convention permits and certificates vary so widely between countries that it is usually enough for the document just to bear the Convention logo or be identified as Convention documents. Further, although the document was in Danish, there are no language requirements in article VI. As well, the applicant submits that the basic rule is that documents issued by foreign states are presumed to be valid and prove their contents (citing *Azziz v Canada (Citizenship and Immigration)*, 2010 FC 663 at paragraph 67, 368 FTR 281). Therefore, the officer erred by investigating the validity of the document.

[15] Second, the applicant says that the officer was overzealous when he made inquiries about the caribou antler tupilaks and the kayak. He submits that neither caribou nor any species of seal are included in the appendices to the Convention and so there was no basis to keep investigating. The applicant takes this as admitted since the items were eventually released.

[16] Third, the applicant says that the officer's over-technical approach to his duties is exemplified by his failure to communicate with the applicant throughout the process. All communications between them were initiated by the applicant. Further, the applicant was not even notified that the certificate was flawed until March 26, 2012, two months after the officer had learned about the problem. At no time did the officer advise the applicant that he could apply for a special import permit to resolve the problem. All the while, the applicant's goods were in danger of being forfeited to the Crown.

[17] Beyond his overzealousness, the applicant argues that the officer also erred by failing to adopt a purposive interpretation of the governing legislation. He refers to section 6 of the Regulations which creates exemptions from the permit requirement for some species as long as it is accompanied by "a permit or certificate that satisfies the requirements of the Convention and is granted by a competent authority in that country." In particular, he cites subsection 6(3) of the Regulations which creates the exception for animals and plants "referred to in subsection (2) and listed in a subitem of column I of Schedule I, or any part or derivative of any such animal." The applicant interprets that as allowing the importation of the tupilaks since sperm whales are listed in Schedule 1, Part 1, item 1.3.8 and they were accompanied by a certificate from the Danish authority.

[18] Further, the applicant says that the detention of the tupilaks in this case serves none of the objectives listed at section 4 of the Act. In his view, the Act is designed to implement the Convention and prevent the illegal poaching or capture of endangered species and there is no evidence of illegal poaching of sperm whales. These specimens were harvested before the Convention came into existence and are exempt under article VII(2). Indeed, the applicant notes that although possession of Appendix I specimens for the purpose of distribution is prohibited by subsection 8(c) of the Act, paragraph 13(1)(a) of the Regulations created an exemption for pre-Convention goods. There is no purposive reason to read requirements into the Act that are stricter than those set out in the Convention.

[19] The applicant also argues that the manager of permitting's later decision not to issue a special import permit was not made in good faith. He says that she failed to address any of the

facts of the case and did not even acknowledge it was for a "special import permit" and not a Convention import permit. Rather, she explained the ordinary process and evaluated his argument about section 6 of the Regulations, even though he had made that argument in his original memorandum of fact and law and not in his actual application for the permit. Indeed, nothing in the letter considered whether it would be unreasonable to refuse the importation of the item, which he submits is the main criterion in the special import permit test. He also challenges her conclusion that the certificate does not satisfy the requirements of the Convention. He says that it was indeed stamped by the Convention authority of Denmark and nothing in the Convention requires the name on the certificate to match the name of the importer or exporter. The applicant also does not view the intention that it be used for transportation within the European Union as significant where it meets the actual requirements of the Convention.

[20] Finally, the applicant says the Court has authority to directly grant him a special import permit (citing *Minister of Public Safety and Emergency Preparedness v Lebon*, 2013 FCA 55, 444 NR 93) and he invites the Court to do so here. He points out that the guidelines state that special import permits can be granted where "it would be considered unreasonable to refuse the importation of the item," and he says it would be here. He argues that these tupilaks meet the criteria set out in article II of the Convention: it would not be detrimental to the survival of the species; they were not obtained by contravening Denmark's laws; and they will not be used for primarily commercial reasons. Further, Denmark had already authorized the export of the materials and in doing so, must have determined the specimens complied with the Convention. Though the wrong form was ultimately issued, the actual destination would have been immaterial to that determination and Denmark would have granted the permit. As such, this is

just a technical error that was made in good faith and Canada's refusal is based on an inflexible and unrealistic interpretation of its duties. The applicant submits that a similar error was made in *Ibrahim v Canada (Minister of Citizenship and Immigration*, 2001 FCT 917, 16 Imm LR (3d) 180, and the Court in that case held that it was patently unreasonable. As well, allowing the applicant to collect the tupilaks presents no danger to the species and nothing is gained by forfeiting these items to the Crown for their eventual destruction. He argues that these exceptional circumstances, along with the failure to consider his application for a special import permit in good faith, justify the Court's direct intervention.

VI. Respondent's Submissions

[21] When reciting the facts, the respondent says that the decision not to grant the special import permit is not under review.

[22] For its argument, the respondent begins by setting out the legislative scheme. In particular, it notes that although article VII(2) of the Convention makes an exemption for pre-Convention specimens, article XIV(1) allows countries to adopt stricter legislation. In Canada, neither the Act nor the Regulations creates an exemption for pre-Convention specimens. Further, the respondent notes that the parties to the Convention adopted a standardized form for permits and certificates by Resolution Conference 12.3.

[23] As well, the respondent argues that the decision attracts a lot of deference. The officers are responsible for applying a complex and highly specialized legislative scheme in which they have special expertise. Further, the respondent submits that the decision to detain something is

discretionary in nature. Once an officer decides that the importation offends the Act, his or her discretion narrows, but the respondent says that that decision and the decision about whether an exemption applies should still be reviewed on the reasonableness standard.

[24] The respondent says that the officer's investigation met that standard. Section 14 gives broad discretionary powers to officers that are conditioned only on reasonable belief. Here, the respondent says the officer had reasonable grounds to investigate further: the required Convention import certificate was missing and the apparent export certificate was in a foreign language. The respondent argues that the officer acted well within his discretion in seeking authentication and detaining the goods until his investigation was complete.

[25] The respondent goes on to argue that the continued detention of the items was justified because the officer's investigation revealed a violation of the Act. The respondent cites section 13 of the Act which says that any imported items "may be detained by an officer until the officer is satisfied that the thing has been dealt with in accordance with this Act and the regulations." Although "may" ordinarily signals discretion, the respondent says it is modified by "until the officer is satisfied" and ought to be read as "should." Hence, once an officer has determined that items are non-compliant, he should detain them.

[26] Here, the officer's investigation revealed that neither an import permit nor a valid export permit had been obtained. The respondent submits that the importation of the sperm whale ivory tupilaks was therefore unlawful and that alone justifies the detention of the items.

[27] Further, the respondent argues that the exemption in subsection 6(1) of the Regulations does not apply, since it applies only to specimens found in Appendix II of the Convention and only if there is a "written authorization that satisfies the requirements of the Convention." The respondent argues that neither hurdle has been met. Sperm whales are listed in Appendix I and the authorization is unsatisfactory for six reasons: it is not for use outside of the European Union; the name on the certificate does not match the name of either the importer or the exporter; the destination country is unidentified; the full name and logo of the Convention does not appear on the document; there is no expiry date; and the document was not translated into one of the official languages of the Convention.

[28] Finally, the respondent concluded by arguing that Canada would be violating its obligations to other states under the Convention if it permitted the applicant to import his tupilaks. It summarizes some of the European requirements for the Convention and concludes that the certificate issued, though valid for transportation between members of the European Union, does not fulfill all the requirements for exporting it somewhere else. The respondent thus concludes that the export of these items was likely illegal in Denmark and argues that Canada would therefore not be allowed to let the applicant have his tupilaks.

VII. Analysis and Decision

A. *Issue 1 – Should the style of cause be amended?*

[29] The style of cause shall be amended to substitute the Attorney General of Canada for the respondents (see *Federal Court Rules*, SOR/98-106, subsection 303(2)).

B. *Issue 2 - Can the special import permit decision be reviewed?*

[30] The applicant argued that the manager of permitting made her decision in bad faith. Whatever the merit of that complaint, the respondent is correct to point out that that decision is not under review. Rule 302 of the *Federal Courts Rules* provides that "an application for judicial review shall be limited to a single order in respect of which relief is sought" unless the Court orders otherwise. The applicant has not moved for such an order, nor has he applied for judicial review of the special import permit decision. As well, the two decisions were made by different people at different times, and they were not part of a continuous course of conduct (see *Truehope Nutritional Support Ltd v Canada (Attorney General)*, 2004 FC 658 at paragraph 6, 251 FTR 155). Most importantly, there is no record from the special import permit decision and the Court is in no position to properly review it. I therefore decline to do so.

C. *Issue 3 - What is the standard of review for the detention decision?*

[31] As the Supreme Court of Canada said at paragraph 62 of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], determining the standard of review is a two-step process:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[32] Neither party has submitted any case law where an officer's decision under the Act has been reviewed by this Court, nor am I aware of any. Therefore, it is helpful to assess the following factors from paragraph 64 of *Dunsmuir*: "(1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal." However, that is not a checklist and not all factors are relevant every time. Rather, what is required is an overall evaluation (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 54, [2009] 1 SCR 339 [*Khosa*]).

[33] Still, it is helpful to begin with the factors. Here, there is no privative clause, but neither is there any statutory right of review. This factor is neutral (see *Khosa* at paragraph 25; *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paragraph 27, [2003] 1 SCR 226 [*Dr Q*]).

[34] As for their purpose, officers are responsible for ensuring compliance with the Act and its Regulations. Notably, subsection 12(2) of the Act gives them the powers of a peace officer; section 13 lets them detain items that are crossing borders; and section 14 gives them broad powers of inspection. Those powers are essentially investigatory and they bear little resemblance to the adjudicative process employed in Court. This factor suggests deference (see *Dr Q* at paragraphs 31 and 32).

[35] There are two questions to be answered. The first is whether the officer abused his discretion by detaining the items and paragraph 53 of *Dunsmuir* tells us that "deference will

usually apply automatically" for such questions. The second is whether the officer misinterpreted the legislation and there too, paragraph 54 of *Dunsmuir* teaches that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function."

[36] Finally, this is a specialized regime informed by international law and neither party produced any case law where this Court has been asked to consider it. Rather, the involvement of courts is usually only anticipated for prosecuting offences, which are brought before provincial or superior courts. This suggests that officers, who deal with the scheme every day, have more expertise than the Federal Court (see *Dr Q* at paragraph 28).

[37] All of the factors therefore point to deference.

[38] Looking beyond the factors, the Federal Court of Appeal has said that the need to interpret international conventions uniformly sometimes justifies a correctness standard (see *Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324 at paragraph 24, 357 DLR (4th) 343). However, that seems to apply only when the text of the convention is being interpreted directly. In *B010 v Canada (Citizenship and Immigration)*, 2013 FCA 87 at paragraph 71, 359 DLR (4th) 730, the Federal Court of Appeal decided that reasonableness was still the appropriate standard when the decision-maker is interpreting the statute that implements a convention, especially where the convention in issue allows state parties to choose how to achieve the convention's objectives. Here, the provisions being interpreted by the officer belong to the Act

and the Regulations, not to the Convention and article XIV(1)(a) of the Convention specifically allows domestic legislation to be stricter than the terms of the Convention.

[39] As well, I acknowledge that the Act creates a significant role for courts who may have to interpret the statute (see subsection 19(1) and sections 22 to 26). It is therefore not a discrete administrative regime that is wholly divorced from the courts and the Supreme Court of Canada has in other circumstances applied a correctness standard where courts could have concurrent original jurisdiction to consider the same legal issues (see *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at paragraphs 14 and 15, [2012] 2 SCR 283). The majority reasoned at paragraph 15 that "it must be inferred that the legislative intent was not to recognize superior expertise of the Board relative to the court with respect to such legal questions". However, that case is distinguishable. There, the reviewing court was also the one that had original jurisdiction, whereas here provincial or superior courts have original jurisdiction and the Federal Court only conducts judicial reviews. Therefore, even if it is not a discrete regime, officers still have more expertise than the Federal Court, and the standard of review is reasonableness.

[40] This means that I should not intervene if the officer's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (see *Dunsmuir* at paragraph 47; *Khosa* at paragraph 59). Although this normally requires careful attention to the reasons, the officer in this case gave no reasons and nobody has argued that he had any duty to do so. Such a situation was addressed by the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paragraph 54, [2011] 3 SCR

654 [*ATA*], and they said that "[w]here there is no duty to give reasons […] or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review" (citations omitted).

[41] Put another way, the officer's decision will be set aside only if the record does not disclose how the facts and applicable law could possibly support the officer's conclusions (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708 [*Newfoundland Nurses*]). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

D. *Issue 4 - Was the officer's decision to detain the items reasonable?*

[42] I agree with the respondent that the officer's initial decision to detain the shipment was reasonable. The shipment had no import certificate and the officer could not read the alleged export permit. Of course, the applicant is right that the certificate met the criteria in article VI(3) (namely, it refers to the Convention, it is stamped by the management authority of Denmark and it was assigned a control number). However, the respondent points out that those criteria were supplemented by Resolution Conference 12.3. There, the state parties agreed that every form "should be printed in one or more of the working languages of the Convention (English, Spanish, French) and in the national language if it is not one of the working languages." They also agreed that permits and certificates should include a number of other details, including the full name and logo of the Convention and the date of expiry. At least some of those were absent from the Danish certificate.

[43] Presented with an unfamiliar but official looking form, the officer committed no error by investigating the matter further. Far from being overzealous to detain the shipment in such circumstances, it would have been rather under-zealous for him not to do so.

[44] Further, the applicant's reliance on *Azziz* is misplaced. Although it is true that documents issued by a foreign state are presumed to be valid and to prove their contents, Mr. Justice Luc Martineau went on to say at paragraph 67 of *Azziz* that "this presumption may be rebutted after verifying the authenticity of the foreign document and the truthfulness of an applicant's assertions." Implicitly, therefore, officers must be allowed to verify that the document actually was issued by the foreign state and is not a forgery. That is all the officer did in this case and it was entirely appropriate.

[45] The applicant also argued that the officer's investigation of the caribou antler tupilaks and the seal leather kayak was overzealous since neither caribou nor seals are endangered. Even putting aside that those objects have since been released, it should be recalled that the invoice accompanying the shipment only said the following: "12 Greenlandic sperm whale tooth and horn tupilaks. And a leather, wood and bone kayak." It did not identify the species from which the horns, leather and bone came from and the officer committed no error by asking whether they were made of animals protected by the Act.

[46] As for the alleged lack of communication, I note that on February 6, 2012, the officer did respond briefly by e-mail to the applicant's agent's inquiry, saying "We are waiting to see what Denmark wants to do or willing to do. I will let you know when we get the word from them."

Although more fluid communication may have been desirable, I do not infer from its absence that the officer was unreasonably exercising his discretion.

E. *Issue 5 - Was the officer's interpretation of the legislation reasonable?*

[47] The applicant argues that the officer's interpretation of the Act betrays its purpose. Among the respondent's criticisms of that argument is that a purposive interpretation of the legislation is not required here since the requirements of the Act are explicit.

[48] Certainly, the plain meaning of provisions is important, but I reject the respondent's contention that purpose can be ignored. Rather, the Supreme Court in *65302 British Columbia Ltd v Canada*, [1999] 3 SCR 804 at paragraph 5, 179 DLR (4th) 577, has endorsed the following statement:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning.

[49] The respondent argues that importing the tupilaks was prohibited by both subsections 6(1) and 6(2).

[50] Subsection 6(1) of the Act prohibits the importation of any animal or plant that was "possessed, distributed or transported in contravention of any law of any foreign state." From

this, the respondent argues that Canada would be violating its international obligations if it gave to the applicant his tupilaks, because they were exported in violation of Denmark's laws.

[51] However, although the respondent's summary of European Union law seems reasonable enough, foreign law should typically be established by expert evidence (see *Allen v Hay* (1922), 64 SCR 76 at 80 to 81, 69 DLR 193, Duff, J). Although that requirement is relaxed in some administrative contexts (see *Xiao v Canada (Citizenship and Immigration)*, 2009 FC 195 at paragraphs 24 to 26, [2009] 4 FCR 510), there should at least be some evidence before the decision-maker that Denmark's laws were violated.

[52] Here, the record discloses nothing. There is no evidence that the exporter was convicted or is being charged of some regulatory or criminal offence, nor is there any communication from an official in Denmark saying that an offence was committed. I see no basis upon which the officer could have concluded that the prohibition in subsection 6(1) of the Act was violated, nor do I see any indication that he made such a conclusion.

[53] That said, I do agree that the officer could have reasonably concluded that subsection 6(2) of the Act prohibited the importation of the sperm whale tupilaks. That subsection says the following:

6. (2) Subject to the regulations, no person shall, except under and in accordance with a permit issued pursuant to subsection 10(1), import into Canada or export from Canada any animal or plant, or any part or derivative of an	6. (2) Sous réserve des règlements, il est interdit d'importer au Canada ou d'exporter hors du Canada, sans licence ou contrairement à celle-ci, tout ou partie d'un animal, d'un végétal ou d'un produit qui en provient.

animal or plant.

[54] The applicant does not deny that that section is engaged and that he had no import permit. Instead, he notes that section 6 of the Regulations creates exemptions from the requirement of an import permit.

[55] Section 6 has three subsections, each of which exempts a person from holding an import permit for some types of specimens if he or she has obtained, before import, a permit, certificate or written authorization that satisfies the requirements of the Convention and is granted by a competent authority in the country of export.

[56] The applicant had a certificate from the competent authority in Denmark, but problematically for him, none of those subsections creates the exemption for animals that are listed in appendix I of the Convention. Subsection 6(1) only creates the exemption for "an animal or plant that is listed as 'fauna' or 'flora' in Appendix II to the Convention but is not listed in Schedule II". Subsection 6(2) creates it for "an animal or plant that is listed as 'fauna' or 'flora' in Appendix III to the Convention but is not listed in Schedule II". Subsection 6(3) creates it for "an animal or plant referred to in subsection (2) and listed in a subitem of column I of Schedule I […] from a country of export listed in column III of that subitem." Subsection 6(3) is the closest since sperm whales are listed in column I of Schedule I, but they are not among the animals referred to in subsection 6(2) and so subsection 6(3) creates no exemption for them. Therefore, the plain language of those sections does not support the applicant.

[57] Still, the applicant says that the exemption should be read in for two reasons: (a) an exemption for pre-Convention goods exists in article VII(2) of the Convention; and (b) the purpose of the legislation is to prevent the poaching and capture of endangered species now and is not thwarted by allowing an exemption for products obtained from those species before the Convention came into force.

[58] One of the respondent's counter-arguments is that it does not matter if there were an exemption, since the certificate provided by the Danish Nature Agency does not meet the requirements of the Convention anyway. Although it is true that the certificate has some deficiencies, I confess that I find that argument unduly technical. The preamble of Resolution Conference 12.3 reveals that the forms were standardized partly because the parties observed "that false and invalid permits and certificates are used more-and-more often for fraudulent purposes and that appropriate measures are needed to prevent such documents from being accepted." In other words, it was meant to prevent forgeries. Here, the communication from Maj Munk of the Danish Nature Agency confirms that the certificate was legitimate, but intended for transportation within the European Union. In other words, it was not a forgery and the Danish Nature Agency has certified that the items were pre-Convention. To rely on strict adherence to the requirements in Resolution Conference 12.3 in the face of evidence that the contents are accurate is, quite literally, to privilege form over substance.

[59] That said, it may be that the Act should be read so strictly, but I do not find it necessary to decide that point since I agree with the respondent's other argument that it was reasonable for the officer not to apply an exemption for pre-Convention goods. Although it exists in the

Convention, the officer was required to implement the Act, so any exemptions have to be found in the legislation, not the Convention. Further, article XIV(1)(a) of the Convention itself allows state parties to adopt stricter legislation than the Convention requires.

[60] As well, subsection 13(1)(a) of the Regulations expressly creates an exemption from the offence of possession where a specimen was removed from its habitat before 1975. Similar express language could have been used had Canada wanted to create the same exemption for importing.

[61] As for the objectives of the legislation, section 4 of the Act says that the "purpose of this Act is to protect certain species of animals and plants, particularly by implementing the Convention and regulating international and interprovincial trade in animals and plants." Not allowing an exemption for pre-Convention goods is consistent with that purpose. To take just one possible reason, it closes the market for products from appendix I species, thus removing any financial incentives for poachers to kill the animals anyway and fabricate their age. That is rationally connected to the purpose of protecting endangered species. An exemption for pre-Convention goods certainly does not advance the objectives of the Act so it was reasonable for the officer to obey the plain meaning of the legislation and not read in the exemption that the applicant wants.

[62] Therefore, it was reasonable not to release the items to the applicant.

[63] I need not deal with Issue 6 because of my findings.

[64] Since the decision was reasonable, this application for judicial review is dismissed and there shall be no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and there shall be no order as to costs.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutes

***Federal Courts Act*, RSC 1985, c F-7**

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
…	…
(3) On an application for judicial review, the Federal Court may	(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

***Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, SC 1992, c 52**

4. The purpose of this Act is to protect certain species of animals and plants, particularly by implementing the Convention and regulating international and interprovincial trade in animals	4. La présente loi a pour objet la protection de certaines espèces animales et végétales, notamment par la mise en oeuvre de la Convention et la réglementation de leur commerce international et

and plants.	interprovincial.
…	…
6. (1) No person shall import into Canada any animal or plant that was taken, or any animal or plant, or any part or derivative of an animal or plant, that was possessed, distributed or transported in contravention of any law of any foreign state.	6. (1) Il est interdit à quiconque d'importer au Canada tout ou partie d'un animal ou d'un végétal pris, détenu, distribué ou acheminé contrairement aux lois d'un État étranger ou tout ou partie d'un produit qui provient de l'animal ou du végétal détenu, distribué ou acheminé contrairement à ces lois.
(2) Subject to the regulations, no person shall, except under and in accordance with a permit issued pursuant to subsection 10(1), import into Canada or export from Canada any animal or plant, or any part or derivative of an animal or plant.	(2) Sous réserve des règlements, il est interdit d'importer au Canada ou d'exporter hors du Canada, sans licence ou contrairement à celle-ci, tout ou partie d'un animal, d'un végétal ou d'un produit qui en provient.
…	…
8. Subject to the regulations, no person shall knowingly possess an animal or plant, or any part or derivative of an animal or plant,	8. Sous réserve des règlements, il est interdit d'avoir sciemment en sa possession tout ou partie d'un animal, d'un végétal ou d'un produit qui en provient :
…	…
(c) for the purpose of distributing or offering to distribute it if the animal or plant, or the animal or plant from which the part or derivative comes, is listed in Appendix I to the Convention.	c) dans le but de le distribuer ou d'offrir de le distribuer, dès lors qu'il est énuméré à l'annexe I de la Convention.
9. Every person who imports into Canada, exports from Canada or transports from one	9. Toute personne qui importe au Canada, exporte hors du Canada ou achemine d'une

province to another province an animal or plant, or any part or derivative of an animal or plant, shall keep in Canada, in the prescribed manner and for the prescribed period, any documents that are required to be kept by the regulations.

province à l'autre tout ou partie d'un animal, d'un végétal ou d'un produit qui en provient tient au Canada, en la forme et selon les modalités — de temps ou autres — réglementaires, les documents prévus par règlement.

10. (1) The Minister may, on application and on such terms and conditions as the Minister thinks fit, issue a permit authorizing the importation, exportation or interprovincial transportation of an animal or plant, or any part or derivative of an animal or plant.

10. (1) Le ministre peut délivrer, sur demande et aux conditions qu'il estime indiquées, une licence autorisant l'importation, l'exportation ou l'acheminement interprovincial de tout ou partie d'un animal, d'un végétal ou d'un produit qui en provient.

…

…

12. (1) The Minister may designate such persons or classes of persons as the Minister considers necessary to act as officers or analysts for the purposes of this Act or any provision of this Act, and if the person to be designated is an employee, or the class of persons to be designated consists of employees, of the government of a province, the Minister shall only designate that person or class with the agreement of that government.

12. (1) Le ministre peut désigner, individuellement ou par catégorie, les agents ou analystes jugés nécessaires au contrôle d'application de la présente loi ou de telle de ses dispositions; les fonctionnaires provinciaux ne peuvent être désignés qu'avec l'agrément du gouvernement provincial intéressé.

(2) Officers designated under subsection (1) have, for the purposes of this Act, all the powers of a peace officer, but the Minister may limit, in any manner the Minister considers appropriate, the powers that certain officers may exercise for the purposes of this Act

(2) Les agents ont tous les pouvoirs d'un agent de la paix; le ministre peut toutefois restreindre, dans le certificat de désignation qu'il leur remet, les pouvoirs qu'ils peuvent exercer pour l'application de la présente loi.

and, where those powers are so limited, they shall be specified in the certificate referred to in subsection (3).

…

13. Any thing that has been imported into or is about to be exported from Canada, or has been transported, or is about to be transported, from a province to another province, may be detained by an officer until the officer is satisfied that the thing has been dealt with in accordance with this Act and the regulations.

14. (1) For the purpose of ensuring compliance with this Act and the regulations, an officer may at any reasonable time enter and inspect any place in which the officer believes, on reasonable grounds, there is any thing to which this Act applies, or there are any documents relating to the administration of this Act or the regulations, and the officer may

(a) open or cause to be opened any container that the officer believes, on reasonable grounds, contains such a thing;

(b) inspect any such thing and take samples free of charge;

(c) require any person to produce for inspection or copying, in whole or in part, any document that the officer

…

13. L'agent peut retenir tout ou partie d'un objet importé ou en instance d'exportation, ou acheminé d'une province à l'autre ou en instance d'acheminement, jusqu'à ce qu'il constate qu'il a été procédé à son égard conformément à la présente loi ou à ses règlements.

14. (1) Dans le but de faire observer la présente loi et ses règlements, l'agent peut, à toute heure convenable, procéder à la visite de tout lieu s'il a des motifs raisonnables de croire que s'y trouve tout ou partie d'un objet visé par la présente loi, ou tout document relatif à l'application de celle-ci ou de ses règlements. Il peut en outre, son avis devant être fondé sur des motifs raisonnables :

a) ouvrir ou faire ouvrir tout contenant où, à son avis, se trouve tout ou partie d'un tel objet;

b) examiner tout objet et prélever, sans compensation, des échantillons;

c) exiger la communication, pour examen ou reproduction totale ou partielle, de tout document qui, à son avis,

believes, on reasonable grounds, contains any information relevant to the administration of this Act or the regulations; and	contient des renseignements utiles à l'application de la présente loi et de ses règlements;
(d) seize any thing by means of or in relation to which the officer believes, on reasonable grounds, this Act or the regulations have been contravened or that the officer believes, on reasonable grounds, will afford evidence of a contravention of this Act or the regulations.	d) saisir tout objet qui, à son avis, a servi ou donné lieu à une contravention à la présente loi ou à ses règlements ou qui peut servir à prouver la contravention.
…	…
16. (1) An officer who detains or seizes a thing under section 13, 14 or 15 or under a warrant issued under the *Criminal Code* may retain custody of the thing or transfer custody of it to such person as the officer may designate.	16. (1) La responsabilité de la garde des objets retenus ou saisis dans le cadre de l'application des articles 13, 14 ou 15 ou en vertu d'un mandat délivré au titre du *Code criminel* incombe à l'agent ou à la personne qu'il désigne.
…	…
19. (1) Where a person is convicted of an offence under this Act, the convicting court may, in addition to any punishment imposed, order that any thing detained or seized, or any proceeds realized from its disposition, be forfeited to Her Majesty.	19. (1) Sur déclaration de culpabilité de l'auteur de l'infraction à la présente loi, le tribunal peut prononcer, en sus de la peine infligée, la confiscation au profit de Sa Majesté des objets retenus ou saisis ou du produit de leur aliénation.
…	…
(3) Where a thing is detained or seized under this Act, it, or the proceeds realized from its disposition, is forfeited to Her Majesty	(3) Il y a confiscation au profit de Sa Majesté des objets, ou du produit de leur aliénation :

(a) in the case of a thing that has been detained under section 13, if the thing has not been removed within the period prescribed by the regulations;

a) qui, ayant été retenus en application de l'article 13, n'ont pas été enlevés à l'expiration du délai réglementaire;

…

…

22. (1) Every person who contravenes a provision of this Act or the regulations

22. (1) Quiconque contrevient à la présente loi ou à ses règlements commet une infraction et encourt, sur déclaration de culpabilité :

(a) is guilty of an offence punishable on summary conviction and is liable

a) par procédure sommaire :

(i) in the case of a person that is a corporation, to a fine not exceeding fifty thousand dollars, and

(i) dans le cas des personnes morales, une amende maximale de cinquante mille dollars,

(ii) in the case of a person other than a person referred to in subparagraph (i), to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months, or to both; or

(ii) dans le cas des autres personnes, une amende maximale de vingt-cinq mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines;

(b) is guilty of an indictable offence and is liable

b) par mise en accusation :

(i) in the case of a person that is a corporation, to a fine not exceeding three hundred thousand dollars, and

(i) dans le cas des personnes morales, une amende maximale de trois cent mille dollars,

(ii) in the case of a person other than a person referred to in subparagraph (i), to a fine not exceeding one hundred and fifty thousand dollars or to imprisonment for a term not exceeding five years, or to

(ii) dans le cas des autres personnes, une amende maximale de cent cinquante mille dollars et un emprisonnement maximal de cinq ans, ou l'une de ces peines.

both.

***Federal Court Rules*, SOR/98-106**

302. Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.	302. Sauf ordonnance contraire de la Cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une réparation est demandée.
303. (1) Subject to subsection (2), an applicant shall name as a respondent every person	303. (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :
(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or	a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;
(b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.	b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.
(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.	(2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.

***Wild Animal and Plant Trade Regulations*, SOR/96-263**

6. (1) A person who imports into Canada an animal or plant that is listed as "fauna" or "flora" in Appendix II to the Convention but is not listed in Schedule II, or any part or derivative of any such animal or plant, is exempted from holding a permit issued under subsection 10(1) of the Act	6. (1) Quiconque importe au Canada tout ou partie d'un animal ou d'un végétal qui est mentionné sous les rubriques « fauna » ou « flora » de l'annexe II de la Convention, mais qui n'est pas mentionné à l'annexe II du présent règlement, ou tout ou partie d'un produit qui en provient,

where the person has obtained, before import, a permit, certificate or written authorization that satisfies the requirements of the Convention and is granted by a competent authority in the country of export.

est dispensé d'avoir la licence visée au paragraphe 10(1) de la Loi s'il a obtenu, avant l'importation, un permis, un certificat ou une autorisation écrite qui satisfait aux exigences de la Convention et qui est délivré par une autorité compétente dans le pays d'exportation.

(2) Subject to subsection (3), a person who imports into Canada an animal or plant that is listed as "fauna" or "flora" in Appendix III to the Convention but is not listed in Schedule II, or any part or derivative of any such animal or plant, is exempted from holding a permit issued under subsection 10(1) of the Act where the person has obtained, before import, a certificate that satisfies the requirements of the Convention and is granted by a competent authority in the country of export.

(2) Sous réserve du paragraphe (3), quiconque importe au Canada tout ou partie d'un animal ou d'un végétal qui est mentionné sous les rubriques « fauna » ou « flora » de l'annexe III de la Convention, mais qui n'est pas mentionné à l'annexe II du présent règlement, ou tout ou partie d'un produit qui en provient, est dispensé d'avoir la licence visée au paragraphe 10(1) de la Loi s'il a obtenu, avant l'importation, un certificat qui satisfait aux exigences de la Convention et qui est délivré par une autorité compétente dans le pays d'exportation.

(3) Where a person imports into Canada an animal or plant referred to in subsection (2) and listed in a subitem of column I of Schedule I, or any part or derivative of any such animal or plant, from a country of export listed in column III of that subitem, the person is exempted from holding a permit issued under subsection 10(1) of the Act where the person has obtained, before import, a permit or certificate that satisfies the requirements of the Convention and is

(3) Lorsque qu'une personne importe au Canada, d'un pays d'exportation mentionné à la colonne III de l'annexe I du présent règlement, tout ou partie d'un animal ou d'un végétal visé au paragraphe (2) et mentionné à la colonne I, ou tout ou partie d'un produit qui en provient, elle est dispensée d'avoir la licence visée au paragraphe 10(1) de la Loi si elle a obtenu, avant l'importation, un permis ou certificat qui satisfait aux exigences de la Convention et

granted by a competent authority in that country.	qui est délivré par une autorité compétente dans ce pays.
…	…
13. (1) Every animal or plant listed as "fauna" or "flora" in Appendix I to the Convention, and any part or derivative of the animal or plant, is exempted from the operation of paragraph 8(c) of the Act where	13. (1) Sont exemptés de l'application de l'alinéa 8c) de la Loi tout ou partie d'un animal ou d'un végétal mentionné sous les rubriques « fauna » ou « flora » de l'annexe I de la Convention et tout ou partie d'un produit qui en provient, dans les cas suivants :
(a) the person who possesses it establishes a reasonable probability that it or, in the case of a part or derivative, the animal or plant from which it comes, was taken from its habitat before July 3, 1975;	a) la personne qui en a la possession établit selon une probabilité raisonnable que l'animal ou le végétal en cause ou duquel provient la partie ou le produit a été retiré de son habitat avant le 3 juillet 1975;
…	…
23. For the purposes of paragraph 19(3)(a) of the Act, the period within which a thing must be removed is 90 days after the date of its detention under section 13 of the Act.	23. Pour l'application de l'alinéa 19(3)a) de la Loi, le délai pour le retrait de l'objet confisqué est de 90 jours, commençant le lendemain du jour où l'objet a été retenu en application de l'article 13 de la Loi.

***Convention on International Trade in Endangered Species of Wild Fauna and Flora*, March 1973, 993 UNTS 243, Can TS 1975 No 32**

Article III	Article III
1. All trade in specimens of species included in Appendix I shall be in accordance with the provisions of this Article.	1. Tout commerce de spécimens d'une espèce inscrite à l'Annexe I doit être conforme aux dispositions du présent Article.
…	…

3. The import of any specimen of a species included in Appendix I shall require the prior grant and presentation of an import permit and either an export permit or a re-export certificate. An import permit shall only be granted when the following conditions have been met:

3. L'importation d'un spécimen d'une espèce inscrite à l'Annexe I nécessite la délivrance et la présentation préalables d'un permis d'importation et, soit d'un permis d'exportation, soit d'un certificat de réexportation. Un permis d'importation doit satisfaire aux conditions suivantes :

(a) a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;

a) une autorité scientifique de l'Etat d'importation a émis l'avis que les objectifs de l'importation ne nuisent pas à la survie de ladite espèce;

(b) a Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and

b) une autorité scientifique de l'Etat d'importation a la preuve que, dans le cas d'un spécimen vivant, le destinataire a les installations adéquates pour le conserver et le traiter avec soin;

(c) a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.

c) un organe de gestion de l'Etat d'importation a la preuve que le spécimen ne sera pas utilisé à des fins principalement commerciales.

…

…

Article VI

Article VI

1. Permits and certificates granted under the provisions of Articles III, IV, and V shall be in accordance with the provisions of this Article.

1. Les permis et certificats délivrés en vertu des dispositions des Articles III, IV et V doivent être conformes aux dispositions du présent Article.

…

…

3. Each permit or certificate shall contain the title of the

3. Tout permis ou certificat se réfère au titre de la présente

present Convention, the name and any identifying stamp of the Management Authority granting it and a control number assigned by the Management Authority.

Convention; il contient le nom et le cachet de l'organe de gestion qui l'a délivré et un numéro de contrôle attribué par l'organe de gestion.

…

…

Article VII

Article VII

…

…

2. Where a Management Authority of the State of export or re-export is satisfied that a specimen was acquired before the provisions of the present Convention applied to that specimen, the provisions of Articles III, IV and V shall not apply to that specimen where the Management Authority issues a certificate to that effect.

2. Lorsqu'un organe de gestion de l'Etat d'exportation ou de réexportation a la preuve que le spécimen a été acquis avant que les dispositions de la présente Convention ne s'appliquent audit spécimen, les dispositions des Articles III, IV et V ne sont pas applicables à ce spécimen, à la condition que ledit organe de gestion délivre un certificat à cet effet.

…

…

Article XIV

Article XIV

1. The provisions of the present Convention shall in no way affect the right of Parties to adopt:

1. Les dispositions de la présente Convention n'affectent pas le droit des Parties d'adopter :

(a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or

a) des mesures internes plus strictes en ce qui concerne les conditions auxquelles le commerce, la capture ou la récolte, la détention ou le transport de spécimens d'espèces inscrites aux Annexes I, II et III sont soumis, mesures qui peuvent aller jusqu'à leur interdiction complète;

(b) domestic measures restricting or prohibiting trade, taking, possession or transport of species not included in Appendix I, II or III.	b) des mesures internes limitant ou interdisant le commerce, la capture ou la récolte, la détention ou le transport d'espèces qui ne sont pas inscrites aux Annexes I, II ou III.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-854-12
STYLE OF CAUSE:	THOMAS ZALMON DRUYAN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	YELLOWKNIFE, NORTHWEST TERRITORIES
DATE OF HEARING:	JANUARY 16, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	O'KEEFE J.
DATED:	JULY 15, 2014

APPEARANCES:

Joseph A. Bernardo	FOR THE APPLICANT
Rohan Brown	FOR THE RESPONDENT

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