Federal Court of Appeal  Cour d'appel fédérale

Date: 20160406

Docket: A-521-14

Citation: 2016 FCA 105

CORAM: **STRATAS J.A.**
WEBB J.A.
GLEASON J.A.

BETWEEN:

STEVEN WISE

Appellant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard at Toronto, Ontario, on April 6, 2016.
Judgment delivered from the Bench at Toronto, Ontario, on April 6, 2016.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on April 6, 2016).

STRATAS J.A.

[1] Mr. Wise appeals from the Judgment dated October 29, 2014 of the Federal Court (*per* O'Keefe J.): 2014 FC 1027. The Federal Court dismissed Mr. Wise's appeal of a decision of a Canada Border Services Agency officer penalizing him $2,500 for the violation of not declaring currency of $10,000 (Cdn.) or more when leaving Canada.

[2] Under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, s. 12 and the *Cross-Border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412, s. 2, a traveller leaving Canada in "actual possession" of $10,000 (Cdn.) or more must declare the currency.

[3] On February 14, 2009, Mr. Wise and his spouse were leaving Canada together on a flight to St. Maartin. A Canada Border Services Agency officer interviewed Mr. Wise and his spouse on the bridge leading to the aircraft. Mr. Wise advised that he was carrying under $10,000 (Cdn.). However, a search of an agenda/credit card holder in Mr. Wise's actual possession revealed $13,820.69 (Cdn.). The officer imposed a $2,500 (Cdn.) fine on the spot and allowed Mr. Wise to leave with the rest of the currency.

[4] In the Federal Court, Mr. Wise submitted that he and his spouse jointly owned the currency and so each was below the $10,000 (Cdn.) threshold. He also submitted that the defence of officially induced error—defined in cases such as *R. v. Jorgensen*, [1995] 4 S.C.R. 55, 129 D.L.R. (4th) 510—was available to him.

[5] Following a full trial, the Federal Court rejected these submissions.

[6] Following the governing law concerning how legislative provisions should be interpreted (*e.g.*, *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193), the Federal Court held that "actual possession" in s. 12 of the Act (in particular, para. 12(3)(*a*) of the Act) means

actual, physical possession, not ownership. Mr. Wise had actual, physical possession of the currency, which exceeded $10,000 (Cdn.).

[7] On this point, we agree with and endorse the Federal Court's analysis and conclusions at paras. 17-24 of its reasons. The text, context and purpose of s. 12 of the Act all support the conclusion that "actual possession" means actual, physical possession, not ownership.

[8] The Federal Court also found that the defence of officially induced error was not available on the facts (paras. 29-30). On appeal, this factually-suffused conclusion can only be set aside on the basis of palpable and overriding error, namely some error that is "obvious" and "goes to the very core of the outcome of the case": *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46. Mr. Wise has not demonstrated any such error.

[9] On appeal of the Federal Court's rejection of the defence of officially induced error, Mr. Wise urges us to prefer the customs officer's statement on cross-examination that he could not recall what he had said to Mr. Wise and that he could not be sure how his statements would have been understood by Mr. Wise: see Memorandum, paras. 8 and 26. In the hearing before us, Mr. Wise referred to multiple parts of the officer's testimony in support of this.

[10] Under *Jorgensen* and related cases, this falls short of making out the defence of officially induced error. Further, whatever the officer might have said to Mr. Wise was said after the conduct contrary to the Act and the Regulations; in no way did the officer induce the conduct. In any event, in an appeal on a point like this, our job is not to retry the case or reweigh the

evidence but rather to assess whether there is palpable and overriding error. Again, we are not persuaded that any such error is present.

[11] Accordingly, we will dismiss the appeal. By agreement, costs will be fixed at $4,000, all-inclusive.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-521-14
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE O'KEEFE DATED OCTOBER 29, 2014, DOCKET NO. T-145-10	
STYLE OF CAUSE:	STEVEN WISE v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	APRIL 6, 2016
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. WEBB J.A. GLEASON J.A.
DELIVERED FROM THE BENCH BY:	STRATAS J.A.

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