

Grounds for Appeal

1. Court erred in applying immigration laws at port of entry.

Background

From my criminal harassment (CC s. 264) conviction of 2017, there is a 3 year probation order, which includes two conditions in particular:

- that I not leave BC;
- that I not be within 100 meters of the US border;

This is regardless of the fact that I'm not a Canadian citizen; that I have no status in Canada; and that I cannot, legally, work in Canada or receive any government or citizenship benefit or assistance (including health care).

I had two hearings, in February and March 2019, to remove those conditions so I could return to the US. The judge (Heather Holmes) denied the requests. At the March 14, 2019 hearing I told the court and the Crown (Mark McIvor) that regardless of the court's decision I would be turning myself in to CBSA, to be removed from Canada. And since the CBSA location I would be turning myself in to was within BC and not within 100 meters of the US border, by doing so I would not be violating the probation order.

On March 15, 2019 I made my way to the Douglas border

crossing point of entry. I presented myself to a CBSA officer at a booth just outside the secondary inspection building. The officer directed me into the secondary inspection area. At the secondary inspection area I presented myself to another CBSA officer (who would much later (2020-02-11) be identified as Meagan Poliwak) at the counter along the west side of the area. I told the officer I am not a Canadian citizen; I have no status in Canada; and I have been convicted of an indictable offense in Canada; and that, for those reasons, I am inadmissible. I told the officer I have copies of documents from IRCC and CBSA on my phone, including my FOSS record, which state I am not a Canadian citizen. I opened the FOSS record on my phone and gave it to the officer. I told the officer about the probation conditions and that the reason I was presenting myself to her at a point of entry is so that I can be denied admission and leave Canada without violating the probation order.

The officer directed me to have a seat in the waiting area while she investigated. The officer subsequently told me, either that I was inadmissible to Canada (according to my testimony), or that I was admissible to Canada (according to Poliwak's testimony). The officer did not explicitly order me to leave Canada. I then left the officer and exited the secondary inspection area. I approached a CBSA officer who was standing outside the entrance to the secondary inspection area. I told the officer I had just been informed I am

inadmissible, and I asked the officer where I go to return to the 45. The officer directed me to a door in a passageway between the secondary inspection building and the primary inspection booths/lanes. I passed through the door and followed the sidewalk south. I periodically glanced over my shoulder and saw that the officer maintained a presence behind me. Once I crossed the physical border the officer withdrew.

I did everything that day very deliberately so that there would be a record of the fact that it was all done within the constraints of the probation order and all applicable laws.

Prior Legal Proceedings

After I was returned to Canada based on a warrant for these charges, I tried to obtain the security video footage of myself at the Douglas port of entry on 2019-03-15, from CBSA. They ignored the requests. I expected my defense would rely substantially on the video footage. Then, literally, the day before the trial was scheduled to start (2019-08-17) Crown Counsel, Bernie Wolfe, told me and the court that CBSA had destroyed all of the video footage of me at the border. Leading up to that, I had repeatedly informed the court I was not ready for trial because I was still pursuing evidence. The court

didn't care and insisted the trial would proceed as scheduled.

The Crown presented it's case, which did not include any evidence or testimony from CBSA. At the close of the Crown's case I told the court I'm not ready to proceed - I'm still pursuing evidence, particularly in light of the recent news that CBSA destroyed the video of me at the border - which was going to be the most significant piece of evidence for my defense.

What followed was a number of adjournments, from August 2019 through February 2020, while I pursued evidence through freedom of information requests and direct, written correspondence with CBSA, the RCMP, IRCC, the BCPS, et cetera. CBSA consistently insisted, to me directly, and through the Crown, that there is absolutely no record of me presenting myself to, or interacting with, CBSA on 2019-03-15. And the Crown consistently argued that the absence of any such record can only mean that it simply didn't happen, that I must be lying about it.

Then, at a status conference on 2020-01-28, I stated in open court, in front of all of the lawyers and prosecutors, the judge, and on the DAR system, that if Wolfe actually believed what he's been arguing and claiming for the past five months then he would WANT CBSA to testify. And the fact that Wolfe has done absolutely nothing in that respect, not even one request

to CBSA for the names or identities of the officers who were working in secondary inspection when I say I presented myself, proves that he knows I'm telling the truth and that HE is the one who is lying and that he knows I'm innocent.

Then, miraculously, out of the blue, a few days later (2020-02-04) CBSA suddenly admitted to Wolfe that, in fact, I DID present myself to them on 2019-03-15 at the Douglas port of entry, and they provided Wolfe the name of the officer I interacted with (Marek Palisak), and her notes relating to that interaction. Of course, this is all according to Wolfe, who has an obvious interest in shifting any blame and responsibility from himself to CBSA.

So, the CBSA staff at the Douglas border crossing had been lying about the existence of official records which would have helped to prove my innocence, as had the Intelligence Analysts and the Superintendents at the Vancouver CBSA office, AND the staff at the CBSA ATIP department in Ottawa!

In addition to Palisak's notes, which CBSA finally disclosed to the Crown on 2020-07-04, on 2020-01-25 I received a copy of my complete, current GCMS record from IRCC. I did not disclose the GCMS record, or the fact that I had it, until I began my cross-examination of Palisak. It should be noted that Palisak's notes, as disclosed to Crown by CBSA, were actually

just a verbatim copy of the comments she had entered in my GCMS record.

Officer Polisak's Testimony

On 2020-03-04 CBSA Officer Meagan Polisak testified. She lied about a number of critical points (most of which will be easy to prove) but mostly she claimed she couldn't remember when asked about anything that would be in my favor.

Polisak testified that even at a port of entry the burden is on CBSA to prove that a person is NOT a Canadian citizen and that failing that CBSA must allow the person to enter Canada. I challenged her about this on cross, pointing out that that would mean any person could show up at the border, claim to be a Canadian citizen and as long as they didn't have a birth certificate or passport with them, CBSA would have to allow them to enter Canada. Polisak stated "Yes".

Polisak testified that when she checked my FOSS record in the computer, she ONLY had access to the "Remarks" field, which contained the comments of another CBSA officer. Polisak explicitly testified that she DID NOT have access to the "Country of Birth" field, which stated "United States of America". On cross, I proved Polisak had lied about only having access to the "Remarks" field because in her notes

she made reference to information in another field of the report. I said to Palisak "If you only had access to the Remarks field, then how did you know the remarks came from someone at the Edmonton CIC office?" Palisak responded "That's why I didn't mention that in my notes." I said "But you DID mention it in your notes! It's right here!"

When I asked Palisak about the information in the "Client Details" section of my GCMS report she testified that information was in the system before she encountered me on 2019-03-15. I asked her if she had access to all of the information in the GCMS record. She said "Yes". I asked her about the "Country of Birth" field, which stated "United States of America". She hesitated, then firmly stated "That wasn't there when I looked at it." I said "But do you see the field named 'Created Date', at the top of the page? It says 2019-01-18. That's two months before you checked the record." She responded "Yes".

Palisak also falsely testified regarding the contents of the "Remarks" field of the FOSS record. She testified that the officer who had entered the remarks had "confirmed" it was born in Sudbury, ON. However, on cross she admitted that the officer had not, in fact, stated that he "confirmed" anything - only that he "concluded" a person named Ricky Reiss was born in Sudbury, ON.

Fox's Testimony

On 2020-03-06 I testified. My testimony was essentially consistent with the information provided above, but particularly:

- that Poliak DID inform me that it was inadmissible and that based on that the only legal option I had from the port of entry was to proceed south, out of Canada;
- that I also showed Poliak a copy of my FOSS record on my phone, and that I explicitly pointed out the "Country of Birth" field which stated "United States of America", so even if Poliak DIDN'T see it when she looked at my information in the computer, she saw it in the paper version;
- that I presented myself at a port of entry rather than at a much closer CBSA office (e.g. in Vancouver) specifically because at a port of entry the burden of proof shifts from CBSA to me.

I explicitly challenged Wolfe to point out a simple lie I had told, ever, and he failed to do so.

Legal Arguments

Defense Position

A "port of entry" is a special, designated area within the context of

immigration law. Although a port of entry may exist within the physical borders of Canada, once a person enters the area designated as a port of entry they are, in the context of immigration law, considered to be outside of Canada, and presumed to be seeking entry to Canada - just as though they were outside the physical borders of Canada. For that reason, every person who is physically present at a port of entry is presumed to be an "immigrant" or a "foreign national". This applies to all people present at a port of entry, regardless of whether they entered the port of entry from within Canada or from the US.

And, within an area designated as a port of entry, the burden is on the person present to prove they are a Canadian citizen or otherwise entitled to "enter Canada" - or more specifically, that they are entitled to leave the area designated as a "port of entry" and enter the rest of Canada. This is in contrast to when a person is encountered "within Canada OTHER THAN at a port of entry", in which case the burden is on CBSA to prove the person is not a Canadian and is, therefore, inadmissible or removable. I argued that Palisak's testimony on this matter was patently incorrect.

The area designated as a port of entry, in the case of the Dauphas border crossing, includes not only the primary inspection booths, but also the building where the secondary inspection area is located, and the land immediately surrounding those. Such that while I was in the secondary inspection area, interacting with Palisak, I was within the area designated as a port of entry.

And, it makes no difference whether the person entered the area designated as a port of entry because they were instructed to by a border official or of their own volition - a person within the designated area is a person within the designated area, regardless of how they came to be there.

Palisak not explicitly ordering me to leave Canada is not relevant because it was sufficient that she, as a border officer acting in her official capacity, told me, while I was present at a port of entry, that it was inadmissible to Canada. Also, since a person at a port of entry is not considered, in the context of immigration laws, to already be within Canada then an order to leave Canada would be nonsensical - you cannot be ordered to leave a place you are not within.

The immigration laws (e.g. the IRPA) sometimes use the term "a person seeking entry to Canada" to refer to a person at a port of entry, because it is a reasonable inference that a person who has travelled to the port of entry and presented themselves to a CBSA officer has done so because they desire or intend to enter Canada upon leaving the port of entry. However, the term is not intended to limit who the laws pertaining to people at a port of entry apply to. The laws apply to all people PRESENT at the port of entry, regardless of whether the person intends, following his examination, to proceed north into Canada, or south into the US.

The "Country of Birth" field of the FOS and GCM records is

critical because the information comes from IRCC, which is the only government body empowered to make definitive determinations whether a person is, or is not a Canadian citizen, and because it is sufficient to create a strong presumption that the person is NOT a Canadian citizen - particularly when the person is encountered at a port of entry, and their FOSS and GCMS records state they were born in a foreign country and their citizenship is unknown.

Therefore, when I presented myself to Officer Polniak at the secondary inspection area, CBSA was legally required to presume I was a foreign national until I had proven otherwise, and since I told Polniak I had no status in Canada, I was a US citizen, born in the US, and both the FOSS and the GCMS records stated I was born in the US and did NOT state I am a Canadian citizen; AND I had told Polniak I had been convicted of criminal harassment in Canada, an indictable offense; Polniak had no evidence or reason to believe I was admissible, and significant reason to believe I was inadmissible. In order for me to leave the area designated and return to Canada the burden was on me to prove I was admissible - which I am not! And for CBSA to allow me to enter Canada, knowing I have no status and I've been convicted of criminal harassment would be an egregious violation of CBSA's duties and of the immigration laws.

I reasonably believed, knowing that I was inadmissible to

Canada and having been told by Palisak that I was inadmissible to Canada, the only legal option I had was to leave the port of entry without entering Canada, which would mean proceeding south, to the US.

I informed the court I would like the opportunity to provide legal authorities to support my positions on these matters. The court did not afford me that opportunity.

Crown's Position

Crown argued that the burden was on CBSA to prove I was not a Canadian citizen, because the secondary inspection area where I interacted with Palisak was within Canada, and because I had entered it from within Canada. And that I was not "a person seeking entry to Canada", because I was already within Canada and was actually seeking to leave Canada.

Crown argued that only the area where the primary inspection booths are located is considered the "port of entry" and that the secondary inspection area is not part of the port of entry.

For these reasons, the Crown argued, the burden was on CBSA to prove I was not a Canadian citizen and, having failed, according to Palisak's testimony, to prove that, CBSA

was required to allow me to return to Canada.

Crown also argued that because Palisak did not explicitly order me to "leave Canada" then I had a choice to return but I chose, instead, to leave - regardless of the fact that I was within an area designated as a port of entry.

Therefore, according to the Crown, I made a deliberate choice to leave Canada voluntarily - NOT because I was denied admission.

The Crown did not offer ANY legal authorities to support any of its positions on these matters.

Conclusions

The court adopted the Crown's positions. The court insisted that after my interaction with Palisak, I had a choice: I could have proceeded north into Canada; or I could have proceeded south into the US; and I chose to proceed south into the US, thereby violating the probation order.