

Robert Malcom Docherty (applicant) v. Minister of Public Safety and Emergency Preparedness
(respondent)
(T-1491-11; 2012 CF 723; 2012 FC 723)

Indexed As: Docherty v. Canada (Minister of Public Safety and Emergency Preparedness)

Federal Court
Phelan, J.
June 8, 2012.

Summary:

Docherty was subjected to a currency seizure when he failed to report CDN \$335 and US \$9,880 to Canadian Customs officials prior to his departure to Costa Rica. The Canadian conversion rate was contested. The Notice of Circumstances of Seizure showed that the US funds were worth \$9,901.74 CDN, putting Docherty over the \$10,000 threshold. The funds were ultimately seized as suspected proceeds of crime. Docherty filed a request for a ministerial review. The Minister's delegate determined that there had been a contravention of the reporting provisions of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and that the seized funds were forfeited. Docherty applied for judicial review.

The Federal Court dismissed the application. "This is a case of a traveller sailing too close to the legal winds."

Criminal Law - Topic 1987.1

Possession or laundering of proceeds of crime - Forfeiture - Review or appeal - In the Minister's decision under s. 27 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, the delegate held that given the applicable US funds conversion rate plus the CDN cash, the total currency in the applicant's possession exceeded CDN \$10,000 and was not reported - The Minister's delegate also concluded in the s. 29 decision that there were sufficient grounds to support the enforcement action, and confirmed the forfeiture - Under this judicial review, the applicant attempted to challenge both the decision as to the validity of the seizure and the decision of forfeiture - The Federal Court stated that "the Applicant is trying to challenge the finding that he did not violate the Act. He has attempted to sweep into this judicial review the core of the Section 27 Decision. Parliament intended that any such challenges be by way of an action under section 30 of the Act. It would be inconsistent with the scheme of the legislation for a person to be able to challenge the Section 27 Decision in an action and also to subsume the very same issues in a judicial review." - See paragraphs 30 and 31.

Customs - Topic 3089

Search and seizure - Seizure - Challenge or review of seizure - [See **Criminal Law - Topic 1987.1**].

Customs - Topic 6803

Exports - General - Currency (incl. requirement of reporting amounts over \$10,000) - The applicant (Mr. Docherty) applied for judicial review of a decision made by the Minister's

delegate not to return funds forfeited to the Crown under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act - The Federal Court held that, given the evidence before the Minister's delegate, the decision was reasonable - "The Minister, as a matter of policy, has concluded that the establishment of the legitimacy of the source of funds is an important factor in the exercise of discretion. That is a relevant consideration given the purposes of the legislation." - The evidence did not effectively link the funds to a legitimate source - The only troubling aspect of the Ministerial decision was the reference to "Mr. Lee" as the applicant - "In other situations, such an error might have called the decision into question; however, in this case, the facts referred to throughout could only apply to the Applicant. Therefore, there is no basis for granting judicial review on this error. There is no substantive evidence that there was confusion about who was exporting funds and not reporting them." - See paragraphs 32 to 37.

Customs - Topic 8208

Offences and penalties - Penalties - Forfeiture - [See **Customs - Topic 6803**].

Customs - Topic 9101

Appeals or review - To courts - From minister - Nature of - [See **Criminal Law - Topic 1987.1**].

Cases Noticed:

Kang v. Canada (Minister of Public Safety and Emergency Preparedness) (2011), 393 F.T.R. 90; 2011 FC 798, reld to. [para. 31].

Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness), [2009] 2 F.C.R. 576; 382 N.R. 2; 2008 FCA 255, reld to. [para. 32].

Statutes Noticed:

Cross-border Currency and Monetary Instruments Reporting Regulations - see Proceeds of Crime (Money Laundering) and Terrorist Financing Act Regulations.

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17, sect. 12(1) [para. 6]; sect. 18 [para. 23]; sect. 23, sect. 24 [para. 23]; sect. 25, sect. 27 [para. 24].

Proceeds of Crime (Money Laundering) and Terrorist Financing Act Regulations, Cross-border Currency and Monetary Instruments Reporting Regulations, SOR/2002-412, sect. 2 [para. 21].

Counsel:

Robert Malcom Docherty, on his own behalf;
Keith Reimer, for the respondent.

Solicitors of Record:

Myles J. Kirvan, Deputy Attorney General of Canada, Vancouver, British Columbia, for the respondent.

This application for judicial review was heard at Vancouver, British Columbia, on May 3, 2012, before Phelan, J., of the Federal Court, who delivered the following reasons for judgment

and judgment, dated June 8, 2012, at Ottawa, Ontario.

Application dismissed.

Editor: E. Joanne Oley

Customs - Topic 3089

Search and seizure - Seizure - Challenge or review of seizure - In the Minister's decision under s. 27 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, the delegate held that given the applicable US funds conversion rate plus the CDN cash, the total currency in the applicant's possession exceeded CDN \$10,000 and was not reported - The Minister's delegate also concluded in the s. 29 decision that there were sufficient grounds to support the enforcement action, and confirmed the forfeiture - Under this judicial review, the applicant attempted to challenge both the decision as to the validity of the seizure and the decision of forfeiture - The Federal Court stated that "the Applicant is trying to challenge the finding that he did not violate the Act. He has attempted to sweep into this judicial review the core of the Section 27 Decision. Parliament intended that any such challenges be by way of an action under section 30 of the Act. It would be inconsistent with the scheme of the legislation for a person to be able to challenge the Section 27 Decision in an action and also to subsume the very same issues in a judicial review." - See paragraphs 30 and 31.

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Offences and penalties - Penalties - Forfeiture - The applicant (Mr. Docherty) applied for judicial review of a decision made by the Minister's delegate not to return funds forfeited to the Crown under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act - The Federal Court held that, given the evidence before the Minister's delegate, the decision was reasonable - "The Minister, as a matter of policy, has concluded that the establishment of the legitimacy of the source of funds is an important factor in the exercise of discretion. That is a relevant consideration given the purposes of the legislation." - The evidence did not effectively link the funds to a legitimate source - The only troubling aspect of the Ministerial decision was the reference to "Mr. Lee" as the applicant - "In other situations, such an error might have called the decision into question; however, in this case, the facts referred to throughout could only apply to the Applicant. Therefore, there is no basis for granting judicial review on this error. There is no substantive evidence that there was confusion about who was exporting funds and not reporting them." - See paragraphs 32 to 37.

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Appeals or review - To courts - From minister - Nature of - In the Minister's decision under s. 27 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, the delegate held that given the applicable US funds conversion rate plus the CDN cash, the total currency in the applicant's possession exceeded CDN \$10,000 and was not reported - The Minister's delegate also concluded in the s. 29 decision that there were sufficient grounds to support the enforcement action, and confirmed the forfeiture -

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