

Mr. Robert Docherty (appellant) v. Minister of Public Safety and Emergency Preparedness
(respondent)
(A-323-12; 2013 FCA 89)

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

Federal Court of Appeal
Pelletier, Gauthier and Mainville, JJ.A.
March 27, 2013.

Summary:

Docherty failed to report CDN \$335 and US \$9,880 to an agent of the Canada Border Services Agency (CBSA). When CBSA applied what it considered to be the appropriate exchange rate, 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 requested a ministerial review. The Minister's delegate determined that there had been a contravention of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, and confirmed the forfeiture. Docherty applied for judicial review.

The Federal Court, in a decision reported at 413 F.T.R. 11, dismissed the application. Docherty appealed.

The Federal Court of Appeal dismissed the appeal. Docherty's explanations were unverifiable and, as such, amounted to no explanation at all. The Federal Court was entitled to find that the Minister's delegate's decision was reasonable.

Courts - Topic 686

Judges - Disqualification - Bias - By trial or applications judge - [See first **Customs - Topic 6803**].

Courts - Topic 4071.1

Federal Court of Canada - Jurisdiction - Federal Court - Practice - Judicial review applications - General - [See **Customs - Topic 9102**].

Criminal Law - Topic 1987.1

Possession or laundering of proceeds of crime - Forfeiture - Review or appeal - [See second **Customs - Topic 6803**].

Customs - Topic 6803

Exports - General - Currency (incl. requirement of reporting amounts over \$10,000) - The Minister's delegate determined that there had been a contravention of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, and confirmed the forfeiture - The judicial review application was dismissed - A ground of appeal was that the reviewing judge was biased, based on the judge's reference to the applicant's greed - The Federal Court of Appeal stated that "the moral quality of [the applicant's] motivation for getting as close as possible to the limit for the exportation of currency from Canada was

irrelevant to the issues before the Court. In commenting as he did, the Federal Court judge attracted the allegation of bias, unnecessarily putting into question the impartiality to which all litigants are entitled from the Court. That said, it requires more than an unfortunate turn of phrase to support an allegation of bias. This ground of appeal fails." - See paragraph 12.

Customs - Topic 6803

Exports - General - Currency (incl. requirement of reporting amounts over \$10,000) - Docherty failed to report CDN \$335 and US \$9,880 to an agent of the Canada Border Services Agency (CBSA) - When CBSA applied what it considered to be the appropriate exchange rate, Docherty was over the \$10,000 threshold - Docherty asserted that the U.S. currency came from an inheritance from an American relative in 1993, which he and his daughter used in their wild mushroom business, conducted in cash and in U.S. funds - He relied on a statutory declaration by his daughter - The Minister's delegate was not satisfied that the funds came from a legitimate source - The reviewing judge found that the forfeiture decision was reasonable - The Federal Court of Appeal dismissed the appeal - Docherty's explanations were unverifiable and, as such, amounted to no explanation at all - "A person who is asked to establish the legitimacy of funds whose presence in his hands is undocumented does not advance his cause by presenting evidence of undocumented funds in the hands of another. Undocumented, in this context, means funds which cannot be accounted for by financial or other records which one would expect an individual, especially one operating a business, to maintain for accounting and income tax purposes." - See paragraphs 16 to 19.

Customs - Topic 8208

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

Customs - Topic 9002

Appeals or review - General - Jurisdiction - [See **Customs - Topic 9102**].

Customs - Topic 9102

Appeals or review - To courts - From Minister - Jurisdiction - A Minister's delegate found that the reporting requirement in s. 12 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act had indeed been breached (the s. 27 decision) and confirmed the forfeiture (the s. 29 decision) - The reviewing judge held that the court did not have jurisdiction to review the s. 27 decision because the applicant had not commenced an action as required by s. 30 of the Act - The Federal Court of Appeal agreed - "Parliament specifically provided that attacks on the correctness of the decision as to whether section 12 was breached are to be commenced by action. While the Court has a discretion to ensure that no proceeding is rejected because it was commenced by the wrong originating document ... that discretion is subject to the opening words of Rule 63 which direct the Court to respect Parliament's choice as to the form of originating document in a particular case." - See paragraphs 13 and 14.

Cases Noticed:

Tourki v. Canada (Minister of Public Safety and Emergency Preparedness), [2008] 1 F.C.R. 331; 367 N.R. 148; 2007 FCA 186, reld to. [para. 5].
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. 10].

Statutes Noticed:

Cross-border Currency and Monetary Instruments Reporting Regulations - see Proceeds of Crime (Money Laundering) and Terrorist Financing Act Regulations (Can.).
Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17, sect. 12 [para. 3]; sect. 23 [para. 2]; sect. 30 [para. 3].
Proceeds of Crime (Money Laundering) and Terrorist Financing Act Regulations (Can.), Cross-border Currency and Monetary Instruments Reporting Regulations, SOR/2002-412, sect. 2(2)(b) [para. 13].

Counsel:

Robert Docherty, on his own behalf;
Jennifer Dagsvik and Keith Reimer, for the respondent.

Solicitors of Record:

William F. Pentney, Deputy Attorney General of Canada, Ottawa, Ontario, for the respondent.

This appeal was heard at Vancouver, British Columbia, on March 19, 2013, before Pelletier, Gauthier and Mainville, J.J.A., of the Federal Court of Appeal. In reasons written by Pelletier, J.A., the Court delivered the following judgment at Ottawa, Ontario, on March 27, 2013.

Appeal dismissed.

Editor: E. Joanne Oley

Courts - Topic 686

Judges - Disqualification - Bias - By trial or applications judge - The Minister's delegate determined that there had been a contravention of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, and confirmed the forfeiture - The judicial review application was dismissed - A ground of appeal was that the reviewing judge was biased, based on the judge's reference to the applicant's greed - The Federal Court of Appeal stated that "the moral quality of [the applicant's] motivation for getting as close as possible to the limit for the exportation of currency from Canada was irrelevant to the issues before the Court. In commenting as he did, the Federal Court judge attracted the allegation of bias, unnecessarily putting into question the impartiality to which all litigants are entitled from the Court. That said, it requires more than an unfortunate turn of phrase to support an allegation of bias. This ground of appeal fails." - See paragraph 12.

Courts - Topic 4071.1

Federal Court of Canada - Jurisdiction - Federal Court - Practice - Judicial review applications - General - A Minister's delegate found that the reporting requirement in s. 12 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act had indeed been breached (the s. 27 decision) and confirmed the forfeiture (the s. 29 decision) - The reviewing judge held that the court did not have jurisdiction to review the s. 27 decision because the applicant had not commenced an action as required by s. 30 of the Act - The Federal Court of Appeal agreed - "Parliament specifically provided that attacks on the correctness of the decision as to whether section 12 was breached are to be commenced by action. While the Court has a discretion to ensure that no proceeding is rejected because it was commenced by the wrong originating document ... that discretion is subject to the opening words of Rule 63 which direct the Court to respect Parliament's choice as to the form of originating document in a particular case." - See paragraphs 13 and 14.

Criminal Law - Topic 1987.1

Possession or laundering of proceeds of crime - Forfeiture - Review or appeal - Docherty failed to report CDN \$335 and US \$9,880 to an agent of the Canada Border Services Agency (CBSA) - When CBSA applied what it considered to be the appropriate exchange rate, Docherty was over the \$10,000 threshold - Docherty asserted that the U.S. currency came from an inheritance from an American relative in 1993, which he and his daughter used in their wild mushroom business, conducted in cash and in U.S. funds - He relied on a statutory declaration by his daughter - The Minister's delegate was not satisfied that the funds came from a legitimate source - The reviewing judge found that the forfeiture decision was reasonable - The Federal Court of Appeal dismissed the appeal - Docherty's explanations were unverifiable and, as such, amounted to no explanation at all - "A person who is asked to establish the legitimacy of funds whose presence in his hands is undocumented does not advance his cause by presenting evidence of undocumented funds in the hands of another. Undocumented, in this context, means funds which cannot be accounted for by financial or other records which one would expect an individual, especially one operating a business, to maintain for accounting and income tax purposes." - See paragraphs 16 to 19.

Customs - Topic 8208

Offences and penalties - Penalties - Forfeiture - Docherty failed to report CDN \$335 and US \$9,880 to an agent of the Canada Border Services Agency (CBSA) - When CBSA applied what it considered to be the appropriate exchange rate, Docherty was over the \$10,000 threshold - Docherty asserted that the U.S. currency came from an inheritance from an American relative in 1993, which he and his daughter used in their wild mushroom business, conducted in cash and in U.S. funds - He relied on a statutory declaration by his daughter - The Minister's delegate was not satisfied that the funds came from a legitimate source - The reviewing judge found that the forfeiture decision was reasonable - The Federal Court of Appeal dismissed the appeal - Docherty's explanations were unverifiable and, as such, amounted to no explanation at all - "A person who is asked to establish the legitimacy of funds whose presence in his hands is undocumented

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Customs - Topic 9002

Appeals or review - General - Jurisdiction - A Minister's delegate found that the reporting requirement in s. 12 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act had indeed been breached (the s. 27 decision) and confirmed the forfeiture (the s. 29 decision) - The reviewing judge held that the court did not have jurisdiction to review the s. 27 decision because the applicant had not commenced an action as required by s. 30 of the Act - The Federal Court of Appeal agreed - "Parliament specifically provided that attacks on the correctness of the decision as to whether section 12 was breached are to be commenced by action. While the Court has a discretion to ensure that no proceeding is rejected because it was commenced by the wrong originating document ... that discretion is subject to the opening words of Rule 63 which direct the Court to respect Parliament's choice as to the form of originating document in a particular case." - See paragraphs 13 and 14.