

Federal Court



Cour fédérale

**Date: 20120608**

**Docket: T-1491-11**

**Citation: 2012 FC 723**

**Ottawa, Ontario, June 8, 2012**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**ROBERT MALCOM DOCHERTY**

**Applicant**

**and**

**MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. INTRODUCTION**

[1] This is a case of a traveller sailing too close to the legal winds. But for greed, this Applicant would not be in Court. The Applicant, a self-represented litigant who ably made his case, applied for judicial review of a decision made on behalf of the Minister denying his request for the exercise of Ministerial discretion to return funds forfeited to the Crown under the provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 [Act].

[2] The Applicant's attack on the Minister's refusal to return funds was wide-ranging and colourful but ultimately unsuccessful. He alleged various misdeeds including misconduct, bias and perjury – none of which had any merit.

[3] In reality, and as was made clear at the hearing, the Applicant's complaint is directed at the seizure and forfeiture itself and only touches on the Minister's discretion because of the allegedly unlawful seizure.

[4] The Applicant attempted to file post-hearing submissions to which the Respondent objected. These post-hearing submissions cannot properly be accepted. Even if they were accepted, they would not alter the result since the same general points were raised at the hearing itself.

## II. BACKGROUND

[5] On November 8, 2010, the Applicant was subjected to a currency seizure when he failed to report CDN \$335.00 and US \$9,880.00 (the Canadian conversion is now hotly contested) to Canadian Customs officials prior to his departure from Pearson International Airport in Toronto en route to Costa Rica.

[6] The Applicant did not report to the Canada Border Services Agency [CBSA] that he was exporting from Canada currency of value equal to or greater than CDN \$10,000.00 as required under section 12(1) of the Act.

<b>12.</b> (1) Every person or entity referred to in subsection (3) shall report to an officer, in accordance with the regulations,	<b>12.</b> (1) Les personnes ou entités visées au paragraphe (3) sont tenues de déclarer à l'agent, conformément aux règlements,
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the importation or exportation of currency or monetary instruments of a value equal to or greater than the prescribed amount.	l'importation ou l'exportation des espèces ou effets d'une valeur égale ou supérieure au montant réglementaire.
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[7] A currency detector dog uncovered the unreported cash and the funds were ultimately seized at “level 4” – suspected proceeds of crime.

[8] In the interview with CBSA officials, the Applicant acknowledged that he was aware of the currency reporting legislation but took the position that the currency he was carrying was just below the \$10,000.00 currency reporting threshold as he was purposely trying to stay under that threshold.

[9] During the verification process, CBSA used the conversion rate of the Bank of Canada issued on the day of seizure. In argument the Applicant contended that the Bank of Canada rate was only issued at noon (Toronto time) on that Monday but the Applicant’s failure to report funds seized occurred at approximately 0930 on that same day. The Applicant’s argument was that the proper rate, in the absence of a published rate at the time of seizure, is the person’s own rate which, he says, was the Saturday rate he received from RBC. Whatever the merits of that position, the Applicant took no steps to challenge the seizure and forfeiture.

[10] In addition to stating that he had purposely stayed under the \$10,000.00 threshold, the Applicant admitted that the funds came from his daughter’s cash mushroom business which had a \$40,000.00 float emanating from an inheritance received many years previously. The Applicant further admitted that the money was to be used to buy property in Costa Rica; that he had had some trouble with police for “growing” and that he had two pre-paid credit cards with him.

[11] The CBSA's reasons for seizing the funds as suspected proceeds of crime were set out in the Notice of Circumstances of Seizure served on the Applicant and dated February 21, 2011:

- Currency was not reported as required by the Act;
- The Applicant was crossing an international border with a large amount of unreported currency;
- The Applicant made a false report by replying "no" when asked about travelling with currency equal to or greater than the prescribed threshold;
- More currency was found on his person after he denied having more;
- The Applicant admitted to being aware of the currency legislation and travelling internationally with an amount of currency below the prescribed threshold;
- The Applicant did not appear bothered by the fact that the said currency was being seized as suspected proceeds of crime;
- The Applicant's answers showed a lack of knowledge;
- The Applicant gave many conflicting stories on what the money would be used for;
- There were signs posted throughout the airport in regards to the currency legislation;
- Bulk cash smuggling was a common form of money laundering;
- Money launderers were aware that borders made it difficult to trace the source of funds;
- \$10,000 was a very high threshold, most people did not have (let alone carry) this amount of cash;
- Travelling with multiple pre-paid credit cards is a known method of money laundering;
- Funds can be remitted electronically to virtually any country;
- It was not necessary to have bank accounts to send money electronically;
- Using the services of financial institutions was faster, cheaper and more secure;
- Smuggling cash across international borders is a strong indicator that the funds are proceeds of crime;
- The Applicant's business operated on a cash basis;
- The Applicant refused to answer how much income he had reported on his tax return for the previous year;
- The Applicant claimed that he and his friend were taking the money to invest in property;
- Legitimate businesses/persons maintain records of their funds and expenses;

- As a legitimate business owner, the Applicant should have been able to provide records to prove the legitimacy of the currency seized;
- Since filing for bankruptcy in 1989, all the Applicant's property was in his daughter's name;
- Having property in another person's name is a way to launder money;
- Legal business owners would have credit cards in their name to establish credit/audit history;
- The Applicant only had pre-paid credit cards which did not make for good business practice.

[12] The Notice of Circumstances of Seizure, issued pursuant to section 26(1) of the Act, also addressed the matter of currency conversion showing that as of November 8, 2010, the US \$9,880.00 carried by the Applicant was worth CDN \$9,901.74 which, when added to the \$335.00 the Applicant had "topped up" (as he described it) after he had done his own conversion at a different exchange rate, put him over the \$10,000.00 threshold.

[13] The Applicant did file a request for a Ministerial review in accordance with section 25 of the Act. The grounds for review were:

- There was no attempt to conceal the currency or to deceive CBSA officers;
- The CBSA purposely manipulated the exchange rate to facilitate the seizure illegally;
- The officers showed bias and prejudice in this seizure when they learned upon questioning that the Applicant had a criminal offence from 1993;
- The funds seized were for business opportunities abroad and every step was taken to ensure that the \$10,000 threshold was not exceeded;
- The source of funds and their use by the Applicant's family was confirmed by evidence and testimony provided in a recent tax court case.

[14] Thereafter, there was a series of correspondence between the Applicant and CBSA. The general thrust of the Applicant's challenge was the exchange rate. The Applicant also described the source of the US funds as his daughter's mushroom business, which is a cash business, and provided a notarized letter from his daughter which explained that the funds had originally come from an inheritance from her grandfather.

[15] On July 29, 2011, the Minister's delegate determined that pursuant to section 27, there had been a contravention of the reporting regulations with respect to the funds seized and that pursuant to section 29, the seized funds were forfeited.

[16] The Minister's delegate explained, accurately, the avenues of redress distinguishing between the process to challenge the section 27 decision as to breach of the Act and Regulations by way of an action in the Federal Court and the process to challenge the section 29 decision of forfeiture by way of judicial review in the Federal Court.

[17] The Applicant filed this application for judicial review. The Applicant did not file, nor seek an extension of time to file, an action in this Court.

[18] Under this judicial review the Applicant has attempted to challenge both the decision as to the validity of the seizure, since it is contended that there was no violation of the reporting requirements, and the exercise of the Minister's discretion to maintain the currency as forfeit.

[19] In the July 29, 2011 letter the Minister concluded that in respect of section 27, the Applicant had not reported the currency export when asked; that the amount unreported exceeded \$10,000.00; there was a contravention of section 12(1); and the amount was lawfully subject to seizure.

[20] In that letter and in respect of section 29, the Minister, for the reasons stated in paragraph 11, concluded that CBSA had sufficient grounds to support the enforcement action taken:

- (a) The Applicant's claim of non-concealment was undermined by the Applicant's denial when asked about having currency over \$10,000.
- (b) The conversion rate was supported by the Bank of Canada's Daily Memorandum of Exchange Rates and, in any event even if one used the RBC's rate as claimed by the Applicant, the rate for US \$1,000.01-\$10,000.00 was 0.9801 which on US \$9,880.00 gave CDN \$9,683.39 to which one adds the \$335.00 for a total of \$10,018.39. There was no basis for the claim of currency manipulation.
- (c) The Applicant had not satisfied the Minister's requirement to establish the legitimate origins of the funds. There was insufficient evidence of the source of the funds, particularly records showing the accumulation of the amount. The Applicant's explanation that the funds were kept in a secure but undisclosed location generated suspicions as to the source.

### III. LEGISLATIVE SCHEME

[21] The basic reporting obligation is set out in section 12(1) of the Act, augmented by the Regulations which set the \$10,000 threshold and the method of calculating the conversion rate – either the Bank of Canada rate or absent that rate, the conversion rate used by the exporters.

<p><b>12.</b> (1) Every person or entity referred to in subsection (3) shall report to an officer, in accordance with the regulations, the importation or exportation of currency or monetary instruments of a value equal to or greater than the prescribed amount.</p>	<p><b>12.</b> (1) Les personnes ou entités visées au paragraphe (3) sont tenues de déclarer à l'agent, conformément aux règlements, l'importation ou l'exportation des espèces ou effets d'une valeur égale ou supérieure au montant réglementaire.</p>
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*Proceeds of Crime (Money Laundering) and Terrorist Financing Act*  
SC 2000, c 17

<p><b>2.</b> (1) For the purposes of reporting the importation or exportation of currency or monetary instruments of a certain value under subsection 12(1) of the Act, the prescribed amount is \$10,000.</p>	<p><b>2.</b> (1) Pour l'application du paragraphe 12(1) de la Loi, les espèces ou effets dont l'importation ou l'exportation doit être déclarée doivent avoir une valeur égale ou supérieure à 10 000 \$.</p>
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<p>(2) The prescribed amount is in Canadian dollars or its equivalent in a foreign currency, based on</p>	<p>(2) La valeur de 10 000 \$ est exprimée en dollars canadiens ou en son équivalent en devises selon :</p>
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<p>(a) the official conversion rate of the Bank of Canada as published in the Bank of Canada's <i>Daily Memorandum of Exchange Rates</i> that is in effect at the time of importation or exportation; or</p>	<p>a) le taux de conversion officiel de la Banque du Canada publié dans son <i>Bulletin quotidien des taux de change</i> en vigueur à la date de l'importation ou de l'exportation;</p>
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<p>(b) if no official conversion rate is set out in that</p>	<p>b) dans le cas où la devise ne figure pas dans ce bulletin, le</p>
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publication for that currency, the conversion rate that the person or entity would use for that currency in the normal course of business at the time of the importation or exportation.

taux de conversion que le déclarant utiliserait dans le cours normal de ses activités à cette date.

*Cross-border Currency and Monetary Instruments Reporting Regulations, SOR/2002-412*

[22] Section 18 allows for the seizure of currency if the officer believes that there has been a contravention of the section 12(1) reporting requirement. It also requires the return of the funds on payment of a penalty except where there are “reasonable grounds to suspect” that the seized funds are proceeds of crime.

**18.** (1) If an officer believes on reasonable grounds that subsection 12(1) has been contravened, the officer may seize as forfeit the currency or monetary instruments.

(2) The officer shall, on payment of a penalty in the prescribed amount, return the seized currency or monetary instruments to the individual from whom they were seized or to the lawful owner unless the officer has reasonable grounds to suspect that the currency or monetary instruments are proceeds of crime within the meaning of subsection 462.3(1) of the *Criminal Code* or funds for use in the financing of terrorist activities.

**18.** (1) S’il a des motifs raisonnables de croire qu’il y a eu contravention au paragraphe 12(1), l’agent peut saisir à titre de confiscation les espèces ou effets.

(2) Sur réception du paiement de la pénalité réglementaire, l’agent restitue au saisi ou au propriétaire légitime les espèces ou effets saisis sauf s’il soupçonne, pour des motifs raisonnables, qu’il s’agit de produits de la criminalité au sens du paragraphe 462.3(1) du *Code criminel* ou de fonds destinés au financement des activités terroristes.

[23] The basic terms of forfeiture are governed by section 23 and section 24 which include a form of privative clause in respect to the challenge to forfeiture.

**23.** Subject to subsection 18(2) and sections 25 to 31, currency or monetary instruments seized as forfeit under subsection 18(1) are forfeited to Her Majesty in right of Canada from the time of the contravention of subsection 12(1) in respect of which they were seized, and no act or proceeding after the forfeiture is necessary to effect the forfeiture.

**24.** The forfeiture of currency or monetary instruments seized under this Part is final and is not subject to review or to be set aside or otherwise dealt with except to the extent and in the manner provided by sections 24.1 and 25.

**23.** Sous réserve du paragraphe 18(2) et des articles 25 à 31, les espèces ou effets saisis en application du paragraphe 18(1) sont confisqués au profit de Sa Majesté du chef du Canada à compter de la contravention au paragraphe 12(1) qui a motivé la saisie. La confiscation produit dès lors son plein effet et n'est assujettie à aucune autre formalité.

**24.** La saisie-confiscation d'espèces ou d'effets effectuée en vertu de la présente partie est définitive et n'est susceptible de révision, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues aux articles 24.1 et 25.

[24] Where a person wishes to challenge the seizure of funds on the basis that section 12(1) was not contravened, a critical aspect of this Applicant's claim, that person must give notice under section 25. The Minister then must decide within 90 days whether section 12(1) was contravened.

This determination is frequently called a "Section 27 Decision".

**25.** A person from whom currency or monetary instruments were seized under section 18, or the lawful owner of the currency or monetary instruments, may within 90 days after the date of the seizure request a decision of the Minister as to whether subsection 12(1) was

**25.** La personne entre les mains de qui ont été saisis des espèces ou effets en vertu de l'article 18 ou leur propriétaire légitime peut, dans les quatre-vingt-dix jours suivant la saisie, demander au ministre de décider s'il y a eu contravention au paragraphe 12(1) en donnant un avis écrit à l'agent qui les a

contravened, by giving notice in writing to the officer who seized the currency or monetary instruments or to an officer at the customs office closest to the place where the seizure took place.

saisis ou à un agent du bureau de douane le plus proche du lieu de la saisie.

**27.** (1) Within 90 days after the expiry of the period referred to in subsection 26(2), the Minister shall decide whether subsection 12(1) was contravened.

**27.** (1) Dans les quatre-vingt-dix jours qui suivent l'expiration du délai mentionné au paragraphe 26(2), le ministre décide s'il y a eu contravention au paragraphe 12(1).

(2) If charges are laid with respect to a money laundering offence or a terrorist activity financing offence in respect of the currency or monetary instruments seized, the Minister may defer making a decision but shall make it in any case no later than 30 days after the conclusion of all court proceedings in respect of those charges.

(2) Dans le cas où des poursuites pour infraction de recyclage des produits de la criminalité ou pour infraction de financement des activités terroristes ont été intentées relativement aux espèces ou effets saisis, le ministre peut reporter la décision, mais celle-ci doit être prise dans les trente jours suivant l'issue des poursuites.

(3) The Minister shall, without delay after making a decision, serve on the person who requested it a written notice of the decision together with the reasons for it.

(3) Le ministre signifie sans délai par écrit à la personne qui a fait la demande un avis de la décision, motifs à l'appui.

[25] Section 30 permits that person to appeal the Section 27 Decision within 90 days by way of an action in the Federal Court.

[26] If the Minister decides that there has been no contravention of the reporting obligation, the currency is returned. If the Minister determines that there has been a contravention, the Minister

must make a second decision, pursuant to section 29, to exercise her discretion as to penalty and/or confirmation of forfeiture.

[27] In the Minister's July 29, 2011 decision, the delegate held that given the applicable US funds conversion rate plus the CDN \$335 cash, the total currency in the Applicant's possession exceeded CDN \$10,000 and was not reported (the Section 27 Decision). The Minister's delegate also concluded in the Section 29 Decision that based on the grounds described in paragraph 11, there were sufficient grounds to support the enforcement action. The forfeiture was confirmed.

[28] The Section 29 Decision included the following findings:

- The Applicant did not report the funds when directly asked.
- Even using the RBC rate on the day the Applicant received a quote, 0.9801, the total being exported was \$10,018.39.
- There was insufficient evidence of the legitimate origins of the funds; there was no direct link between the \$40,000 inheritance in 1993 and the funds to be exported. The suspicion about the source of funds remained.
- There was insufficient documentation about the daughter's source of funds.
- The fact that the funds were supposedly kept in an undisclosed "secure location" generated further suspicion as to the source of funds.

#### IV. ANALYSIS

[29] The real issues raised by this judicial review are:

- (a) Is the Section 27 Decision subject to judicial review?

- (b) Did the Minister's delegate err in the decision not to provide relief from forfeiture?
- (c) Did the Minister's delegate exhibit bias?

[30] With respect to the first issue, 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.

[31] 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. That is the basis for Justice Mosley's decision in *Kang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 798, [2011] 393 FTR 90 (paras 25-30), which reasoning I adopt.

[32] With respect to the second issue, the first question is that of the standard of review. In *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255, [2009] 2 FCR 576, the Court of Appeal confirmed that the standard of review is reasonableness.

[33] In my view, it was reasonably open to the Minister to decline to exercise discretion in favour of the Applicant. 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.

[34] The evidence, even from the Applicant's daughter, did not effectively link the funds to a legitimate source. The Tax Court decision, relied on by the Applicant, concluded that the inheritance was used by his daughter to buy property. Those same funds, which were spent, are notes said to have been hidden away in cash, and are used to establish the legitimacy of the source of funds. This is a proposition which reasonably raised more questions than it answered.

[35] The only troubling aspect of the Ministerial decision is 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.

[36] Given the evidence before the Minister's delegate, the decision was reasonable.

[37] The last issue, actual bias, has no substance. Bias is a serious allegation which must be supported by facts, not by hyperbole, conjecture or speculation.

[38] The alleged bias on the part of the Minister's delegate is the failure to investigate the allegations of bias, prejudice and perjury leveled against various CBSA officers. The fact that the officers did not accept the Applicant's position does not in and of itself constitute the improper conduct alleged.

[39] The allegation does not even rise to the level of reasonable apprehension of bias, much less actual bias. The record shows a fair and comprehensive process in which the Applicant was accorded every right and courtesy to which he was entitled.

[40] Therefore, the Applicant has not made out grounds for judicial review in any of the issues in this matter.

V. CONCLUSION

[41] This application for judicial review is dismissed with costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed with costs.

**“Michael L. Phelan”**

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1491-11

**STYLE OF CAUSE:** ROBERT MALCOM DOCHERTY

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** May 3, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Phelan J.

**DATED:** June 8, 2012

**APPEARANCES:**

Mr. Robert Malcom Docherty	FOR THE APPLICANT (ON HIS OWN BEHALF)
Mr. Keith Reimer	FOR THE RESPONDENT

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