Federal Court of Appeal  Cour d'appel fédérale

**Date: 20130327**

**Docket: A-323-12**

**Citation: 2013 FCA 89**

**CORAM:** **PELLETIER J.A.**
**GAUTHIER J.A.**
**MAINVILLE J.A.**

**BETWEEN:**

**MR. ROBERT DOCHERTY**

**Appellant**

**and**

**MINISTER OF PUBLIC SAFETY AND**

**EMERGENCY PREPAREDNESS**

**Respondent**

Heard at Vancouver, British Colombia, on March 19, 2013.

Judgment delivered at Ottawa, Ontario, on March 27, 2013.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GAUTHIER J.A.
MAINVILLE J.A.

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## REASONS FOR JUDGMENT

**PELLETIER J.A.**

[1] This is an appeal from the decision of Mr. Justice Phelan of the Federal Court, reported as *Docherty v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 723, [2012] F.C.J. No. 701.

[2] This matter arises under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (the Act). On November 8, 2010, Mr. Docherty, who was about

to board an international flight at Pearson International Airport, was asked by an agent of the Canada Border Services Agency (CBSA) whether he had $10,000 or more in cash on his person. Mr. Docherty declared that he had cash but that it was less than $10,000. The currency was produced and it consisted of $9,880 in U.S. funds and $335 in Canadian funds. When CBSA applied what it considered to be the appropriate exchange rate, the total amount exceeded $10,000 by a small amount. The CBSA seized the funds and, as permitted by subsection 18(2) of the Act, concluded there were reasonable grounds to believe that the funds were proceeds of crime. The funds were, as of the moment of seizure, forfeit to the Crown, as provided by section 23 of the Act.

[3] Persons who wish to contest whether they failed to declare, as required by section 12 of the Act, that they had in their possession $10,000 or more in cash can ask for a determination by the Minister pursuant to section 25 of the Act. If the Minister decides that they failed to make the necessary declaration, they may challenge that decision by commencing an action in the Federal Court, as provided in section 30 of the Act.

[4] If the Minister decides there was non-compliance with section 12, he may, pursuant to section 29 of the Act, do one of three things:

a) return the funds to the owner, with or without payment of the prescribed fine;

b) order the return of the fine paid pursuant to subsection 18(2) of the Act;

c) confirm that the funds are forfeit to the Crown, subject to certain exceptions which are not relevant here.

[5] The Minister's decision under section 29 is judicially reviewable pursuant to sections 18 and 18.1 of the Federal Courts Act, R.S.C. 1985 c. F-7: see *Tourki v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FCA 186, [2008] 1 F.C.R. 331, at paragraph 18.

[6] In this case, Mr. Docherty exercised his right to seek a ministerial determination under section 25 as to whether s. 12 had indeed been breached. The Minister (acting through his delegate) found that it had (the Section 27 Decision) and confirmed the forfeiture of the funds to the Crown (the Section 29 Decision).

[7] In his letter dated July 29, 2011, the Minister's Delegate set out the reasons leading to the seizure of the funds as well as those confirming their forfeiture. In response to Mr. Docherty's assertion that the source of the funds was an inheritance received from an American relative in 1993, the Minister's Delegate noted that Mr. Docherty was not able to trace the link between the funds in his possession and the inheritance. In response to Mr. Docherty's assertion that the funds had been provided to him by his daughter, the Minister's Delegate commented that Mr. Docherty had failed to provide any documentation establishing how it was that his daughter had access to that amount of money. In particular, the Minister's Delegate gave little weight to a statutory declaration provided by Mr. Docherty's daughter to the effect that "in November 2010, I provided U.S. funds to my father Robert Docherty to seek property opportunities in Costa Rica." In the Minister's Delegate's view, this declaration was entitled to little weight as it was made after the fact and for the purposes of opposing the forfeiture. Finally, the Minister's

Delegate took into account the fact that the funds were not taken from a bank account but rather from an undisclosed secure location.

[8] Mr. Docherty did not challenge the Section 27 Decision by bringing an action in the Federal Court. Instead, he made an application for judicial review in which he challenged both the Section 27 and the Section 29 decisions.

[9] The Federal Court rejected Mr. Docherty's application for judicial review. It held that it did not have jurisdiction to review the determination that section 12 of the Act had been breached (the Section 27 Decision) because Mr. Docherty had not commenced an action as required by section 30 of the Act. Nevertheless, the Judge reviewed Mr. Docherty's representations on that issue and found that they were not persuasive.

[10] The Federal Court held that the standard of review of the Minister's Delegate's decision to decline relief from forfeiture was reasonableness, following the decision of this Court in *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255, [2009] 2 F.C.R. 576, at paragraph 25. The Court found that the evidence provided to the Minister's Delegate by Mr. Docherty was not sufficient to establish that the funds came from a legitimate source. In particular, the Federal Court was not persuaded by a Tax Court of Canada decision resulting from his daughter’s appeal from a net worth assessment of her income. The Court considered that the decision suggested the inheritance had been spent buying real property. The Federal Court also rejected Mr. Docherty's allegation that the Minister's Delegate was biased because the latter did not investigate allegations of bias and perjury made against various CBSA

officers. While there appears to be some confusion in the record as to the exchange rate used by the CBSA, that confusion does not support allegations of bias and perjury. Nothing more need be said on this issue.

[11] In the result, the Federal Court dismissed Mr. Docherty's application for judicial review.

[12] Mr. Docherty now appeals to this Court. His first ground of appeal is that the Federal Court judge was biased, a conclusion which Mr. Docherty says is supported by the Federal Court judge's reference to his greed. In Mr. Docherty's view, this characterization was unnecessary and demonstrated that the judge was not impartial. In this case, the moral quality of Mr. Docherty'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.

[13] Before us, Mr. Docherty reviewed at length the evidence surrounding the appropriate exchange rate in an attempt to persuade us that he was entitled to rely on the exchange rate which he chose "in the normal course of business at the time of ... exportation", to use the words of the *Cross Border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412, at paragraph 2(2)(b). If Mr. Docherty's rate is used, he was carrying less that $10,000 cash and was not subject to the reporting requirement in section 12. I agree with the Federal Court that

the legality of the Section 27 Decision was not properly before it in the application for judicial review: see *Tourki*, cited above, at paragraph 17-18.

[14] While this may strike Mr. Docherty as an instance of procedural rigidity, the fact is that 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 (see Rule 57 of the *Federal Courts Rules*, SOR/98-106), 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. This ground of appeal fails as well.

[15] As a result, the only decision which was properly before the Federal Court was the Section 29 Decision, that is, the Minister's Delegate's decision to decline to grant Mr. Docherty relief from forfeiture pursuant to section 29. On that question, the standard of review is reasonableness: see *Sellathurai*, cited above, at para. 25.

[16] In the corrrespondence between the Recourse Directorate of the CBSA and Mr. Docherty, the constant preoccupation of the CBSA was confirmation that the funds seized from Mr. Docherty came from a legitimate source. Mr. Docherty was asked for certain information and was given the opportunity to provide whatever other information he thought relevant. In the end, the Minister's Delegate was not satisfied that the funds came from a legitimate source and therefore the possibility that they were proceeds of crime could not be excluded. On the basis of the evidence before him, this was a reasonable decision and should not be disturbed.

[17] The sum and substance of Mr. Docherty's submissions was that the U.S. currency seized from him came from an inheritance from an American relative in 1993, which he and his daughter used in their wild mushroom business, a business which was conducted in cash and in U.S. funds. Mr. Docherty did not produce any business or banking records to support his position. He relied on a statutory declaration by his daughter affirming that she gave him an undetermined amount of U.S. currency sometime immediately preceding the seizure of the funds, and on a redacted version of a Tax Court of Canada decision in which his daughter challenged a net worth assessment of her income. In my view, the Federal Court was right in finding that the Minister did not act unreasonably in failing to give this evidence the effect Mr. Docherty claimed for it.

[18] 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. It may be that there is an innocent explanation for the presence of these funds in Mr. Docherty's hands, but he cannot establish that explanation by pointing to the presence of undocumented funds in his daughter's hands.

[19] Individuals are free to arrange their affairs so as to leave the smallest possible financial footprint consistent with their obligations under federal and provincial tax laws. The

disadvantage of doing so is that when a question arises as to the source of large amounts of cash found in their possession, they have very few means of establishing the legitimacy of those funds. In the context of the issues sought to be addressed by the Act - money laundering and the financing of terrorism - the government is entitled to ask for a reasonable explanation of the source of currency in excess of the prescribed limit found on persons leaving Canada. In this case, Mr. Docherty's explanations were unverifiable and, as such, amounted to no explanation at all. In my view, the Federal Court was entitled to find that the Minister's Delegate's decision was reasonable

[20] That said, the Minister's Delegate expressed himself awkwardly in at least one particular. In his July 29, 2011 letter to Mr. Docherty, he gave no weight to Mr. Docherty's daughter's statutory declaration because "it was prepared after and as a consequence of the enforcement action." This suggests that any after-the-fact explanation is entitled to no weight. If this is what the Minister's Delegate meant to say, it is unreasonable and absurd.

[21] I understand the Minister's Delegate to be saying that documentation showing the source of the seized funds created prior to and independently of the seizure is more persuasive than an after-the-fact explanation. It is apparent that explanations can only be provided after the enforcement action has occurred, so that the timing of such explanations is not a sufficient reason to set them aside entirely. Self-serving after-the-fact explanations do not have the same probative value as documents prepared prior to the seizure by third parties in the normal course of financial transactions. In this case, the daughter's statutory declaration was imprecise and unverifiable. In

context, I take this to be the basis on which the Minister's Delegate declined to give any weight to Mr. Docherty's daughter's statutory declaration.

[22] In the result, I would dismiss the appeal with costs.

"J.D. Denis Pelletier"

J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Robert M. Mainville J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-323-12 |
| **STYLE OF CAUSE:** | Mr. Robert Docherty and Minister of Public Safety and Emergency Preparedness |
| **PLACE OF HEARING:** | Vancouver BC |
| **DATE OF HEARING:** | March 19, 2013 |
| **REASONS FOR JUDGMENT BY:** | PELLETIER J.A. |
| **CONCURRED IN BY:** | GAUTHIER J.A.<br>MAINVILLE J.A. |
| **CONCURRING REASONS BY:** | |
| **DISSENTING REASONS BY:** | |
| **DATED:** | March 27, 2013 |

**APPEARANCES:**

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| Ms. Jennifer Dagsvik,<br>Mr. Keith Reimer | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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