Date: 20070427

Docket: T-1119-06

Citation: 2007 FC 454

Vancouver, British Columbia, April 27, 2007

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

LAUREN ONDRE

Applicant

and

ATTORNEY GENERAL OF CANADA
MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] Shortly after midnight on April 2, 2005, the Applicant, Ms. Lauren Ondre, arrived at the Canada/United States border crossing at the port of Pacific Highway on her way into Canada. Currency in the amount of $292,195.00 USD (the Seized Currency) was found during a search by Customs Officers, Chreptyk and Clarke, in the jack storage compartments of her vehicle. During the customs inspection process, the Applicant did not report this currency even after Officer Chreptyk advised her of the requirement to report currency amounts exceeding $10,000 CAD.

[2] Officer Chreptyk seized the money as "suspected proceeds of crime", pursuant to s. 18 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (the Act). The Applicant sought a Ministerial review of Officer Chreptyk's decision, as permitted under s. 25 of the Act. In a decision dated May 26, 2006 (the Ministerial Decision or decision of the Minister's delegate), the Minister's delegate confirmed that there was a contravention of s. 12(1) of the Act (that is, a failure to report as required) and that, under s. 29(1)(c) of the Act, the Seized Currency would be held as forfeit.

[3] The Applicant seeks judicial review of the Ministerial Decision.

I. Issues

[4] The issue raised by this application is whether the Minister's delegate erred in confirming that there were reasonable grounds to believe that the Seized Currency was the proceeds of crime.

II. Statutory Framework

[5] The statutory scheme regarding the seizure and forfeiture of currency is relatively new, having been in place since only 2000. I will set out my understanding of the legislative framework and how that framework was applied in this case.

[6] The object of the Act revolves around the implementation of measures to detect and deter money laundering and the financing of terrorist activities (s. 3, the Act). Although the importation and exportation of large amounts of currency to and from Canada is not prohibited, there is a

mandatory reporting requirement. Subsections 12(1) and (3)(a) of the Act, together with s. 2(1) of the *Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412 (the Regulations), obligate a person entering or leaving Canada to report currency and monetary instruments on their person or in their accompanying luggage if they have a value equal to or greater than $10,000.00 CAD.

[7] As I understand it, the reported information is provided to the Financial Transactions and Reports Analysis Centre of Canada, an arm's-length agency established under s. 41 of the Act. The Centre "collects, analyses, assesses and discloses information in order to assist in the detection, prevention and deterrence of money laundering and of the financing of terrorist activities" (s. 40, the Act).

[8] The Canada Border Services Agency (CBSA) is responsible for the seizure and forfeiture of unreported currency and monetary instruments under the Act. In general, once reported in accordance with the Act and the Regulations, the currency or monetary instruments are returned to the person without penalty or forfeiture by the responsible customs officer. However, if the customs officer believes, on reasonable grounds, that s. 12(1) (the reporting requirement) has been contravened, the officer may "seize as forfeit the currency or monetary instruments" (s. 18(1), the Act). Under s. 18(2) of the Act, the customs officer is mandated to return the seized currency or monetary instruments, "unless the officer has reasonable grounds to suspect that the currency or monetary instruments are proceeds of crime". Thereafter, the rights of review and appeal are as set out in s. 25 and s. 30 of the Act.

[9] The term “proceeds of crime”, as set out in s. 462.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, provides:

"proceeds of crime" means any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of (*a*) the commission in Canada of a designated offence, or (*b*) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.	"produits de la criminalité" Bien, bénéfice ou avantage qui est obtenu ou qui provient, au Canada ou à l'extérieur du Canada, directement ou indirectement: *a*) soit de la perpétration d'une infraction désignée; *b*) soit d'un acte ou d'une omission qui, au Canada, aurait constitué une infraction désignée.

A "designated offence" is essentially an indictable offence.

[10] It is important to note that the Act provides that the currency and monetary instruments may be seized and forfeited whether or not they are associated with money laundering or terrorism. The test, as set out in the Act, is only that there are reasonable grounds to suspect that they are the proceeds of crime.

[11] Under s. 25 of the Act, a person from whom the currency or monetary instruments were seized or the lawful owner may request a decision of the Minister as to whether s. 12(1) was contravened, within 90 days of the seizure.

[12] After a person seeks a Ministerial Decision, his file becomes the responsibility of the CBSA's Recourse Directorate. There, an adjudicator prepares a document described as a "Notice of Reasons for Action", and serves this on a claimant pursuant to s. 26(1) of the Act. Thereafter, s. 26(2) of the Act affords the person the opportunity to furnish evidence within 30 days. The customs officer also makes submissions to the adjudicator.

[13] Based on all of the evidence, the adjudicator prepares a document entitled Case Synopsis and Reasons for Decision (Synopsis and Reasons). The Synopsis and Reasons serve as a recommendation and are provided to the Minister's delegate. The Minister's delegate – in this case, a manager within the Recourse Directorate of the Minister – is delegated to make the Minister's decisions under sections 25 and 29 of the Act.

[14] There are two parts to the Ministerial Decision. The Minister's delegate first decides whether s. 12(1) was contravened by a failure to report the currency or monetary instruments. Secondly, if the Minister's delegate determines that there was a contravention of s. 12(1), the Minister, under s. 29, determines whether the currency should be forfeited or returned on the payment of a penalty or if a penalty paid should be returned.

[15] A decision that there has been a failure to report under s. 12 of the Act may be appealed to the Federal Court by way of an action (s. 30, the Act). In this regard see the decisions of my colleagues in *Dokaj v. Canada (Minister of National Revenue)*, 2005 FC 1437, 282 F.T.R. 121, [2005] F.C.J. No. 1783 (F.C.) (QL) and *Tourki v. Canada (Minister of National Revenue)*, 2006 FC 50, 285 F.T.R. 291, [2006] F.C.J. No. 52 (F.C.) (QL). However, as held in *Dokaj*, the Applicant

does not have a right of appeal in respect of a Ministerial Decision issued under s. 29 of the Act. A judicial review is the only avenue open to an Applicant to seek review of a Ministerial Decision that currency or monetary instruments will be forfeited.

III. Analytical Framework

[16] I turn to the analytical framework that was to be applied to the decision in question. The case at bar deals with an administrative review of an *in rem* property seizure. The overarching issue is whether there are reasonable grounds to suspect that the currency itself is proceeds of crime, not whether the person who failed to declare the currency has committed a crime (*Tourki*, above at paras. 40-45, 54-55).

[17] In *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 208, Justice Simpson noted that the legislation is silent regarding the principles to be used by the Minister's delegate in deciding whether or not to confirm the forfeiture of the currency. She does conclude, however, that the proper test would be for the Minister's delegate to determine whether a reasonable suspicion still existed, after review of all the evidence, that the currency was proceeds of crime.

[18] After reviewing relevant legal principles and jurisprudence, Justice Simpson, at para. 71, concluded that, "evidence to support a suspicion need not be compelling, it must simply be credible and objective". I agree.

[19] As to the burden of proof on an applicant, I refer to the comments of Justice Simpson in *Sellathurai*, above at paras. 72-73:

> With regard to the burden of proof on an applicant who wishes to dispel a suspicion based on reasonable grounds, it is my view that such an applicant must adduce evidence which proves beyond a reasonable doubt that there are no reasonable grounds for suspicion. Only in such circumstances will the evidence be sufficient to displace a reasonable suspicion.
>
> I have reached this conclusion because, if a Minister's Delegate were only satisfied on the balance of probabilities that there were no reasonable grounds for suspicion, it would still be open to him to suspect that forfeited currency was proceeds of crime. The civil standard of proof does not free the mind from all reasonable doubt and, if reasonable doubt exists, suspicion survives.

[20] With this framework in mind, I turn to the decisions in this case and the evidence presented by the Applicant under s. 26(2) of the Act.

IV. Background to the Seized Currency

A. *Officer Chreptyk's Decision*

[21] As noted above and as described in his written report (Narrative Report) dated April 2, 2005 (the same day as the seizure), Officer Chreptyk found the Seized Currency in the jack compartments of the truck driven by the Applicant. When asked whether she was aware of any cash in the car, her response was “I don’t know what you are talking about”.

[22] Although the RCMP were called and were present for about 90 minutes during the counting of the currency, they did not question or detain the Applicant. The RCMP were apparently called for

security purposes as the Officers had some concern that there might a be further person involved with the transactions.

[23] The 28 bundles of currency consisted of loose bills wrapped with elastics. It took Officer Chreptyk and Officer Clarke several hours to count the funds. By their counting, the Seized Currency totaled $292,195.00 USD, in the following denominations: 275 x $5; 2105 x $10; 6581 x $20; 601 x $50; and 1081 x $100.

[24] In addition to the Seized Currency, a business card for Devin Coverdale, two notes, and a blank FedEx shipping label were found. One of the notes consisted of numbers that were consistent with the amount of the Seized Currency while the other note was described by Officer Chreptyk as follows:

> A note written in black felt pen on a brown envelope was also found suggesting the delivery of four boxes and that the airport would be crowded and would be safe? It appeared to be written by the same pen as the note with the money. […]

[25] Although $1,000 USD was found in the Applicant's purse and seized, it was later returned to the Applicant.

[26] Officer Chreptyk made the decision that the Seized Currency was to be seized as "proceeds of crime – level 4", summarizing his reasons in his Narrative Report as follows:

1) The cash was not declared;

2) The cash had a strong smell of marijuana;

3) The cash was bundled in a way consistant [sic] with organized crime (various denominations in one bundle, multiple types of elastics used);

4) Finding such a large amount in one place with no explanation for it;

5) ONDRE had no idea the money was in the car by her statement: “I don’t know what you are talking about” in reference to Customs finding the cash;

6) The cash in her possession [$1,000 USD that was in her backpack] was ION scanned positive with a Cocaine high reading; and

7) ONDRE was a model and worked at a restaurant. This seemed to be an excessive amount of cash for her to be with given her means of income.

B. *Applicant Submissions and Evidence*

[27] By letter dated June 9, 2005, the Applicant requested a decision of the Minister pursuant to s. 25 of the Act as to whether subsection 12(1) of the Act had been contravened. By letter dated July 5, 2005, the Applicant was provided with the Notice of Reasons for Action, which outlined the reasons for the seizure and forfeiture.

[28] By letter dated October 31, 2005, the Applicant provided further submissions pursuant to s. 26(2) of the Act. These submissions included affidavits sworn by the Applicant and by Thomas J. Ballanco, a California lawyer. According to these affidavits, the Seized Currency was provided to the Applicant by an indeterminate number of unnamed investors who are funding unspecified litigation brought by certain unnamed Canadian corporations against the United States government regarding alleged trade violations under the North American Free Trade Agreement (NAFTA). The

Applicant claimed to be the appointed agent and attorney-in-fact of the investors in this scheme who have been promised a portion of the NAFTA litigation proceeds should it ultimately be successful. Finally, it was explained that the Seized Currency was being taken into Canada to be deposited in an account and then provided to Canadian legal counsel to pay for his retainer and the continuing legal fees in the litigation. In support of the submissions, the Applicant provided a heavily redacted copy of a Memorandum of Understanding and Financing Agreement (MOU) that purports to be in relation to the NAFTA litigation.

[29] In a letter dated November 10, 2005, the CBSA adjudicator requested the Applicant to provide the following: (a) an explanation as to why the funds could not have been deposited in a U.S. bank and wire transferred to a Canadian bank given the risk of loss or theft inherent with physical transportation of cash; (b) copies of receipts showing that the currency was in fact received from investors and was related to the funding of the NAFTA litigation, as well as documentation showing that the Applicant was contractually appointed as the investors' agent/representative; and (c) confirmation and any written verification that the Applicant reported the funds to U.S. Customs prior to entering Canada on April 2, 2005.

[30] On December 23, 2005 and January 6, 2006, counsel for the Applicant responded to the CBSA adjudicator's letter. With respect to the first question, the Applicant admitted that it would have been possible for her to effect a wire transfer of the funds by employing the services of banking institutions as opposed to physically transporting the cash. In response to the second question, the Applicant provided copies of heavily-redacted documents that purport to be

agreements by a series of persons who, by the terms of the document, agree to pay certain sums of money in order to participate in the NAFTA litigation and appoint the Applicant as the “agent and attorney-in-fact" for purposes of “transactions associated with or contemplated by the NAFTA litigation”. In the submissions, the Applicant also included a document entitled “FOCH Accounts Register” comprised of a series of entries of sums of money. The Applicant did not respond to the third question.

C. *Further Submissions of Customs Officers*

[31] On December 18, 2005, Officer Clarke provided submissions, which can be summarized as follows:

- The physical transportation of the funds in cash form across the border would seem to be unnecessary when the MOU provided in relation to the NAFTA litigation contemplates the establishment of bank accounts by the American lawyers, accounts from which the funds could have been transferred to Canadian bank accounts if this was in fact intended.

- If the Applicant’s cash had in fact been legitimately acquired in the manner subsequently explained through her legal counsel, the Applicant would not have made the surprising statement “I don’t know what you are talking about” to Customs Officers at the time the cash in her truck was discovered.

- Similarly, the Applicant would not have refused to answer Customs Officers’ questions if the cash was lawfully obtained.

- In light of the Applicant’s stated knowledge of U.S. currency declaration laws (knowledge apparently obtained from her own American legal counsel, Mr. Ballanco), it is illogical that she would have any concerns about truthfully reporting the Seized Currency to Canadian Customs officers unless the Seized Currency was illegally obtained.

- The currency would not have emitted such an overwhelming odour of marijuana unless it had in fact been housed with marijuana.

- It is surprising that the Applicant had not provided any actual receipts showing that money was in fact received from the investors.

- The Canadian lawyer representing the Applicant for the ministerial review is one who works primarily for clients involved in marijuana grow operations and is dedicated to such matters as advocating the decriminalization of marijuana.

[32] On March 9, 2006, the CBSA adjudicator received further information from a CBSA Regional Intelligence Officer with respect to the Ministerial review. Specifically, she explained that she issued a lookout for Devin Coverdale, an individual whose business card was found in the compartment with the Seized Currency. On May 3, 2005, this lookout resulted in a search of Mr. Coverdale's vehicle at the border that revealed approximately $27,900 USD worth of unreported currency concealed in the air duct system of his truck. The Intelligence Officer indicated that she believed that the currency seized from the Applicant and Mr. Coverdale is linked to a group involved in cannabis smuggling between British Columbia and Washington State.

D. *Synopsis and Reasons*

[33] On March 22, 2006, the CBSA adjudicator issued his Synopsis and Reasons recommending that the Minister issue a decision to the effect that the Act was contravened and that the Seized Currency should be forfeited. After summarizing the facts of the case, the adjudicator stated his reasons as follows:

> In this case, the information on file establishes that currency was not reported. Furthermore, in this case, a common sense inference that the funds are criminally tainted is drawn as a result of the cumulative effect of the factors identified by the seizing agency in addition to the following characteristics:
>
> - Claimant asked question at primary about currency but still does not declare currency;

- Only required to demonstrate "reasonable grounds to suspect" that currency is proceeds of crime and not required to prove beyond a reasonable doubt;

- In the claimant's legal representative's submission dated October 31, 2005, an attorney (Mr. Ballanco) recommended that Ms. Ondre take funds from investors in cash and were to be deposited to a Canadian bank. However, if this was true funds could have been deposited in a U.S. bank and wire transferred to a bank in Canada rather than risking physical movement of currency;

- In relation to the above point, the redacted MOU forming part of the claimant's October 31, 2005, submission stated in Point 7 that funds contributed to the NAFTA litigation could be held by Frankel and/or Ballanco's accounts or in one or more accounts specifically held by or on behalf of the "Companies". Thus, it appears bank accounts existed in which to deposit and transfer the cash to other (Canadian) banks if that was the intention;

- If funds were legitimate as presented in lawyer's submission it seems reasonable that claimant would have at least made a cursory reference to the funding of the litigation following the discovery of the currency by Customs rather than remain silent. Following the discovery of the currency when the seizing officer asked the claimant if she was aware that there was cash in her car she responded by saying "I don't know what you are talking about";

- Ms. Ondre refused to answer any questions from the Customs officers about if the money was lawfully obtained;

- From lawyer's October 31, 2005, submission, Mr. Ballanco, one of the U.S. Attorneys working on the NAFTA [litigation], said in point 10 of his Affidavit that he advised Ms. Ondre of the U.S. reporting requirements for currency in excess of $10,000 USD. She also told one of the Custom's officers during the enforcement action that she was aware of the requirement to report funds over $10,000 to U.S. Customs. If the funds were legitimately acquired and she was aware of this requirement a reasonable person would not have had any reservations in reporting the currency to U.S. (or Canadian) Customs;
- […]
- The currency was concealed inside the jack covers behind the driver's and passengers seats of the claimant's vehicle, a storage area not designed for storing currency;

- There was a strong odour of marijuana emanating from the found currency;

- During the appeal process the claimant declined to answer an Adjudications question asked on November 10, 2005, requesting that she confirm that she reported the funds to U.S. Customs prior to her entering Canada on April 2, 2005;

- Memorandum of Understanding and Financing Agreement (MOU) submitted as part of the appeal on October 31, 2005, was not signed at end of MOU by Ms. Ondre or other parties involved;

- Approximately 45% of the currency seized consisted of $20.00 USD bills. The rest consisted of $5, $10, $50 and $100 USD bills. The $20.00 note in Canada and the U.S. is the predominant bill for street level drug trafficking.

E. *Ministerial Decision*

[34] On May 26, 2006, the Minister's delegate issued his decision pursuant to s. 27 of the Act determining that the seizure of the currency was justified under s. 12(1) of the Act, on the ground that the Applicant had not reported the importation of the currency to customs officials. In addition to noting that the currency was concealed "indicating intent to circumvent the reporting requirements", the Minister's delegate stated the following:

> The manner of concealment, the fact that there are safer more secure means of transporting currency across an international border, that the money was not packaged consistent with having been received from a financial institution and that some of the money tested positive for and had a strong odour of drugs, are reasonable grounds to suspect proceeds of crime. You did not provide an explanation as to why you were carrying such a substantial amount of currency following its discovery and refused to answer any questions from the Customs officers concerning whether the money was lawfully obtained. The submissions from your legal representative were reviewed; however, inconsistent and/or inconclusive statements and information were provided concerning the seized currency. As such and based on the multiplicity of indicators, reasonable suspicion existed at the time of seizure and still exists. Therefore, the currency shall be forfeited.

[35] This is the decision under review in this application. However, the parties acknowledge that the Synopsis and Reasons provided by the adjudicator should also be considered as part of the reasons for decision.

V. Standard of Review

[36] As required in judicial review of decisions of this nature, I must address my mind to the appropriate standard of review of the Minister's decision. Two of my colleagues have addressed the appropriate standard of review in the context of decisions related to Ministerial decisions made under the provisions of the Act (*Thérancé c. Canada (Ministre de la sécurité publique)*, 2007 CF 136 and *Sellathurai*, above. In *Thérancé*, at para. 20, Justice Beaudry, having conducted a pragmatic and functional analysis, concluded that the Minister's decision should be reviewed on a standard of patent unreasonableness. In *Sellathurai*, at para. 60, Justice Simpson, after a similar analysis, concluded that the reasonableness standard of review was appropriate, except when dealing with the burden of proof faced by an applicant who wishes to dispel "reasonable grounds to suspect", where she concluded that the correctness should be applied.

[37] The Supreme Court of Canada has clearly stated that the pragmatic and functional approach must be undertaken by a reviewing judge "in every case where a statute delegates power to an administrative decision-maker" (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, at para. 21, [2003] 1 S.C.R. 226). Further, this analysis must be applied anew with respect to each decision and not merely each general type of decision of a particular decision-maker under a particular legislative provision (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, 263 D.L.R. (4th) 113, [2005] F.C.J. No. 2056 at para. 50 (F.C.A.) (QL)). It is the particularities of the decision at issue in a given case that will govern the standard of review to be employed by the reviewing Court.

[38] The first step is to identify the particular question or questions at issue. The question that had to be answered by the Minister's delegate was whether a reasonable suspicion still existed, after

review of all the evidence, that the Seized Currency was proceeds of crime. Keeping this question in mind, I turn to the four elements of the pragmatic and functional analysis.

A. *Existence of a Privative Clause*

[39] As noted in both *Thérancé* and *Sellathurai*, the Act contains a strong privative clause. Section 24 of the Act states that:

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.	La confiscation d'espèces ou d'effets saisis 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.

[40] There is no statutory appeal in sections 25 to 30 of the Act from a decision to confirm forfeiture under section 29 of the Act. Review is only available in judicial review proceedings. In this regard, see: *Tourki*, above at paras. 30-36 and *Ha v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 594, 150 A.C.S.W. (3d) 333, [2006] F.C.J. No. 1123 at para. 7 (F.C.) (QL).

[41] This suggests a high degree of deference.

B. *Relative expertise*

[42] The decision in issue was made by a Minister’s delegate who holds the position of “manager” in the Adjudications Division of the CBSA’s Recourse Directorate. Although there was

no evidence before me, in this case, as to the specific training received by persons in this position, Justice Simpson commented in *Sellathurai*, at para. 49, that managers and adjudicators receive training from RCMP and Department of Justice specialists and that they are guided in their work by an RCMP document entitled "Integrated Proceeds of Crime Investigator Indicator List". I do not believe that this would be disputed by the Applicant. Thus, it appears to me that, when the question is one that requires some knowledge and expertise related to the nature of the evidence that led a customs officer to suspect that the funds were the proceeds of crime, the expertise of the Minister's delegate would be superior to that of the Court. However, if the question is one that requires the delegate to determine, for example, the burden of proof or to assess whether procedural fairness was afforded to an applicant, the Court is in as good a position as the Minister's delegate and less deference would be owed.

[43] In this case, the question in issue required the Minister's delegate to assess the strength or credibility of the evidence on both sides of the issue. The evidence involves matters that are within the expertise of the Minister's delegate. For example, the delegate's knowledge of the practices by persons involved in cross-border drug trade is much greater than that of the Court.

[44] In my view, for the question before the Court in this application, significant deference is owed to the Minister's delegate on this factor.

B. *The Purpose of the Act and of Section 29*

[45] The general purpose of this part of the Act is to detect and deter money laundering and terrorist financing by requiring the reporting of cross-border currency movement (see the Act, s. 3). Part 2 of the Act (containing sections 12 to 39) sets out the reporting scheme. Parliament has mandated serious sanctions in the event that there is a failure to report, including full forfeiture of currency and monetary instruments when there are reasonable grounds to suspect that the unreported currency or monetary instruments are the proceeds of crime. Section 29 sets out the final step in a seizure and allows the Minister's delegate to determine whether, on the facts of each particular case, a seizure should be maintained. While the Act has a broad public purpose, the decision of the Minister's delegate is limited to the facts before the delegate and is applicable only to the currency or monetary instruments seized in an individual case. Thus, at the s. 29 level, the decision is not polycentric. This does not suggest a higher level of deference.

C. *The Nature of the Question – Law or Fact*

[46] The question of whether or not the factual record before the Minister's delegate discloses reasonable grounds to suspect that the Seized Currency is proceeds of crime is a question of mixed fact and law. However, once the delegate applies the correct burden of proof to the evidence before him, the decision is entirely fact driven. This suggests a higher level of deference.

[47] In conclusion, having weighed all of the factors, I am satisfied that the Ministerial Decision is reviewable on a standard of patent unreasonableness. On this standard, a decision should only be set aside if it is clearly irrational or evidently not in accordance with reason (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 52).

VI. Application of the Standard of Review to the Ministerial Decision

[48] The Applicant does not argue that she failed to report the Seized Currency as required pursuant to s. 12(1) of the Act. Further, the Applicant also does not dispute the material facts of her interactions with the Customs Officers at the time of the seizure. Thus, I may accept as fact the following:

- The Seized Currency, in the amount of $292,195, was concealed in the jack compartments of her vehicle;
- The Seized Currency was contained in bundles bound with elastics and was made up of: 275 x $5; 2105 x $10; 6581 x $20; 601 x $50; and 1081 x $100;
- The Seized Currency gave off a strong smell of marijuana;
- When asked if she was aware of the Seized Currency, the Applicant's immediate response was, "I don't know what you are talking about";
- When asked later about the Seized Currency, the Applicant refused to respond to questions by the Customs Officers;
- Also contained in the vehicle were two notes and a blank FedEx shipping label;
- The RCMP were called and attended at the border crossing for about one and a half hours; they did not question or detain the Applicant; and
- The Applicant is a waitress and model.

[49] The Applicant made one argument with respect to this list of facts. Officer Chreptyk and the Minister's delegate appear to have considered, as a factor in their decisions, the refusal of the Applicant to answer questions with respect to the Seized Currency. In argument before me, the Applicant argued that her silence should not have been considered. I agree and believe that it was an irrelevant consideration. Knowing that the RCMP had been called, it is understandable that the

Applicant would be reluctant to respond to interrogation. However, this is but one factor and would not, in my view, change the cumulative impact of the other factors.

[50] Aside from the Applicant's silence, it was entirely appropriate for the Minister's delegate to rely on these facts coupled with his understanding of cross-border transactions and criminal activity to determine that there were reasonable grounds to suspect that the Seized Currency was the proceeds of crime.

[51] The next step in the analysis was for the Minister's delegate to evaluate the submissions of the Applicant to determine whether the suspicion was dispelled. The reasons demonstrate that all of these submissions were considered. No evidence was ignored. At the end of the analysis, it is evidence that the explanations of the Applicant were rejected. The essence of the explanation provided by the Applicant was that the Seized Currency was provided to the Applicant by an indeterminate number of unnamed investors who are funding unspecified litigation brought by certain unnamed Canadian corporations against the United States government regarding alleged trade violations under NAFTA.

[52] The Applicant draws some distinctions between this case and that of *Sellathurai*, above, where Mr. Sellathurai had a previous record with customs officials and failed to provide any receipts. My first response to this argument is that each of these cases must be examined on its particular facts. Just because a factor contributing to the finding against the currency in Mr.

Sellathurai's case was that he had a record with CBSA does not mean that a Minister's delegate (or this Court) can infer that the lack of a record refutes a suspicion.

[53] With respect to the absence of receipts in the case of Mr. Sellathurai and the presence of copious documents in this case purporting to substantiate a reasonable explanation, I have reviewed the documents relied on by the Applicant. Little weight was given to this evidence by the Minister's delegate. I have closely examined the documentary evidence submitted by the Applicant in her legal representative's two submissions. As noted above, the Applicant provided copies of heavily-redacted documents that purport to be agreements by a series of persons who, by the terms of the document, agree to pay certain sums of money in order to participate in the NAFTA litigation and appoint the Applicant as the "agent and attorney-in-fact" for purposes of "transactions associated with or contemplated by the NAFTA litigation". The FOCH Accounts Register ledger referred to certain sums of money but there were no receipts showing receipt of the monies by the Applicant from the alleged investors. Thus, there was little evidence to tie the documentary evidence to the Applicant. The designation of the Applicant as an attorney-in-fact is inconsistent with the occupation of the Applicant as a waitress and model and with her statement to Officer Chreptyk that she knew nothing about the Seized Currency. The Minister's delegate's conclusion that "inconsistent and/or inconclusive statements and information were provided concerning the seized currency" was open to him on the evidence provided. Further, the reasons as set out in the Synopsis and Reasons provide ample explanation of the problems with this evidence.

[54] Other aspects of the story of an alleged NAFTA litigation are unsupported. In spite of the claim that Canadian counsel was to be the recipient of the funds, no evidence was provided by the Canadian counsel and he was not identified. The Minister's delegate also placed heavy weight on the fact that the funds for this purported litigation were not transported by wire transfer or other means. In my view, this was a very pertinent fact; carriage of the payments in small bills in a hidden compartment of a vehicle is simply not consistent with a legitimate business transaction. In sum, the story put forward by the Applicant is quite implausible, bordering on the absurd. It was not unreasonable for the Minister's delegate to reject the submissions and maintain the suspicion.

[55] Finally, I add that the arguments of the Applicant before me focused on alleged problems with each of the various factors relied on by the Minister's delegate. However, in this case, there was no individual factor that drove the decision; rather, it was the cumulative effect of the factors that formed the basis of the Ministerial Decision. As stated by the Supreme Court of Canada in *R. v. Jacques*, [1996] 3 S.C.R. 312, at para. 24, 139 D.L.R. (4th) 223, (quoting from *R. v. Marin*, [1994] O.J. No. 1280, at para. 16 (Gen. Div.)):

> The "indicators" [facts] are seen to be a constellation, or cluster, leading or tending to a general conclusion. Looked at individually, no single one is likely sufficient to warrant the grounds for the detention and seizure. The whole is greater than the sum of the individual parts viewed individually.

[56] Overall, I am satisfied that when seen as a "constellation" there was sufficient objective and credible evidence before the Minister's delegate upon which to base his conclusion. The Ministerial Decision is not clearly irrational or not in accordance with reason; it is not patently unreasonable.

[57] I have some concern with the fact that the Applicant was not provided with all of the reports and submissions that related to the seizure. It is not clear that the Applicant received copies of the Narrative Reports. Nor, does it appear that the final submissions of Officer Clarke or of the Regional Intelligence Officer were given to the Applicant. The process used may raise the question of whether an applicant knows the case against him or her – a fundamental tenet of natural justice. This issue was not raised before me. Nevertheless, I examined the additional submissions carefully. In this case, it appears to me that the Narrative Reports were accurately summarized in the Notice for Reasons for Action, and that the December 18, 2005 submissions of Officer Clarke did not add new evidence. The submission of the CBSA Regional Intelligence Officer was not referred to; I assume that it was not relied on by the Minister's delegate in reaching his decision. Accordingly, I am satisfied that there was no material breach of natural justice.

VI. Conclusion

[58] For these reasons, the application will be dismissed.

ORDER

THIS COURT ORDERS that the application is dismissed with costs to the Respondent.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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