abroad. Thus, if an individual purchases or owns a foreign vacation property that must be renovated because the individual or a family member has an impairment, the renovation costs qualify for the METC just as if the renovation was made to the individual's Canadian property. Similar relief may be available for any incremental costs incurred during the construction of a foreign property to provide features that enable an impaired individual to gain access to, or be mobile or functional within, the property, as long as the home is a principal place of residence of the individual—that is, used more than any other property as his or her residence. In most cases, it is difficult for a Canadian-resident individual to establish that a foreign property being constructed will be his or her principal place of residence. Thus, from an income tax perspective it is generally preferable to purchase an existing foreign property and renovate it rather than undertake modifications as part of the construction of a foreign property, because the "principal place of residence" test does not apply to a renovation or alteration.

Travel expenses incurred to obtain medical treatment. Transportation and travel costs incurred to seek medical treatment abroad are eligible for the METC if (1) they are paid to a person engaged in the business of providing transportation services for the transport of the patient and/or for one accompanying person if a medical practitioner certifies that the patient is incapable of travelling alone; (2) the destination is at least 40 kilometres from the patient's home by a reasonably direct route; (3) substantially equivalent medical services are not available where the patient lives; and (4) it is reasonable for the patient to travel to the particular place to seek the medical services. If the patient lives in an area where transportation services are not readily available, the individual may instead claim vehicle expenses.

Other travel expenses (costs ancillary to the actual cost of being transported) are subject to the same limitations as transportation expenses, except that the distance travelled must be more than 80 kilometres from the patient's home. These expenses include the reasonable cost of meals and the accommodation expenses incurred while the patient is seeking medical treatment. If a bone marrow or organ transplant is required, the travel, board, and lodging costs of the patient and one person accompanying the patient are eligible for the METC. In addition, the costs paid by the patient for the donor and one person accompanying the donor that were incurred in respect of the transplant are METC-eligible. A medical practitioner need not certify the necessity of the accompanying person for the patient or donor; there is no minimum distance that must be travelled; and the patient does not have to justify why he or she sought the transplant in the place travelled to.

Even if the conditions to claim the travel expenses are not met, the foreign medical expenses themselves may still be eligible for the METC. Thus, an individual may choose to seek medical treatment abroad even if substantially equivalent medical services are available where the individual lives in Canada. The general rules determine whether the individual can claim the METC for the medical costs.

Medical insurance premiums and reimbursements. The CRA accepts that premiums paid for supplemental travel insurance coverage can qualify for the METC, if paid to a private health services plan for hospital or medical care that would otherwise qualify for the METC (2007-0229901E5, June 7, 2007). When the travel insurance premiums also cover related non-medical items such as life insurance and cancellation insurance, the CRA's administrative position is to disallow the entire premium; the CRA, however, has verbally confirmed that the medical coverage component of the travel insurance premiums will be allowed as an eligible medical expense, if a reasonable breakdown is provided by the insurance company. As is the case with Canadian medical expenses, if a foreign medical expense is reimbursed by the province or territory in which an individual resides or by an individual's private medical insurance carrier, only the unreimbursed portion of the medical expense qualifies for the METC.

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Failure To Report Cash

A person who enters or leaves Canada with $10,000 or more in cash (or certain cashable items) must report the amount (section 12 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, referred to herein as "the Proceeds of Crime Act"). Under section 18, if the CBSA officer "believes on reasonable grounds" that the individual has not reported as required, "the officer may seize as forfeit the currency or monetary instruments." But the officer must release the money on payment of a fine "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." (That provision generally refers to all indictable offences under federal law, except for mainly agriculture-related offences.) Recourse is limited if the officer does not return the funds.

There is no statutory basis for challenging the CBSA officer's view that he or she had "reasonable grounds" to suspect that the currency or monetary instruments were

proceeds of an indictable offence. A person whose funds were forfeited may apply under section 25 within 90 days of seizure for a decision by the minister of public safety and emergency preparedness on whether section 12 of the Proceeds of Crime Act was contravened. But section 12 does not refer to "proceeds of crime" or "reasonable suspicions": those tests are in section 18. Thus, whether the person has failed to report is a reviewable issue and is generally easily ascertained. It is also possible to challenge whether a document is a "monetary instrument" as defined in regulation 1 of the Cross-Border Currency and Monetary Instruments Reporting Regulations and whether the traveller was about to make a report but was prevented from doing so.

Once money is seized under section 18, it "is automatically forfeited to Her Majesty in right of Canada from the time of the contravention of s. 12(1)." (See section 23 of the Proceeds of Crime Act and *Sidhu v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 911.) Under section 24 of the Proceeds of Crime Act, "[t]he 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." Section 24.1 allows the minister to take self-initiated corrective measures to return the money; section 25 is the limited right of review discussed above.

After waiting 30 days for submissions from the claimant, the minister has 90 days in which to decide whether section 12 was contravened (section 27). (As noted above, the minister's review does not require consideration of whether the seizing officer had reasonable grounds to suspect that the money was proceeds of crime.) The minister's decision may be appealed to the FC. There seems little value to be gained from that appeal, and the cases suggest that an appeal is rarely sought.

If the minister decides that the money was properly seized, then he may consider whether (1) to return the money subject to a penalty; (2) if a penalty was charged, to waive the penalty; or (3) to confirm the forfeiture (section 29 of the Proceeds of Crime Act). Generally, the CBSA allows applicants to try to prove that the money was not proceeds of crime. But the minister's discretion is not statutorily constrained, except perhaps by a reading of the objects of the law set out in section 3, which include "to detect and deter money laundering and the financing of terrorist activities."

In *Sellathurai v. Canada (Public Safety and Emergency Preparedness)* (2008 FCA 255), the FCA said:

> [S]ection 29 . . . is an application for relief from forfeiture. The issue is not whether the Minister can show reasonable grounds to suspect that the seized funds are proceeds of crime. The only issue is whether the applicant can persuade the Minister to exercise his discretion to grant relief from forfeiture by satisfying him that the seized funds are not proceeds of crime. Without precluding the possibility that the Minister can be satisfied on this issue in other ways, the obvious approach is to show that the funds come from a legitimate source.

If the minister's section 29 decision was reasonable, then it stands. The FC "has no jurisdiction on an application for review to review" the minister's decision that the applicant failed to report as required by section 12, which failure triggered the forfeiture. (See *Mamnuni v. Canada (Public Safety and Emergency Preparedness)*, 2011 FC 736.)

Under sections 13 and 14, a traveller may prevent forfeiture by deciding not to go ahead with the importation or exportation of the money. The CBSA officer may give the traveller a chance to decide not to proceed with the import or export, but the officer is not obliged to give the traveller that chance, and "the discretion contemplated by subsection 14(1) is no longer available once a person who has passed through security and has not yet indicated that he has currency or monetary instruments to report, is approached by a customs officer." (See *Mamnuni*.)

The law applies to more than just cash: it also applies to a bank draft, a cheque, or a security that allows the holder to cash it, provided that the named person to whom the draft, cheque, or security is payable has endorsed it on the back. (See regulation 1(1) of the cross-border currency regulations, "monetary instruments.") The law does not apply if the traveller is carrying valuable jewels or fine gold (the latter in the form of bars, not coins). (In *Sellathurai*, the appellant had two gold bars worth $20,000 and some jewellery; the CBSA returned those items but seized $123,000 in cash. However, such goods may have to be reported under the Customs Act when they are being brought into Canada.)

If the traveller reports cash or near-cash instruments that he or she is carrying, the customs officer cannot properly seize those items. The traveller's report must disclose his or her name, address, citizenship, and other personal details, the cash or near-cash being carried, and the person's destination. (See schedule 1 of the cross-border currency regulations.) However, it is not necessary to disclose on the report the source of the funds, and there is no requirement to demonstrate that the money came from legal sources.

The effect of the rules is that the CBSA can seize a traveller's cash or near-cash without proof of crime, and the traveller has no power to demand its return unless he or she can satisfy the CBSA that the money came from

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legal sources. (Strictly speaking, the CBSA need not return the money even if it is shown to come from legal sources; however, the CBSA would need to justify the retention on a judicial review application because retention would offend the spirit of the Proceeds of Crime Act.)

There does not seem to be any protection under the Charter of Rights for government appropriation in which money is seized only on the basis of an officer's claim that he or she had reasonable grounds to suspect that the money was proceeds of crime without any duty to prove that that suspicion was reasonable or accurate. The FCA in *Tourki v. Canada (Public Safety and Emergency Preparedness)* (2007 FCA 186) ruled out any protection under sections 7, 8, and 11(d) of the Charter. On section 8 (unreasonable searches), the FCA referred to the SCC decision in *Simmons* ([1988] 2 SCR 495), which upheld the search powers under the Customs Act on the basis that "travellers seeking to cross national boundaries fully expect to be subject to a screening process." On section 11(d) (presumption of innocence), the FCA dismissed the right on the simple basis that "[t]he appellant is not an accused. . . . The seizure and forfeiture process established by the Act is a civil collection mechanism that is not intended to punish the individual." For section 7 (life, liberty, and security), the FCA said: "The duty to report imposed by the Act and the seizure and forfeiture mechanism it establishes do not engage the right to life, liberty and security of the person. The right to life, liberty and security of the person encompass[es] a person's fundamental life choices, and not purely economic interests or property rights." (In *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, a somewhat similar case, the SCC concluded that a provincial law that allows the court to order forfeiture of property is not criminal law. Under that particular law, however, the court must conclude that the property is proceeds of unlawful activity: an officer's suspicions are not enough.)

Because tax evasion is an indictable criminal offence that might be covered by the "proceeds of crime" definition, one might expect the CBSA to insist on disclosure of the same books and records that are used for a CRA audit. It may be that a traveller who does not report is reluctant to do so for fear of triggering a CRA audit. (There is good reason to think that the CBSA does not disclose to the CRA information collected in cross-border cash reports. To address a perceived inability under the Proceeds of Crime Act to share similar information gathered by financial intermediaries, the March 2013 budget proposed to require a separate report to the CRA on international electronic funds transfers over $10,000.) Even if reporting cash to the CBSA increases the risk of an audit, one has a better chance of keeping that money following a CRA audit than one has of reclaiming once it is seized by the CBSA on a suspicion that it is proceeds of crime. There are appeal rights for CRA assessments, and the CRA may still audit the traveller after the CBSA seizes his or her money. In deciding how much tax a person owes, the CRA may not give credit for the money that the CBSA seized, and it is not clear that one is entitled to any credit because the seized money was not paid on account of taxes.

In summary, however much a client may fear a CRA audit if he or she reports money to CBSA, depending on whether other issues may be potentially unearthed on audit, it may be better to report the money and risk the audit than to lose the money and still risk the audit.

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