T-155-06

Citation: 2007 FC 208

2007 FC 208 (CanLII)

Ottawa, Ontario, February 23, 2007

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

GOWRKUMARAN SELLATHURAI

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

(SOLICITOR GENERAL OF CANADA)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review concerns $123,000.00 CAD and $435.00 USD seized from the Applicant and forfeited at Pearson Airport in Toronto on November 10, 2003 (the Forfeited Currency). The forfeiture was undertaken pursuant to the *Proceeds of Crime (Money Laundering) and Terrorism Financing Act*, S.C. 2000, c. 17 (the Act).

[2] The Forfeited Currency consists of the sums the Applicant declared, $4,000.00 CAD and $400.00 USD (the Declared Currency) and the amounts he did not declare $119,000.00 CAD and $35.00 USD (the Undeclared Currency).

THE APPLICATION

[3] The application is brought with respect to a decision by the Minister of Public Safety and Emergency Preparedness (the Minister) of October 6, 2005 in which he confirmed the forfeiture of the Undeclared Currency under paragraph 29(1)(c) of the Act.

THE APPLICANT AND OTHERS

[4] The Applicant is Mr. Gowrkumaran Sellathurai (the Applicant). Since its incorporation in 1994, he has operated a wholesale jewellery business in Scarborough, Ontario called Jayasaji Jewellers (the Business). His wife Palarani Gowrkumaran is listed in the company's articles of incorporation as its sole officer and director and the Applicant's lawyer, T. Jegatheesan, in his letter of March 2, 2004, describes her as the owner of the business. However, the Applicant's affidavit of March 1, 2004 (the Applicant's Affidavit) indicates that he has signing authority over the Business accounts and that he and his wife run the Business as "complete partners". The Applicant has lived in Toronto with his wife and three children for thirteen years. He came to Canada in 1986 and became a Canadian citizen in 1991.

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[5] Mr. George Montgomery Pathinather and Mr. Shudhir Chawla are the Applicant's business associates. Their affidavits of January 29, 2004 (the Pathinather Affidavit) and February 5, 2004 (the Chawla Affidavit) state that they provided the Applicant $45,000.00 and $47,000.00 respectively for business purposes. Those amounts are said to be included in the Forfeited Currency.

[6] Mr. Sathi Sathananthan is the bookkeeper for the Business. He swore an affidavit dated February 16, 2004 (the Bookkeeper's Affidavit) which describes a series of withdrawals from the account of the Business totaling $37,000.00. This amount is also said to be included in the Forfeited Currency.

THE HEARING

[7] This application was set down for a one-day hearing but more time was needed. Since counsel were not available to conclude the hearing the next day, it was agreed that counsel for the Applicant would complete his reply by filing written submissions on or before December 18, 2006 and that counsel for the Respondent could, if he wished, file written observations thereon on or before January 12, 2007. Reply submissions were filed and the Respondent delivered a Sur-Reply dated January 10, 2007.

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THE LEGISLATIVE FRAMEWORK APPLIED TO THIS CASE

[8] The export of large amounts of currency from Canada is not prohibited but there is a mandatory reporting requirement. Subsections 12(1) and (3)(a) of the Act, together with subsection 2(1) of the *Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412, obligate a person 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.

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[9] Subsection 18(1) of the Act provides that, if currency and instruments are not reported, they may be seized and forfeited. Subsection 18(2) provides that, instead of returning the seized items upon payment of a penalty, a customs officer may decide to maintain the forfeiture, as was done in this case (the Forfeiture). The Applicant concedes that the officer had reasonable grounds to maintain the Forfeiture. The relevant subsection reads as follows:

18. (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. (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.
[my emphasis]	[je souligne]

[10] With respect to proceeds of crime, subsection 462.3(1) of the *Criminal Code* provides:

"proceeds of crime" means any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of	«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*) the commission in Canada of a designated offence, or	*a*) soit de la perpétration d'une infraction désignée;
(*b*) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.	*b*) soit d'un acte ou d'une omission qui, au Canada, aurait constitué une infraction désignée.

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[11] A "designated offence" is essentially an indictable offence and is defined as follows:

(*a*) any offence that may be prosecuted as an indictable offence under this or any other Act of Parliament, other than an indictable offence prescribed by regulation, or	*a*) Soit toute infraction prévue par la présente loi ou une autre loi fédérale et pouvant être poursuivie par mise en accusation, à l'exception de tout acte criminel désigné par règlement;
(*b*) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (*a*);	*b*) soit le complot ou la tentative en vue de commettre une telle infraction ou le fait d'en être complice après le fait ou d'en conseiller la perpétration.

[12] The relevant regulations are entitled *Regulations Excluding Certain Indictable Offences from the Definition of "Designated Offence"*, SOR/2002-63. They exclude indictable offences under the legislation listed in Schedule "A" hereto. That legislation has no impact on this case.

[13] The Canada Border Services Agency (CBSA) is responsible for the seizure and forfeiture of undeclared currency and monetary instruments under the Act. A CBSA officer (the Customs Officer) interrogated the Applicant at Pearson Airport on November 10, 2003. She prepared handwritten notes as she was interviewing the Applicant (the Customs Officer's Notes). She also prepared a report describing the Seizure and Forfeiture dated November 13, 2003 (the Seizure Report).

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[14] On November 19, 2003, the Applicant asked for a Minister's decision under section 25 of the Act. It states:

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

[15] After the Applicant asked for a ministerial decision, his file became the responsibility of CBSA's Recourse Directorate. There, an adjudicator reviewed the file and prepared a document formally described as a "Written Notice of Circumstances of Seizure" but informally known as a "Notice of Reasons for Action". In this case, it was dated January 12, 2004 (the Notice of Reasons) and was served on the Applicant pursuant to subsection 26(1) of the Act which says:

26. (1) If a decision of the Minister is requested under section 25, the President shall without delay serve on the person who requested it written notice of the	26. (1) Le président signifie sans délai par écrit à la personne qui a présenté la demande visée à l'article 25 un avis exposant les circonstances de la saisie à

circumstances of the seizure in respect of which the decision is requested.

l'origine de la demande.

[16] Thereafter, subsection 26(2) of the Act afforded the Applicant the opportunity to furnish evidence. It reads as follows:

26. (2) The person on whom a notice is served under subsection (1) may, within 30 days after the notice is served, furnish any evidence in the matter that they desire to furnish.

26. (2) Le demandeur dispose de trente jours à compter de la signification de l'avis pour produire tous moyens de preuve à l'appui de ses prétentions.

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[17] The Applicant filed the Applicant's Affidavit, the Pathinather Affidavit, the Chawla Affidavit and the Bookkeeper Affidavit described above. His counsel forwarded two letters which contained his submissions and also supplied three letters giving character references for the Applicant. This material will be discussed below.

[18] In addition to receiving the Applicant's evidence, the Respondent was entitled to pursue its own inquiries and did so in this case. The Applicant's lawyer advised the adjudicator that Constable David Kim of the RCMP had interviewed the Applicant on December 3, 2003 to address the possibility that the Applicant had been attempting to fund Tamil terrorists in Sri Lanka. The adjudicator had not known of the interview but said she would make inquiries. After doing so, she wrote to the Applicant's lawyer on June 18, 2004 and advised that:

> I have been advised that Constable Kim only investigated whether the currency was to be used for terrorist financing and there was no conclusive evidence to indicate it was intended for terrorist financing. He advised that his investigation did not entail whether the currency was money laundering or proceeds of crime.

[19] The adjudicator also obtained a report dated December 4, 2003 which described the Applicant's previous history with CBSA. It showed that on February 25, 1999, the Applicant had declared commercial goods but had failed to declare personal items worth approximately $400.00. As well, in 1994, he smuggled jewellery in saris. No particulars of this incident were available. However, when, as a result of that incident, he was subjected to a later search, nothing was found.

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[20] The Respondent also conducted a CPIC (Canadian Police Information Centre) search which showed that the Applicant had not been convicted of a criminal offence. Finally, the Minister's Delegate acknowledged during his cross-examination that there was no information in the adjudicator's file which linked the Applicant to organized crime.

[21] From September 2004 to July 2005, the Applicant's application for a Minister's decision was suspended while the Applicant pursued an Access to Information Request. However, in July 2005, the Applicant retained new counsel who revoked the suspension and asked for a decision as soon as possible.

[22] By this date, the first adjudicator had been promoted and a second adjudicator had assumed responsibility for the Applicant's file. She prepared a document entitled Case Synopsis and Reasons for Decision (the Synopsis and Reasons). It was signed by the adjudicator on September 25, 2005.

[23] The Synopsis and Reasons served as a recommendation and was given to a Manager in the Recourse Directorate. He was delegated to make the Minister's decisions under sections 25 and 29 of the Act (the Minister's Delegate). He signed the Synopsis and Reasons on October 3, 2005 and in so doing, he decided to confirm the Forfeiture of the Undeclared Currency and return the Declared Currency to the Applicant.

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[24] The final step was communicating his decision and by letter dated October 6, 2005, the Applicant was advised that the Minister's Delegate had concluded that subsection 12(1) of the Act had been contravened and had confirmed the Forfeiture of the Undeclared Currency (the Decision). These decisions were reached under subsections 27(1) and (3) and paragraph 29(1)(c) of the Act. They provide that:

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).
…	…
(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.
29. (1) If the Minister decides that subsection 12(1) was contravened, the Minister shall, subject to the terms and conditions that the Minister may determine,	29. (1) S'il décide qu'il y a eu contravention au paragraphe 12(1), le ministre, aux conditions qu'il fixe :
…	…
(*c*) subject to any order made under section 33 or 34, confirm that the currency or monetary instruments are forfeited to Her Majesty in right of Canada.	*c*) soit confirme la confiscation des espèces ou effets au profit de Sa Majesté du chef du Canada, sous réserve de toute ordonnance rendue en application des articles 33 ou 34.

THE EVENTS LEADING TO THE SEIZURE AND FORFEITURE

[25] On November 10, 2003, the Applicant arrived at Pearson airport to board a flight to Paris. From there, he planned to travel to Dubai and on to Sri Lanka. While at the airport, he did not report to the CBSA that he was transporting currency in excess of $10,000.00 CAD. At 6:30 pm, the Applicant was approached by the Customs Officer who asked what currency he was carrying at that time. In response to her query, he stated that he had only the Declared Currency. The Customs Officer examined his carry on luggage to verify his declaration and found two gold bars which the Applicant valued at $20,000.00 CAD. At this point, the Customs Officer noted that sweat was "pouring" down the Applicant's face. She then noticed a bulge in his pant's pocket which, when produced, turned out to be a large sum of money.

[26] At that point, the Customs Officer was joined by a supervisor and they escorted the Applicant to a private area in the jetway for further questioning. There, she found a total of eight envelopes of bills enclosed in elastic bands.

[27] After those discoveries, the Applicant was moved again to an area described as "Terminal I Secondary". In that location, the money was counted and forfeited and the Applicant was given a receipt. He was left in possession of his two gold bars (which are not considered currency in Canada), a quantity of jewellery and the petty cash in his wallet. The Forfeiture included both the Declared Currency and the Undeclared Currency.

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[28] The Applicant advised the Customs Officer that he travelled to Dubai in the United Arab Emirates about once a month. The Seizure Report shows that the Applicant's passport indicated that he had returned to Canada from Dubai on October 13, 2003. The Customs Officer's Notes show that the Applicant also said that he did not usually travel with large sums of money and was doing so only because it was close to Christmas.

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[29] The Applicant told the Customs Officer that he had bought his ticket on the day of the flight (Monday, November 10th) because the ticket office had been closed on Saturday the 8th. He said he was travelling to attend his father's funeral and that he would be away for one week. However, when the Customs Officer examined his tickets, she found that his ticket for travel that day to Paris had been issued on November 6th for a flight out on the 10th and returning on the 19th and that his ticket from Dubai to Colombo had been issued on October 31st. She, therefore, concluded that his trip was not for the purpose or for the duration he had stated.

[30] The Customs Officer's Notes show that the Applicant indicated quite early in his conversation with the Customs Officer that he was a jeweller and the Minister's Delegate agreed during his cross-examination on his affidavit sworn on April 12, 2006 that the Synopsis and Reasons inaccurately suggested that the Applicant had withheld information about being a jeweller until later in his interview with the Customs Officer.

[31] The Applicant told the Customs Officer that $47,000.00 of the Forfeited Currency had been lent to him by Kanthy Wilberg, a Montreal jeweller, to buy jewellery. Further,

$45,000.00 had been lent to him by George Mulhambery of Montreal also to buy jewellery. The Applicant provided Montreal telephone numbers for both jewellers and said he had driven to Montreal two days earlier to meet with them. The Applicant did not explain the source of the balance of the Forfeited Currency.

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THE EVIDENCE SUBMITTED ON THE APPLICANT'S BEHALF

[32] In his affidavit of March 1, 2004, the Applicant contradicted the information about the source of the currency that he had given to the Customs Officer. He swore that he had been given $45,000.00 by Mr. Pathinather of Montreal, Quebec for the purchase of specified items of jewellery and that $47,000.00 had been advanced to him by Mr. Chawla of Markham, Ontario for the purchase of gold bullion. In this regard, the Chawla Affidavit contradicted the Applicant. Mr. Chawla said he gave the Applicant $47,000.00 to buy 22 carat gold jewellery in Dubai. He made no mention of a bullion purchase.

[33] The Chawla Affidavit exhibited an undated letter without letterhead signed by Mr. Kurgan who confirmed that, in September 2003, he had loaned Mr. Chawla 93 oz. of fine gold from his personal holdings and that it had a value of $47,750.00 CAD. Mr. Chawla swore that the gold bullion he sold had been given to him as a loan to help him re-establish himself after a difficult financial period. Mr. Chawla said that the $47,000.00 in cash he provided to the Applicant was obtained when he sold that gold bullion to jewellers for cash. However, in spite of repeated requests from the adjudicator, no receipts or affidavits were provided to prove that these sales had occurred.

[34] The Pathinather Affidavit stated that, on November 6 or 7, 2003, he had provided the Applicant with $45,000.00 in cash which came from his business safe and which had been obtained from cash sales of jewellery. Again, in spite of the adjudicator's requests, no evidence was provided to substantiate those sales.

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[35] Messrs. Chawla and Pathinather said they trusted the Applicant because they had known and dealt with him over 3.5 and 10 years respectively. They deposed that the East Indian Community prefers cash transactions and that they commonly dealt with the Applicant in large sums of cash. What they did not explain, in spite of the adjudicator's expressions of concern, was the absence of any proof to substantiate the sales which generated the cash they said they gave to the Applicant.

[36] The Bookkeeper's Affidavit indicated his belief that the balance of the Forfeited Currency (after deducting Mr. Chawla's $47,000.00 and Mr. Pathinather's $45,000.00) was withdrawn from the Business account. He based this belief on his finding that between September 19 and November 10, 2003, the Applicant withdrew $37,000.00 "…through six cheques on the Business account issued to himself…". The particulars of the cheques are as follows:

September 19, 2003	$8,000.00
September 24, 2003	8,000.00
September 25, 2003	6,000.00
November 7, 2003	5,000.00
November 7, 2003	7,000.00
November 10, 2003	3,000.00

[37] This evidence was inaccurate. The cheques were not issued to the Applicant. Rather, they were payable to the Applicant's wife. However, in the Applicant's Affidavit he says that he received the money when the cheques were cashed.

[38] The Applicant's Affidavit also states that:

- He is well-travelled and flies from Toronto to Dubai every one or two months.
- He had never before carried a large amount of currency. He normally uses bank transfers. He was not aware he had to declare business currency.
- He did not reveal the identities of Mr. Pathinather and Mr. Chawla for fear that as members of Canada's East Indian Community, they would fall under suspicion.
- He carried cash for jewellery purchases in Dubai on this trip because he was on a tight schedule and would have had trouble using Canadian banking services on Remembrance Day, November 11, 2003.

[39] When the adjudicator reviewed the Chawla and Pathinather Affidavits, she wrote to the Applicant's counsel on March 15 and May 3, 2004 saying that they did not "substantiate the legitimacy of their portion of the seized currency." In her first letter, she suggested that legitimate businesses keep records of their funds and she expressed concern that the Applicant's explanation for carrying cash did not make sense when she indicated her understanding that Canadian cash is not easily used for purchases in foreign countries. She asked for more information but none was forthcoming.

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[40] The three letters of reference for the Applicant were ultimately discounted in the Synopsis and Reasons on the basis that they did not address the specific problem of the legitimacy of the Forfeited Currency.

THE DECISION

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[41] The Minister's Delegate concluded that there were reasonable grounds to suspect that the Undeclared Currency was proceeds of crime.

[42] The Reasons in the Minister's Delegate letter of October 6 read as follows:

> The evidence submitted has confirmed that you were specifically questioned by a Customs officer at Pearson International Airport on November 10, 2003, and you advised the officer that you did not have currency in excess of $10,000.00 CAD. Examination revealed $435.00 USD currency and $123,000.00 Canadian currency. Consequently, by virtue of section 12 and 18 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act; the currency was lawfully subject to seizure. No terms of release were offered for the currency as the officer had reasonable suspicions to suspect proceeds of crime.
>
> Although your solicitor's representations have been considered, mitigation has not been granted in this case. The evidence provided is not verifiable and does not substantiate the origin of the currency. Based on the totality of the evidence and the lack of verifiable evidence to support the legitimate origin of the currency, reasonable suspicion still exists. As such the currency has been held as forfeit. However, it has been decided that the declared currency ($4,000.00 Canadian and $400.00 USD) should be returned to you.

[43] The Synopsis and Reasons shows that the Applicant had failed to address the adjudicator's concerns regarding:

- the packaging of the Forfeited Currency - Why was it in eight envelopes, some with mixed denominations and bound with elastics?;
- the contradictory evidence – At Pearson, the Applicant told the Customs Officer that the Forfeited Currency came from two Montreal jewellers. He gave their names and phone numbers and said he had met them a few days earlier. But the Applicant's Affidavit gave two entirely different names, only one was in Montreal. As well, they were no longer the only source of the funds. He added the Business as a source;
- the fact that money had been withdrawn from the Business account in September for a trip in November even though there was an intervening trip to Dubai in October 2003;
- the lack of documentation showing that sales of gold and jewellery had generated the funds from Messrs. Chawla and Pathinather;
- the Applicant's untrue statements to the Customs Officer about the purpose of his trip and the date on which he purchased his ticket for the November 10th flight;
- the Applicant's statement that he intended to use the money for jewellery purchases in Dubai where Canadian currency is not readily accepted.

[44] It is clear to me that the adjudicator's focus on proof of the actual source of the Forfeited Currency was appropriate. It was not enough to merely show through bank statements and bald statements in affidavits that the Applicant and his business associates had sufficient means to have provided the Forfeited Currency. In this regard, see the

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decision of Blais J. in *Martirossian v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 1119 at paragraph 36.

[45] In his affidavit of April 12, 2006, the Minister's Delegate expanded on his Reasons. I have deleted the passages in paragraphs 14(b) and 19 which he acknowledged were inaccurate during his cross-examination.

> 14. In my view, this material demonstrated that there were reasonable grounds to suspect that the undeclared currency seized from the Applicant on November 10, 2003 was proceeds of crime within the meaning of subsection 462.3(1) of the *Criminal Code*, the most significant of which were the following:
>
> (a) the fact that the Applicant was attempting to export a very large amount of currency and chose to report only a small fraction of this currency to the Customs officer;
> (b) the fact that when questioned about … the origin of the currency by the Customs officer, the Applicant provided a conflicting and unclear explanation;
> (c) the fact that further to his request for a ministerial review of the seizure, the Applicant provided an explanation for the origin of the currency that differed from that provided originally to the Customs officer; and
> (d) the fact that the ultimate explanation provided by the Applicant for the origin of the currency is implausible and not corroborated by sufficient supporting documentation.
>
> 15. With respect to the first ground, the material before me demonstrated that the Applicant was traveling with $123,000 (Canadian) and $435 (U.S.). It also demonstrated that the Applicant was a frequent international traveler who would have been aware of currency reporting requirements. Yet when he was asked by a Customs officer how much currency he had in his possession, the Applicant chose to only report $4,000 (Canadian) and $400 (U.S.). In my view, such behaviour raises a suspicion that the currency in question is illicit.

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16. In particular, because of the risk of theft or loss, most individuals who legitimately possess such large amounts of funds would not attempt to transport these funds in the form of bulk currency. Instead, individuals who wish to transfer large amounts of legitimate funds between countries generally do so using the services of financial institutions (i.e., electronic funds transfers, bank drafts, money orders, traveller's cheques, etc.) because they are faster, cheaper and more secure than bulk cash transportation.

17. In addition, unlike currency of the United States of America, Canadian currency is not readily used or accepted in countries other than Canada. Therefore, it is implausible that large quantities of legitimate Canadian currency would be brought by a traveler to a country such as the United Arab Emirates in order to conduct legitimate business.

18. Furthermore, while recognizing that an occasional traveller may nevertheless decide to incur the risk and inconvenience of travelling with large sums of Canadian currency, it is highly unlikely that such a traveller would then fail to truthfully respond to specific questioning from a Customs officer about the amount of currency being carried unless the currency is in fact illicit and the traveller fears discovery and confiscation of the currency.

19. …When asked by the Customs officer to explain the origin of the currency, the Applicant initially advised that he was unsure of the identities of the individuals who had given him the currency. Later, the Applicant stated that a certain "Kanthy Wilkerg" and "George Mulhambery", both from Montreal, provided him with $47,000 (Canadian) and $45,000 (Canadian) respectively to purchase jewellery. While providing these vague and conflicting explanations, the Applicant was visibly nervous with sweat pouring down his face. In my view, such behaviour raises a suspicion that the currency in question is illicit.

20. In particular, currency can either originate from a legitimate legal source or from the proceeds of crime. For the reasons set out at paragraphs 16 to 18 above, the larger the amount of Canadian currency that is being transported internationally yet not declared, the less likely it will have originated from a legal source. For the rare individual who transports large sums of legitimately earned currency destined for legal purposes, it can be expected that he or

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she will be able to clearly explain both the source and intended use of the currency. On the other hand, a traveller's inability to clearly provide such explanations is indicative that he or she is aware that the currency was not earned through legitimate means or is intended for illicit use.

21. With respect to the third ground, the material before me indicated that in March 2004, approximately four months after advising the Customs officer that a certain "Kanthy Wilkerg" and "George Mulhambery", both of Montreal, provided him with $47,000 (Canadian) and $45,000 (Canadian) respectively to purchase jewellery, the Applicant provided a different explanation for the origin of the funds. Now, the Applicant was stating that Shudhir Chawla of Markham, Ontario provided him with $47,000 (Canadian) while George Montgomery Pathinather of Montreal provided him with $45,000 (Canadian) to purchase jewellery. In addition, for the first time, the Applicant explained that the balance of the currency he was carrying ($31,000 (Canadian) and $435 (U.S.)) had been withdrawn from the business account of Jayasaji Jewellery Ltd., a wholesale jewellery company that the Applicant owns with his wife Palaran Gowrikumaran. In my view, the fact that the Applicant has provided this new explanation for the origin of the funds which differs from that provided at the time of the seizure raises a suspicion that the currency in question is illicit for the reasons set out at paragraph 20 above.

22. With respect to the fourth ground, the material before me indicated that while Shudhir Chawla and George Montgomery Pathinather had stated that they provided the Applicant with a total of $92,000 (Canadian) to purchase certain vaguely described jewellery in the United Arab Emirates on their behalf, neither provided contracts, receipts or any other documentation to support the existence of such a significant financial obligation. In addition, while copies of cheques and bank statements were provided to show that six cheques made payable to the Applicant's wife in September and early November 2003 were drawn down against Jayasaji Jewellery Ltd. bank account, there was no indication that the balance of the currency seized on November 10, 2003 indeed originated from these accounts. In my view, the fact that the Applicant could not provide persuasive documentation to establish a legitimate origin for the funds raises a suspicion that the currency in question is illicit.

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> 23. In particular, it is not plausible that legitimate businesses seeking to purchase $92,000 worth of jewellery in a foreign country would do so by entrusting another person with currency in that amount and providing him with vague instructions about the type and quantity of jewelerly [sic] to buy, without documenting this arrangement in any form. The fact that the Applicant has chosen to provide such an implausible and unsubstantiated explanation for the origin of the currency renders it reasonable to suspect that the currency is in fact proceeds of crime.
>
> 24. In sum, on the basis of all of the material that was before me, with particular emphasis on the grounds set out above and taken as a whole, I concluded that it was reasonable to suspect that the unreported currency in the amount of $119,000 (Canadian) and $35 (US) was proceeds of crime within the meaning of subsection 462.3(1) of the *Criminal Code*.

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THE STANDARD OF REVIEW

[46] The following pragmatic and functional analysis has been prepared in light of the Supreme Court of Canada's decisions in *Pushpanathan v. Canada (Minister of Citizenship and Immigration),* [1998] 1 S.C.R. 982 and *Dr. Q v. College of Physicians and Surgeons of British Columbia,* [2003] 1 S.C.R. 226.

(i) Privative Clause/Appeal Provisions

[47] The Act includes a strong privative clause. Section 24 states:

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	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

sections 25 to 30.

que dans la mesure et selon les modalités prévues aux articles 25 à 30.

Further, there is no statutory appeal in sections 25 to 30 of the Act from a decision to confirm a forfeiture under section 29 of the Act. Review is only available in judicial review proceedings. In this regard, see: *Tourki v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2006] F.C.J. No. 52 at paragraphs 30 to 36 and *Ha v. Canada (Minister of Public Safety and Emergency Preparedness*, [2006] F.C.J. No. 1123 at paragraph 7.

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[48] In my view, these facts suggest a high degree of deference.

(ii) Relative Expertise

[49] Section 29 decisions about the appropriate penalty to impose when currency is unreported are made by Minister's delegates. They are individuals who hold the position of "Manager" in the Adjudications Division of the CBSA's Recourse Directorate. The cross-examination of the Minister's Delegate on his affidavit in this case discloses 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".

[50] There have been 307 decisions made under section 29 since it came into force on January 6, 2003 and in 216 of those cases, forfeiture of the seized currency was

confirmed. For these reasons, I acknowledged that Managers have considerable expertise relative to the Court.

[51] I should note that, after the hearing in this case, Respondent's counsel wrote the Court on February 7, 2007. The letter referred to a decision of my colleague, Mr. Justice Beaudry, in *Marc Elie Thérancé c. Canada (Ministre de la sécurité publique)*, 2007 CF 136. That case also involved an application for judicial review of a decision of a Minister's Delegate under section 29 of the Act. Following a pragmatic and functional analysis, Beaudry, J. concluded, with the agreement of counsel for both parties, that the Standard of Review was patent unreasonableness.

[52] In *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at paragraph 50, the Federal Court of Appeal emphasized the importance of undertaking the functional and pragmatic analysis every time judicial review of a decision is before the Court even if earlier judgments have dealt with the standard of review to be applied to decisions under the same statutory provision.

[53] Accordingly, I am required to make a fresh assessment of the standard of review on the facts of this case and in my view, Justice Beaudry's decision can be distinguished because in this case the Minister's Delegate was not required to use any special expertise in reaching the Decision. The fact that the Applicant contradicted himself and failed to supply adequate documentation are issues which the Court is also able to address. Accordingly, in this case, this factor does not suggest a high degree of deference.

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(iii) The Purpose of the Act and of Section 29

[54] The Act received Royal assent on June 29, 2000. Its objectives include detecting and deterring money laundering and terrorist financing. They are set out at section 3. It reads in part:

(*a*) to implement specific measures to detect and deter money laundering and the financing of terrorist activities and to facilitate the investigation and prosecution of money laundering offences and terrorist activity financing offences, including	*a*) de mettre en oeuvre des mesures visant à détecter et décourager le recyclage des produits de la criminalité et le financement des activités terroristes et à faciliter les enquêtes et les poursuites relatives aux infractions de recyclage des produits de la criminalité et aux infractions de financement des activités terroristes, notamment :
…	…
ii) requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments,	(ii) établir un régime de déclaration obligatoire des opérations financières douteuses et des mouvements transfrontaliers d'espèces et d'effets,
…	…
(*b*) to respond to the threat posed by organized crime by providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves; and	*b*) de combattre le crime organisé en fournissant aux responsables de l'application de la loi les renseignements leur permettant de priver les criminels du produit de leurs activités illicites, tout en assurant la mise en place des garanties nécessaires à la protection de la vie privée des personnes à l'égard des renseignements personnels les concernant;
(*c*) to assist in fulfilling Canada's international commitments to participate in the fight against transnational crime, particularly money laundering, and the fight against terrorist activity.	*c*) d'aider le Canada à remplir ses engagements internationaux dans la lutte contre le crime transnational, particulièrement le recyclage des produits de la criminalité, et la lutte contre les activités terroristes.

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[55] In order to implement the objective specified at paragraph 3(a)(ii), Part 2 of the Act provides for a currency reporting regime under which importers and exporters of currency must make a report to a Customs official whenever they import or export currency or monetary instruments valued over $10,000.00 CAD.

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[56] Part 2 of the Act became effective with the coming into force of the *Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412 on January 6, 2003.

[57] In the event of a failure to report, Parliament has mandated serious sanctions including forfeiture in the event there are reasonable grounds to suspect that the undeclared currency is proceeds of crime or funding for terrorists. The existence of this sanction not only encourages compliance with the reporting obligations but also ensures that suspected proceeds of crime or funds for terrorists are not returned to persons who have contravened the Act by not reporting.

[58] The Respondent says that in enforcing Part 2 of the Act, the Minister's Delegate is engaged in a balancing of the interests of the Applicant with those of the Canadian public. However, I do not accept this characterization. In my view, the balancing of private and public interests was done by Parliament when it established the legislative scheme. A Minister's Delegate has a much narrower role under section 29. He is simply determining whether, on the facts in a particular applicant's case, a forfeiture should be confirmed. Accordingly, because, in my view, this factor is not polycentric it does not suggest a deferential approach.

(iv) ***The Nature of the Question – Law or Fact***

[59] Once a Minister's Delegate correctly applies the correct burden of proof to an applicant's evidence, the remainder of the Decision is fact driven. This suggests significant deference on factual matters but none on the burden of proof.

Conclusion

[60] I have concluded that, in this case, primarily because relative expertise does not actually play a significant role, I will review the Decision using a reasonableness standard except when dealing with the burden of proof faced by an applicant who wishes to dispel "reasonable grounds to suspect". On that issue, correctness will be the standard of review.

THE ISSUES

[61] The Applicant has raised the following issues. The headings are mine.

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No reasonable grounds?

I. The Minister erred in his decision that the funds in question are forfeit insofar as there exists no reasonable grounds to suspect that the funds in question are the proceeds of crime.

An improper test?

II. The Minister erred in his decision insofar as he improperly reversed the burden of proof, finding, in effect, that the Applicant failed to prove that the funds in question were not the proceeds of crime.

A contradictory decision?

III. The Minister erred in his decision insofar as his decision is, on its face, contradictory and therefore unreasonable.

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I. No reasonable grounds

[62] The Applicant says that the sole reason for the Decision was the Applicant's failure to report. However, this submission is not borne out by the facts. It is clear that the Applicant's lies and failure to provide documentation played a large part in the Decision.

II. An Improper Test

[63] Section 29 of the Act is silent about the principles to be used by a Minister's Delegate in deciding whether to confirm a currency forfeiture. However, the Decision makes it clear that, in this case, the Minister's Delegate was determining whether a reasonable suspicion still existed. In other words, the Minister's Delegate adopted for the Decision the test the Customs Officer at the airport was required to use when she

declined to return the Forfeited Currency, pursuant to subsection 18(2) of the Act. That subsection provides that she must have had "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". In my view, the Decision stated the correct test when it indicated that the Minister's Delegate was determining whether such reasonable grounds still existed.

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[64] However, the Applicant submits that the Minister's Delegate did not apply the test correctly because he relied on the Synopsis and Reasons and it states:

> …Mr. Sellathurai broke the law by failing to declare $123,574.20 in Canadian currency. Having broken the law and failed to declare, a person cannot regain currency seized as forfeit, on a reasonable suspicion under the *Act*, by merely telling a story that could be true. An innocent explanation as to the origin of the funds must be proven in sufficient detail and with enough credible, reliable and independent evidence to establish that no other reasonable explanation is possible. Otherwise, reasonable doubts remain and the forfeiture stands.
>
> [my emphasis]

[65] I am persuaded, having read the transcript of the cross-examination of the Minister's Delegate on his affidavit that he relied to a considerable degree on the Synopsis and Reasons. This means that I cannot discount the possibility that he may well have been influenced by the adjudicator's opinion about the burden of proof to be borne to the Applicant. She appears to have thought that, to dispel reasonable grounds for suspicion, an applicant must prove an innocent explanation beyond all doubt.

[66] Before reviewing the law, it is helpful to recall the context. The Applicant is not involved in a criminal proceeding or indeed in any *in personam* matter. This is an administrative proceeding *in rem*. It concerns only the Undeclared Currency and whether there are reasonable grounds to suspect that it is proceeds of crime. In *Martineau v. Canada (M.N.R.)*, [2004] 3 S.C.R. 737 at paragraph 56, Justice Fish writing for a unanimous court held that seizures and forfeitures under the *Customs Act* are not penal in nature, but are rather administrative measures intended to provide a timely and effective means of enforcing the *Customs Act*.

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[67] Although this case concerns "reasonable grounds to suspect", the Supreme Court of Canada's interpretation of the phrase "reasonable grounds to believe" is an appropriate starting point. In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at paragraph 114, the Court said the following:

> The first issue raised by s. 19(1)(j) of the *Immigration Act* is the meaning of the evidentiary standard that there be "reasonable grounds [page 145] to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less that the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship & Immigration)* (2000), 9 Imm. L.R. (3d) 61 (F.C.T.D.).
>
> [my emphasis]

[68] In the earlier case of *R. v. Monney*, [1999] 1 S.C.R. 652, the Court had considered section 98 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.), which required a customs officer to suspect on reasonable grounds that a person had narcotics secreted on or about his person before conducting a strip search.

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[69] In this context, the Court said at paragraph 49:

> …Having determined, however, that the search conducted by the customs officers was constitutionally permissible pursuant to s. 98 of the Customs Act on the basis of reasonable grounds to suspect, which can be viewed as a lesser but included standard in the threshold of reasonable and probable grounds to believe, I see no reason to interfere with the implicit factual finding at trial, confirmed on appeal, that Inspector Roberts had at the very least reasonable grounds to suspect that the respondent had ingested narcotics.
>
> [my emphasis]

[70] The question then is how to describe the lesser but included standard. In my view, even reasonable grounds to suspect must involve more that a "mere" or subjective suspicion or a hunch. The suspicion must be supported by credible objective evidence. In this regard, see *R v. Calderon*, [2004] O.J. No. 3474. There, the Ontario Court of Appeal considered whether police officers had reasonable grounds to suspect that the appellants had been implicated in the transportation of drugs. In that connection, the Court noted that an objective assessment was essential. The Court said at paragraph 69 that "… even a hunch born of intuition gained by experience …" would not support a conclusion that reasonable grounds to suspect were present.

[71] If credible objective evidence is required to support a suspicion, the question becomes where does the lesser standard appear. To this point, both reasonable grounds to believe and suspect have been treated identically. In my view, the difference must appear in the characterization of the evidence. In *Mugasera, supra*, the Court said that "compelling" evidence was needed to support reason to believe. In my view, this is where the distinction is made. Evidence to support a suspicion need not be compelling, it must simply be credible and objective.

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[72] 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.

[73] 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.

[74] In this case, the adjudicator required proof beyond all doubt and I am satisfied that this constituted an error in law because proof beyond a reasonable doubt is sufficient to defeat reasonable grounds for suspicion.

[75] The next question is whether this error was material. In this regard, I have concluded that it was not. There can be no suggestion on the facts of this case that the Applicant met the correct standard. His evidence failed to displace, beyond a reasonable doubt, the objective and credible evidence supporting the Minister's Delegate's suspicion that the Undeclared Currency was proceeds of crime.

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[76] In *Canadian Cable Television Assn. v. American College Sports Collective of Canada, Inc. (C.A.)*, [1991] 3 F.C. 626 at paragraph 41, the Court said:

> 41. If a final word needs to be said, let it be that an inconsequential error of law, or even a number of them, which could have no effect on the outcome do not require this Court to set aside a decision … The authorities have all required a real possibility that the result was affected.

[77] Since I can see no possibility that the error affected the Decision, the application for judicial review will not succeed on this issue.

III. Contradictory Decision

[78] The Applicant says the Decision should be set aside because it is "contradictory" in that the Declared Currency was returned even though the evidence relating to its origin did not differ from that relating to the origin of the Undeclared Currency. In other words, the Applicant takes issue with the fact that the Decision differed as between the Declared and the Undeclared Currency without a logical explanation for the difference.

[79] However, the Respondent points out that, under section 28 of the Act, the Minister's Delegate was obliged to return the Declared Currency once he concluded that

it had been reported. This was so whether or not he still had reasonable grounds to suspect that it was proceeds of crime. In light of this submission, I have concluded that the return of the Declared Currency does not undermine the Decision.

NON ISSUES

[80] Before the hearing adjourned, Applicant's counsel began his submissions in reply and asked for leave to raise the sufficiency of the reasons in the Decision of October 6, 2005 as an issue. Leave was refused as the request was made far too late in the process.

[81] In his written submissions in reply, the Applicant's counsel raised a second new issue alleging that the adjudicator never told the Applicant that she had concerns about the evidence in the Bookkeeper's Affidavit. Again, because it was first raised in reply, I have not dealt with this submission.

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JUDGMENT

For all these reasons the application is hereby dismissed with costs.

"Sandra J. Simpson"
Judge

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FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Louis P. Strezos	FOR APPLICANT
Jan Brongers	FOR RESPONDENT

SOLICITORS OF RECORD:

Louis P. Strezos & Associates Toronto, Ontario	FOR APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR RESPONDENT

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SCHEDULE “A”

EXCLUSION

1. The indictable offences under the following Acts are excluded from the definition "designated offence" in subsection 462.3(1) of the *Criminal Code*:

(*a*) *Budget Implementation Act, 2000*;

(*b*) *Canada Agricultural Products Act*;

(*c*) *Copyright Act*;

(*d*) *Excise Act*, except for the indictable offences under subsections 233(1) and 240(1);

(*e*) *Excise Tax Act*;

(*f*) *Feeds Act*;

(*g*) *Fertilizers Act*;

(*h*) *Foreign Publishers Advertising Services Act*;

(*i*) *Health of Animals Act*;

(*j*) *Income Tax Act*;

(*k*) *Meat Inspection Act*;

(*l*) *Nuclear Safety and Control Act*, except for the indictable offence under section 50;

(*m*) *Plant Protection Act*; and

(*n*) *Seeds Act*.

1. Les actes criminels prévus par les lois ci-après sont exclus de la définition de « infraction désignée », au paragraphe 462.3(1) du *Code criminel*:

a) la *Loi d'exécution du budget de 2000*;

b) la *Loi sur les produits agricoles au Canada*;

c) la *Loi sur le droit d'auteur*;

d) la *Loi sur l'accise*, exception faite des actes criminels prévus aux paragraphes 233(1) et 240(1) de cette loi;

e) la *Loi sur la taxe d'accise*;

f) la *Loi relative aux aliments du bétail*;

g) la *Loi sur les engrais*;

h) la *Loi sur les services publicitaires fournis par des éditeurs étrangers*;

i) la *Loi sur la santé des animaux*;

j) la *Loi de l'impôt sur le revenu*;

k) la *Loi sur l'inspection des viandes*;

l) la *Loi sur la sûreté et la réglementation nucléaires*, exception faite de l'acte criminel prévu à l'article 50 de cette loi;

m) la *Loi sur la protection des végétaux*;

n) la *Loi sur les semences*.

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