A-148-07
2008 FCA 255

Gowrkumaran Sellathurai (*Appellant*)

v.

Minister of Public Safety and Emergency Preparedness (Solicitor General of Canada) (*Respondent*)

INDEXED AS: SELLATHURAI v. CANADA (MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS) (F.C.A.)

Federal Court of Appeal, Nadon, Pelletier and Ryer JJ.A.—Toronto, June 17; Ottawa, September 9, 2008.

Customs and Excise — Proceeds of Crime (Money Laundering) and Terrorist Financing Act — Appeal from Federal Court decision dismissing application for judicial review of Minister's delegate's decision declining to return undeclared currency seized by customs officer — Act, s. 12 requiring all persons entering or leaving Canada with more than prescribed amount of currency to report amount to nearest customs office upon arriving in or leaving Canada — Act, s. 18 authorizing seizure in event of breach of s. 12 — No terms of release offered pursuant to Act, s. 18(2), as reasonable grounds at time of seizure to suspect funds proceeds of crime within meaning of Criminal Code, s. 462.3(1), or used in funding terrorism — Ministerial review of customs officer's decision finding evidence as to origin of funds neither verifiable nor supporting legitimacy of seized currency — Per Pelletier J.A. (Nadon J.A. concurring): Once breach of Act, s. 12 confirmed by Minister, only issue remaining for Act., s. 29 decision, whether Minister persuaded to grant relief from forfeiture — Must be satisfied seized funds not proceeds of crime — Minister mischaracterizing nature of problem — Decision, affidavit suggesting Minister considering grounds for suspicion identified by customs officer, deciding whether grounds still legitimate — Applications Judge thus concluding Minister adopted test imposed on customs officer by Act, s. 18(2) — Affidavit inappropriate and without weight, as impermissibly improving upon reasons given — Minister's decision under Act, s. 29, reviewable on standard of reasonableness — Not unreasonable for Minister to decline to accept unverifiable evidence at face value — Appeal dismissed — Per Ryer J.A. (concurring): Minister's delegate adopting reasonable grounds to suspect test in Act, s. 18(2) — As credible, objectively ascertainable evidence sought as basis upon which to ground s. 29(1) decision, Minister's delegate correctly understanding appropriate legal standard underpinning s. 18(2) test — Reasonable inference criminality reasonably suspected of being associated with undeclared funds constituting designated indictable offence within meaning of Criminal Code, s. 462.3(1), as required by test in Act, s. 18(2).

This was an appeal from a Federal Court decision dismissing an application for judicial review of the Minister's delegate's decision declining to return approximately $123 000 of undeclared currency seized by a customs officer as the appellant was about to depart for Sri Lanka from Pearson International Airport.

The funds were seized and forfeited because the appellant failed to declare them to a customs officer as required by section 12 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (Act). Section 12 of the Act requires all persons entering or leaving Canada with more than a prescribed amount of currency to report that amount to the nearest customs office upon arriving in or leaving Canada, while section 18 of the Act authorizes seizure in the event of a breach of section 12. As there were reasonable grounds at the time of seizure to suspect that the funds were proceeds of crime within the meaning of subsection 462.3(1) of the *Criminal Code* or were to be used in the funding of terrorism, no terms of release pursuant to subsection 18(2) of the Act were offered. Upon review, the Minister's delegate confirmed the forfeiture of undeclared funds and found that the

evidence submitted as to the source of the funds was not verifiable and did not support the legitimate origin of the seized currency.

The issue was whether the Minister's delegate properly exercised his discretion, under subsection 29(1).

Held, the appeal should be dismissed.

Per Pelletier J.A. (Nadon J.A. concurring): (1) Once the breach of section 12 of the Act is confirmed by the Minister, the only issue remaining for the section 29 decision is whether the Minister can be persuaded to grant relief from forfeiture. He must be satisfied that the seized funds are not proceeds of crime. The Minister mischaracterized the nature of the problem by indicating that "reasonable suspicion still exists". This suggested that the Minister considered the reasonable grounds for suspicion identified by the customs officer and decided whether those grounds were still legitimate. In her reasons, the applications Judge equated this exercise with the adoption, by the Minister, of the test imposed on the customs officer by subsection 18(2) of the Act.

The affidavit filed by the Minister's delegate, in which he restated and reviewed the grounds for suspicion identified by the customs officer, and indicated why he believed they remained unanswered, may have led the applications Judge to that conclusion. This form of affidavit is inappropriate and should not have been given any weight at all. The Federal Court has previously stated that a tribunal or a decision maker cannot improve upon the reasons given to the applicant by means of the affidavit filed in the judicial review proceedings.

(2) The standard of proof that an applicant must meet in order to satisfy the Minister that the seized funds are not proceeds of crime is resolved by the issue of standard of review. The Minister's decision under section 29 of the Act is reviewable on a standard of reasonableness. It was not unreasonable for the Minister to decline to accept the appellant's unverifiable evidence at face value.

Per Ryer J.A. (concurring): This appeal had to proceed on the basis that the Minister's delegate adopted the reasonable grounds to suspect test in subsection 18(2) of the Act and that the issue was whether the Minister's delegate properly applied that test. The question of whether the reasonable grounds to suspect element of subsection 18(2) was properly interpreted by the Minister's delegate in making the subsection 29(1) decision was reviewable on the standard of correctness. The record indicated that credible and objectively ascertainable evidence was sought as the basis upon which to ground the subsection 29(1) decision. As such, the subsection 29(1) decision was unassailable in terms of whether it was based upon a correct understanding of the appropriate legal standard that underpins the reasonable grounds to suspect test.

The application of the legal test for reasonable grounds to suspect by the Minister's delegate to the facts that were before him was reviewable on the standard of reasonableness. The Minister's delegate concluded that it was reasonable to suspect that the undeclared funds were proceeds of crime within the meaning of subsection 462.3(1) of the *Criminal Code*. This demonstrated that the Minister's delegate determined that it was reasonable to suspect that the undeclared funds were the proceeds of a designated indictable offence under subsection 462.3(1) of the Code. The fact that the undeclared funds consisted of C$119 000 in mixed denominations that were out of order and held together with elastics, supported a reasonable inference that the criminality reasonably suspected of being associated with the undeclared funds was a designated indictable offence.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Criminal Code, R.S.C., 1985, c. C-46, ss. 2 "terrorist activity" (as enacted by S.C. 2001, c. 41, s. 2), 462.3(1) (as enacted by R.S.C., 1985 (4th Supp.), c. 42, s. 2; S.C. 2001, c. 32, s. 12),"designated offence" (as enacted by S.C. 1996, c.19, s.68; S.C. 2001, c. 32, s. 12), "proceeds of crime" (as enacted by R.S.C., 1985 (4th Supp.), c. 42, s. 2; S.C. 2001, c. 32, s. 12).
Cross-border Currency and Monetary Instruments Reporting Regulations, SOR/2002-412, s. 2.
Customs Act, R.S.C. 1985 (2nd Supp.), c. 1.

Excise Act, R.S.C., 1985, c. E-14.
Income Tax Act, R.S.C., 1985 (5th Supp.), c. 1.
Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17, ss. 1 (as am. by S.C. 2001, c. 41, s. 48), 12 (as am. *idem*, s. 54), 18 (as am. *idem*, s. 134), 22 (as am. *idem*, s. 60), 23, 24, 25 (as am. *idem*, s. 61), 26, 27 (as am. *idem*, s. 62), 28, 29, 30 (as am. *idem*, s. 139).
Regulations Excluding Certain Indictable Offences from the Definition of "Designated Offence", SOR/2002-63, s. 1.

CASES JUDICIALLY CONSIDERED

APPLIED:

Dag v. Canada (Minister of Public Safety and Emergency Preparedness) (2008), 70 Admin. L.R. (4th) 214; 377 N.R. 212; 2008 FCA 95; *Tourki v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2008] 1 F.C.R. 311; (2007), 284 D.L.R. (4th) 356; 223 C.C.C. (3d), 267; 367 N.R. 148; 2007 FCA 186; *The King v. Central Railway Signal Co.*, [1933] S.C.R. 555; [1933] D.L.R. 737; *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190; (2008), 329 N.B.R. (2d) 1; 291 D.L.R. (4th) 577; 69 Admin. L.R. (4th) 1; 64 C.C.E.L. (3d) 1; [2008] CLLC 220-020; 69 Imm. L.R. (3d) 1; 170 L.A.C. (4th) 1; 95 L.C.R. 65; 372 N.R. 1; 2008 SCC 9; *R. v. Kang-Brown*, [2008] 1 S.C.R. 456; (2008), 432 A.R. 1; 293 D.L.R. (4th) 99; [2008] 6 W.W.R. 117; (2008), 87 Alta. L.R. (4th) 1; 230 C.C.C. (3d) 289; 55 C.R. (6th) 240; 169 C.R.R. (2d) 61; 373 N.R. 67; 2008 SCC 18.

CONSIDERED:

R. v. Pilarinos, 2001 BCSC 1690; *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2; (1982), 137 D.L.R. (2d) 558; 44 N.R. 354; *Simmonds v. M.N.R.* (2006), 289 F.T.R. 15; [2006] 2 C.T.C. 261; [2006] D.T.C. 6083; 2006 FC 130.

REFERRED TO:

Dag v. Canada (Minister of Public Safety and Emergency Preparedness) (2007), 65 Admin. L.R. (4th) 31; 318 F.T.R. 269; 2007 FC 427; affd (2008), 70 Admin. L.R. (4th) 214; 377 N.R. 212; 2008 FCA 95; *Dupre v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 1177; *Hamam v. Canada (Minister of Public Safety and Emergency Preparedness)* (2007), 314 F.T.R. 151; 2007 FC 691; *Yang v. Canada (Minister of Public Safety and Emergency Preparedness)* (2008), 79 Admin. L.R. (4th) 168; 324 F.T.R. 22; 2008 FC 158; *Lyew v. Canada (Minister of Public Safety and Emergency Preparedness)* (2007), 317 F.T.R. 234; 2007 FC 1117; *Dang v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 157; *Ondre v. Canada (Minister of Public Safety and Emergency Preparedness)* (2007), 312. F.T.R. 134; 2007 FC 454; *Yusufov v. Canada (Minister of Public Safety and Emergency Preparedness)* (2007), 312 F.T.R. 122; 2007 FC 453; *Majeed v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 1082; *Qasem v. M.N.R.*, [2008] 3 F.C.R. 385; (2008), 322 F.T.R. 47; 2008 FC 31; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d); 243 N.R. 22; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; (1998), 160 D.L.R. (4th) 193; 11 Admin. L.R. (3d) 1; 43 Imm. L.R. (2d) 117; 226 N.R. 201; amended reasons [1998] 1 S.C.R. 1222; (1998), 11 Admin. L.R. (3d) 130; *Kalra v. Canada (Minister of Citizenship and Immigration)* (2003), 29 Imm. L.R. (3d) 208; 2003 FC 941; *Yue v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 717; *Abdullah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185; *Molson Breweries v. John Labatt Ltd.*, [2000] 3 F.C. 145; (2000), 5 C.P.R. (4th) 180; 252 N.R. 91 (C.A.); *R. v. Shah*, [1992] B.C.J. No. 2716 (Prov. Ct.) (QL); *R. v. Clymore* (1992), 74 C.C.C. (3d) 217 (B.C.S.C.); *R. v. Hicks*, [2000] B.C.J. No. 2653 (Prov. Ct. (Crim. Div.)) (QL).

APPEAL from the decision of the Federal Court ((2007), 63 Admin. L.R. (4th) 161; 309 F.T.R. 114; 2007 FC 208) dismissing an application for judicial review of the Minister's delegate's decision declining to return approximately $123 000 of undeclared currency seized from the appellant by a customs officer. Appeal dismissed.

APPEARANCES:

Louis P. Strezos for appellant.
Jan E. Brongers for respondent.

SOLICITORS OF RECORD:

Louis P. Strezos, Toronto, for appellant.
Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

Pelletier J.A.:

INTRODUCTION

[1] This is an appeal from the decision of Simpson J. of the Federal Court, reported at (2007), 63 Admin. L.R. (4th) 161, dismissing Mr. Sellathurai's application for judicial review of the Minister's decision (made on his behalf by his delegate) declining to return approximately $123 000 which were seized from him by a customs officer as he was about to depart for Sri Lanka from Pearson International Airport.

[2] The funds were seized and forfeited because Mr. Sellathurai failed to declare them to a customs officer as he was required to do by section 12 [as am. by S.C. 2001, c. 41, s. 54] of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 [s. 1 (as am. *idem*, s. 48)] (the Act) and, as conceded by his counsel, at the time of seizure there were reasonable grounds to suspect that the funds were proceeds of crime or were to be used in the funding of terrorism. The issue in this appeal is whether the Minister properly exercised his discretion in refusing to return the funds to Mr. Sellathurai.

THE FACTS

[3] The following statement of the facts surrounding the seizure is taken from the case synopsis and reasons for decision prepared by the Canada Border Services Agency (formerly the Canada Customs and Revenue Agency) (the Agency) in response to Mr. Sellathurai's request for a ministerial review of the seizure of his funds (appeal book, at pages 227-228):

> . . . on November 10, 2003, Mr. Sellathurai was questioned by Customs officials at Pearson International Airport, Toronto, Ontario outbound from Canada. He reported $4,000.00 in Canadian currency and $400.00 in American currency. He was asked the purpose of his trip. Mr. Sellathurai responded that he was to attend the funeral of his father and would be absent from Canada one week. The officer examined his passport noting that he had exited the United Arab Emirates on October 13, 2003. The officer asked to verify his currency. Mr. Sellathurai provided an envelope that contained several bills. The officer requested that he present the American currency, which he stated was in his carry-on. The officer questioned why he was taking $4,000.00 for a week-long trip. He advised the officer that he was an importer of clothing and a grocer as well as a salesman. Examination of his carry-on revealed two gold bars. When asked the value, he stated "$20,000.00". A receipt was provided from a Canadian jewellery store indicating that gold jewellery had been exchanged for the two gold bars. In his front pant pocket was more money. Mr. Sellathurai was moved to a private area for further examination. Mr. Sellathurai had, in total, eight envelopes of currency, the gold bars and some American currency. The officer asked him what the money was intended for. He stated that he was going to buy jewellery. At this time, the officer reminded him that he had stated he was a salesman, grocer and importer of clothing. Mr. Sellathurai stated that he is also a wholesaler of jewellery. He provided a business card. The name on the card was the same as the business name on the receipt for the gold bars. The officer advised Mr. Sellathurai that the currency was under seizure. While the paperwork was being prepared, Mr. Sellathurai stated that $90,000.00 was a loan from a jeweller in Montreal. He stated that $47,000.00 was from one individual and another $45,000.00 was from another person. He was unsure of their names at first. He stated that he intended to purchase jewellery for the two on this trip. He had no contract to substantiate this and no documents to support a withdrawal from a banking institution. As the officer had reasonable grounds to suspect that the currency was proceeds of crime, no terms of release were offered. The officer returned his documents, his two gold bars and other jewellery.

[4] The seizure was made under the authority of sections 12 and 18 [as am. by S.C. 2001, c. 41, s. 134] of the Act: section 12 requires all persons entering or leaving Canada with more than a prescribed amount of currency to report that amount to the nearest customs office upon arriving in or leaving Canada, while section 18 authorizes seizure in the event of a breach of section 12:

12. (1) Every person or entity referred to in subsection (3) shall report to an officer, in accordance with the regulations, the importation or exportation of currency or monetary instruments of a value equal to or greater than the prescribed amount.

. . .

(3) Currency or monetary instruments shall be reported under subsection (1)

(*a*) in the case of currency or monetary instruments in the actual possession of a person arriving in or departing from Canada, or that form part of their baggage if they and their baggage are being carried on board the same conveyance, by that person or, in prescribed circumstances, by the person in charge of the conveyance;

. . .

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

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

[5] The prescribed amount is $10 000: see section 2 of the *Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412.

[6] In accordance with paragraph 18(3)(*a*) of the Act, the officer gave Mr. Sellathurai written notice of the seizure and of his recourse under sections 25 [as am. by S.C. 2001, c. 41, s. 61] and 30 [as am. *idem*, s. 139] of the Act:

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.

. . .

30. (1) A person who requests a decision of the Minister under section 25 may, within 90 days after being notified of the decision, appeal the decision by way of an action in the Federal Court in which the person is the plaintiff and the Minister is the defendant.

[7] Mr. Sellathurai exercised his right to request a ministerial review of the officer's decision. In a letter dated January 12, 2004, an officer of the Agency set out the circumstances surrounding the seizure. The officer then went on to request further information (appeal book, at page 63):

Please submit evidence to support where you obtained the money such as withdrawal from a bank account or other such evidence *that would support that the money was legitimately obtained.* [Emphasis added.]

[8] No specific grounds for suspicion are identified in this letter and no specific explanations are requested. The only proof requested is proof that the funds were legitimately obtained.

[9] In response to this request, Mr. Sellathurai supplied three affidavits and three letters of reference. The

affidavits were provided by Sathi Sathananthan, Shudhir Chawla, and George Montgomery Pathinather. Sathi Sathananthan, Mr. Sellathurai's bookkeeper, produced bank statements and cancelled cheques showing withdrawals from Mr. Sellathurai's business account between September 19, 2003 and November 10, 2003, in the amount of $37 000 by way of cheques drawn in favour of Mr. Sellathurai's wife.

[10] Shudhir Chawla deposed that he is Mr. Sellathurai's business associate and that he loaned him $47 000 in cash to purchase 22 carat gold jewellery for him in Dubai. The $47 000 was the product of the sale of 93 ounces of gold bullion in various cash transactions. George Montgomery Pathinather deposed that he is in the jewellery business in Montréal and has known Mr. Sellathurai for three and a half years. He further deposed that he provided the latter, from funds kept in his office safe, $45 000 in cash, generated by cash transactions.

[11] The officer responded to these elements of proof in a letter to Mr. Sellathurai's counsel dated March 15, 2004. The material parts of that letter are as follows (appeal book, at pages 103-104):

> The affidavits from George Pathinather and Shudhir Chawla *do not substantiate the legitimacy of their portion of the seized currency*. Legitimate businesses wish to maintain records of their funds and expenses to ensure records for tax purposes and maintain internal audit controls. . . They will require documentary evidence *to support the legitimacy of the seized 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. . . [Emphasis added.]

[12] When counsel objected to the dismissal of the evidence provided on Mr. Sellathurai's behalf, the officer responded as follows in a letter dated May 3, 2004 (appeal book, at page 107):

> I would like to re-state that the affidavits from George Pathinather and Shudhir Chawla *do not substantiate the legitimacy of their portion of the seized currency*. They will require documentary evidence to support *the legitimacy of the seized currency*. [Emphasis added.]

[13] In a letter dated June 18, 2004, the officer responded to a further inquiry by Mr. Sellathurai's counsel by re-stating the position taken in her letter of March 15, 2004, and insisting upon production of documentary evidence to support the legitimacy of the seized currency: appeal book, at pages 108-109.

[14] The Minister (by his delegate) advised Mr. Sellathurai of his decision by letter dated October 6, 2005. The reasons given for the decision are contained in the following two paragraphs (appeal book, at pages 116-117):

> 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; [*sic*] the currency was lawfully subject to seizure. No terms of release were offered for the currency as the officer had reasonable suspicion to suspect proceeds of crime [*sic*].
>
> 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. . . .

THE FEDERAL COURT'S DECISION

[15] Mr. Sellathurai sought judicial review of this decision in the Federal Court. The application Judge reviewed the facts and addressed the question of standard of review. She concluded that the Minister's decision should be reviewed on a standard of reason- ableness, 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", at paragraph 60.

[16] Counsel for Mr. Sellathurai argued that the Minister's delegate used the wrong test in deciding whether to confirm the forfeiture of Mr. Sellathurai's funds. This is apparent from the application Judge's statement of the issues (at paragraph 61):

> The Applicant has raised the following issues. The headings are mine.
>
> **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.

[17] The application Judge dealt with the second issue, that of the reversal of the onus of proof, in the following terms (at paragraph 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.

[18] The application Judge found no merit in the first issue and then analyzed the issue of standard of proof applicable to an applicant who sought to recover funds seized as forfeit. After a discussion of the authorities, she concluded as follows (at paragraphs 72-74):

> 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.

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.

[19] The application Judge concluded that the adjudicator (the Agency officer) required proof in excess of proof beyond a reasonable doubt because of the statement, quoted earlier in these reasons, that proof that there was no other reasonable explanation as to the source of the funds, was required. However, the application Judge went on to conclude that the error was not material because Mr. Sellathurai's evidence fell below the standard of proof beyond a reasonable doubt. Since the Minister's error could not have affected the outcome, the application for judicial review could not succeed and was therefore dismissed.

THE POSITIONS OF THE PARTIES

[20] In the memorandum of fact and law filed on Mr. Sellathurai's behalf, his counsel defined the issue in the appeal as follows (appellant's memorandum, at paragraph 15):

The Appellant respectfully submits that Justice Simpson erred in law in finding that, in order to dispel a reasonable suspicion that funds seized and held as forfeit are the proceeds of crime under section 18(2) of the *Proceeds of Crime (Money Laundering) and Terrorism Financing Act* and to thereby obtain the return of the currency under section 29(1)(a) of the *Act*, the Appellant had to establish **beyond a reasonable doubt** that the funds were legitimately obtained. It is submitted that the standard of proof required to dispel a reasonable suspicion properly lies between the civil standard of proof on a balance of probabilities and the criminal standard of proof beyond a reasonable doubt. [Emphasis in the original.]

[21] The balance of the memorandum discussed the nuances of standard of proof, proof beyond a reasonable doubt and proof required to dispel a reasonable doubt. In the course of that discussion, counsel for Mr. Sellathurai conceded that (appellant's memorandum, at paragraph 16):

. . . reasonable suspicion existed *at the time of the forfeiture* by the CBSA officer. [Emphasis in the original.]

[22] The substance of the appellant's argument was that since the evidence submitted by Mr. Sellathurai was uncontradicted and was relevant to the source and the legitimacy of the funds, it ought to have been accepted as sufficient to dispel the reasonable suspicion which existed at the time of the seizure of the currency. Counsel argued that the requirement of proof beyond a reasonable doubt is misplaced since that standard is used only in the criminal context where the liberty of the subject is at stake. In this case, the Act makes no reference to proof beyond a reasonable doubt. According to counsel for Mr. Sellathurai, the appropriate standard of proof required to dispel reasonable suspicion lies between the civil standard of proof and the criminal standard of proof beyond a reasonable doubt. In taking this position, counsel relies on a quotation from Bennett J. in *R. v. Pilarinos*, 2001 BCSC 1690, at paragraph 143, dealing with proof of a reasonable apprehension of bias:

In summary, there is a strong presumption of judicial integrity that may only be displaced by cogent evidence establishing a real likelihood of bias. It is trite to note that this burden is higher than a simple balance of probabilities, but lower than proof

beyond a reasonable doubt. The burden lies with the person alleging a reasonable apprehension of bias. A reasonable apprehension of bias is determined by the well-informed, right-minded individual who is aware of all of the circumstances, including the nature of the case, its surrounding circumstances and the presumption of judicial integrity.

[23] Counsel for Mr. Sellathurai concluded his argument by suggesting (appellant's memorandum, at paragraph 26):

At the very least, when the material was being submitted by the Appellant to the Recourse Directorate, some effort should have been made by the Recourse Directorate or the Minister's Delegate to put the Appellant on notice as to the standard that was being applied so that he could meet it. . . .

[24] The Minister's position is that the application Judge's conclusion is reasonable and therefore, no intervention is justified.

ANALYSIS

Standard of Review

[25] The question of the standard of review of the Minister's decision under section 29 was settled by this Court in *Dag v. Canada (Minister of Public Safety and Emergency Preparedness)* (2008), 70 Admin. L.R. (4th) 214, at paragraph 4 (*Dag*), where it was held that the standard of review of the Minister's decision under section 29 was reasonableness. Consideration of the issue of the standard of review of the decision as to the standard of proof to be met by the applicant will, for reasons which will become apparent, be deferred to a later point in these reasons.

Review of the Jurisprudence

[26] Simpson J.'s decision in this case was followed in a number of subsequent cases in the Federal Court which adopted her endorsement of the Minister's statement of the basis on which he was exercising his discretion under section 29 of the Act: see *Dag v. Canada (Minister of Public Safety and Emergency Preparedness)* (2007), 318 F.T.R. 269, at paragraph 31; affd (2008), 70 Admin. L.R. (4th) 214 (F.C.A.); *Dupre v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 1177, at paragraph 22 (*Dupre*); *Hamam v. Canada (Minister of Public Safety and Emergency Preparedness)* (2007), 314 F.T.R. 151, at paragraph 24; *Yang v. Canada (Minister of Public Safety and Emergency Preparedness)* (2008), 79 Admin. L.R. (4th) 168, at paragraph 11 (*Yang*); *Lyew v. Canada (Minister of Public Safety and Emergency Preparedness)* (2007), 317 F.T.R. 234, at paragraph 31 (*Lyew*); *Dang v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 157, at paragraph 29; *Ondre v. Canada (Minister of Public Safety and Emergency Preparedness)* (2007), 312 F.T.R. 134, at paragraph 46 (*Ondre*); *Yusufov v. Canada (Minister of Public Safety and Emergency Preparedness)* (2007), 312 F.T.R. 122, at paragraph 42 (*Yusufov*); *Majeed v. Canada (Minister of Public Safety)*, 2007 FC 1082, at paragraph 47 (*Majeed*); *Qasem v. M.N.R.*, [2008] 3 F.C.R. 385, at paragraph 14 (*Qasem*).

[27] On the other hand, there has been a certain divergence of opinion as to the standard of proof to be met by the applicant. Some judges have adopted Simpson J.'s position that the appropriate standard is proof beyond a reasonable doubt: see *Ondre*, at paragraph 19; *Yusufov*, at paragraph 20; *Majeed*, at paragraph 50. Other judges have framed the issue in terms of the evidentiary burden on the applicant to dispel the Minister's suspicions: see *Dupre*, at paragraphs 37-38; *Yang*, at paragraphs 20-21; *Qasem*, at paragraph 18. Some judges have been critical of the use of language taken from the criminal context to describe the burden upon the applicant: *Qasem*, at paragraph 21; *Lyew*, at paragraph 32.

[28] It appears from this that Simpson J.'s decision in this case has, to some extent, framed the terms of the debate with respect to the operation of section 29. Two themes have emerged from the jurisprudence, namely the basis on which the Minister exercises his discretion under section 29 and the standard of proof to be met by an applicant.

Before examining these in more detail, it is necessary to examine the nature of the Minister's decision under section 29.

The Nature of the Section 29 Decision

[29] To understand what the Minister is required to do under section 29, it is necessary to understand the status of the seized currency at the time the section 29 decision is taken.

[30] The forfeiture of currency under section 18 is effective as of the time of the breach of section 12 [see section 23 of the Act]:

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

[31] Not only is the forfeiture effective as of the date of the breach of section 12, it is also final, subject only to judicial review of the finding that section 12 has been breached [see section 24 of the Act]:

24. The forfeiture of currency or monetary instruments seized under this Part is final and is not subject to review or to be set aside or otherwise dealt with except to the extent and in the manner provided by sections 25 to 30.

[32] As this Court pointed out in *Tourki v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2008] 1 F.C.R. 331 (*Tourki*), that which is the subject of review under sections 25 to 30 is the conclusion that there has been a breach of section 12, not the consequences of that breach: see paragraphs 16-18. Of course, the applicant's only interest in challenging the finding under section 12 is to attempt to obtain the return of the funds seized or the penalty paid. And since the only way to access the discretion vested in the Minister under section 29 is to request a review under section 25, such an application is, in effect, an application for relief from forfeiture.

[33] The only means by which a decision under section 29 may be challenged is by means of judicial review: see *Tourki*, at paragraph 18. The jurisprudence suggests that the question raised in such an application for judicial review is the relationship between the Minister's decision under section 29 and that of the customs officer under subsection 18(2). Does section 29 call for the Minister to review or to repeat the exercise undertaken by the customs officer in coming to the conclusion to seize the funds?

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,

(*a*) decide that the currency or monetary instruments or, subject to subsection (2), an amount of money equal to their value on the day the Minister of Public Works and Government Services is informed of the decision, be returned, on payment of a penalty in the prescribed amount or without penalty;

(*b*) decide that any penalty or portion of any penalty that was paid under subsection 18(2) be remitted; or

(*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.

The Minister of Public Works and Government Services shall give effect to a decision of the Minister under paragraph (*a*) or (*b*) on being informed of it.

[34] The Minister is only called upon to exercise his discretion under section 29 where he concludes, pursuant to a request made under section 25, that there has in fact been a breach of section 12. Consequently, the starting point for

the exercise of the Minister's discretion is that the forfeited currency, which is now in the hands of the Minister of Public Works pursuant to section 22 [as am. by S.C. 2001, c. 41, s. 60], is, for all legal purposes, property of the Crown: see *The King v. Central Railway Signal Co.*, [1933] S.C.R. 555, at pages 557-558, where the following appears:

> Some question was raised on the argument as to the effect of the seizure of the 4th July and as to its character as well. The point was not raised in the courts below and the evidence on the point is quite sufficient. It is not open to question on that evidence, that the goods were seized, and "seized as forfeited" for violation of the *Excise Act*. Nor is there any room for doubt as to the effect of such a seizure. It proceeds upon the assumption that the goods, having been forfeited *ipso jure*, in consequence of the violation of the Act, are at the time of seizure, and not as a consequence of it, the property of the Crown. There are several provisions of the statute under which forfeiture supervenes upon the commission of the offence, as a legal consequence of the offence, independently of any act on the part of the officers of excise or any conviction or other judgment of a court.

[35] The logic which applies under the *Excise Act*, R.S.C., 1985, c. E-14, also applies to the *Customs Act*, R.S.C., 1985 (2nd Supp.), c. 1, as well as to the Act under consideration here: see *Tourki*, at paragraph 17.

[36] It seems to me to follow from this that the effect of the customs officer's conclusion that he or she had reasonable grounds to suspect that the seized currency was proceeds of crime is spent once the breach of section 12 is confirmed by the Minister. The forfeiture is complete and the currency is property of the Crown. The only question remaining for determination under section 29 is whether the Minister will exercise his discretion to grant relief from forfeiture, either by returning the funds themselves or by returning the statutory penalty paid to secure the release of the funds.

[37] In this case, the Minister recognized the nature of the discretion he was being called upon to exercise when he advised Mr. Sellathurai, in his letter of October 6, 2005, that "mitigation has not been granted in this case": appeal book, at page 117. Mitigation of the consequences of forfeiture is, in effect, relief from forfeiture. While the Minister's characterization of the decision he makes under section 29 is not conclusive, I find confirmation of my position in the Minister's response to Mr. Sellathurai's request.

The Basis of the Exercise of the Minister's Discretion

[38] This leads to the question as to how the Minister will exercise his discretion. As this Court recognized in *Tourki*, at paragraph 29, the Act does not stipulate the basis on which the Minister is to exercise his discretion. The jurisprudence on the exercise of a statutory discretion requires, among other considerations, that the discretion be exercised to further the objects of the statute which confers the discretion (*Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, at pages 7-8 (*Maple Lodge Farms*)):

> It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

[39] While the basis upon which courts will intervene with respect to discretionary decisions has evolved since *Maple Lodge Farms*, consideration of the statutory purpose remains a key element of the analysis: see *Baker v.*

Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, at paragraphs 67-68; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paragraph 36.

The Exercise of the Minister's Discretion

[40] How did the Minister exercise his discretion in this case? The answer to that question requires a review of what the Minister did, as well as what the Minister said he did. In my view, they are not the same thing.

[41] From his first contact with Mr. Sellathurai, the Minister (acting through the Agency and through his delegate) asked him for one thing only: to demonstrate to him that the seized funds came from a legitimate source. A review of the exchange of correspondence between the Agency and Mr. Sellathurai's counsel, set out in the first part of these reasons, shows that Mr. Sellathurai was repeatedly and consistently asked to provide proof that the seized funds came from a legitimate source. When Mr. Sellathurai did provide such proof in the form of the affidavits of Sathananthan, Chawla, and Pathinather, the Minister was not persuaded because the affidavits provided explanations which were unverifiable. It seems clear from a fair reading of the record that what the Minister actually did was to insist upon proof of the legitimacy of the source of the funds as a condition of exercising his discretion in favour of Mr. Sellathurai.

[42] What the Minister said he did is slightly different. In his letter to Mr. Sellathurai explaining why he was refusing his request for "mitigation", the Minister wrote as follows (appeal book, at page 117):

> 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. . . . [Emphasis added.]

[43] There is logic in the Minister's reasoning that if the applicant cannot show that the seized funds come from a legitimate source, the customs officer's reasonable grounds for suspicion that the funds are proceeds of crime still remain. However, to cast the issue in these terms is to see the section 29 decision in terms of reassessing the customs officer's decision. As noted above, once the breach of section 12 is confirmed, the only issue remaining is whether the Minister will grant relief from forfeiture. Thus while the Minister's statement appears reasonable, it mischaracterizes the nature of the problem confronting the Minister.

[44] The reference to "reasonable suspicion still exists" suggests that the Minister considered the reasonable grounds for suspicion identified by the customs officer and, in light of the information provided by Mr. Sellathurai, decided whether those grounds for suspicion were still legitimate. In her reasons, the application Judge equated this exercise with the adoption of the test imposed on the customs officer by subsection 18(2): see paragraph 63.

[45] The application Judge may have been led to that conclusion by the nature of the affidavit filed by the Minister's delegate. While the letter setting out the reasons for the refusal of Mr. Sellathurai's request deals only with the evidence of the legitimacy of the source of the seized funds, the Minister's delegate filed an affidavit in which he restated and reviewed the grounds for suspicion identified by the customs officer, and indicated why he believed they remained unanswered. In my view, this form of affidavit is inappropriate and ought not to have been given any weight at all.

[46] The judges of the Federal Court have previously stated that a tribunal or a decision maker cannot improve upon the reasons given to the applicant by means of the affidavit filed in the judicial review proceedings. In *Simmonds v. M.N.R.* (2006), 289 F.T.R. 15, Dawson J. wrote, at paragraph 22 of her reasons:

> I observe the transparency in decision-making is not promoted by allowing decision-makers to supplement their reasons after the fact in affidavits.

[47] See to the same effect *Kalra v. Canada (Minister of Citizenship and Immigration)* (2003), 29 Imm. L.R. (3d) 208 (F.C.), at paragraph 15; *Yue v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 717, at paragraph 3; *Abdullah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185, at paragraph 13. Any other approach to this issue allows tribunals to remedy a defect in their decision by filing further and better reasons in the form of an affidavit. In those circumstances, an applicant for judicial review is being asked to hit a moving target.

[48] Quite apart from its admissibility on the issue of the reasons for the decision, the Minister's delegate's affidavit raises issues of credibility because the factual issues identified in the affidavit were never raised with Mr. Sellathurai, nor was he ever asked for any explanation of any of the facts which were identified as giving rise to reasonable grounds for suspicion. One would have thought that if the Minister's delegate was examining the facts identified as the grounds for suspicion, he would have made inquiries about them.

[49] Where the Minister repeatedly asks for proof that the seized currency has a legitimate source, as he did in this case, it is a fair conclusion that he made his decision on the basis of the applicant's evidence on that issue. The underlying logic is unassailable. If the currency can be shown to have a legitimate source, then it cannot be proceeds of crime.

[50] If, on the other hand, the Minister is not satisfied that the seized currency comes from a legitimate source, it does not mean that the funds are proceeds of crime. It simply means that the Minister has not been satisfied that they are not proceeds of crime. The distinction is important because it goes directly to the nature of the decision which the Minister is asked to make under section 29 which, as noted earlier in these reasons, 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. That is what the Minister requested in this case, and when Mr. Sellathurai was unable to satisfy him on the issue, the Minister was entitled to decline to exercise his discretion to grant relief from forfeiture.

The Standard of Proof

[51] This leads to the question which was argued at length before us. What standard of proof must the applicant meet in order to satisfy the Minister that the seized funds are not proceeds of crime? In my view, this question is resolved by the issue of standard of review. The Minister's decision under section 29 is reviewable on a standard of reasonableness. It follows that if the Minister's conclusion as to the legitimacy of the source of the funds is reasonable, having regard to the evidence in the record before him, then his decision is not reviewable. Similarly, if the Minister's conclusion is unreasonable, then the decision is reviewable and the Court should intervene. It is neither necessary nor useful to attempt to define in advance the nature and kind of proof which the applicant must

put before the Minister.

[52] On the facts of this case, Mr. Sellathurai put before the Minister evidence which was essentially unverifiable. It was not unreasonable for the Minister to decline to accept this evidence at face value. As was pointed out in the correspondence between the Agency and counsel for Mr. Sellathurai, businesses are bound to retain books and records sufficient to allow the Agency to verify their compliance with their obligations under the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1. The failure to do so is not evidence that such businesses are breaking the law, but it does not assist them in demonstrating that their income is legitimately derived. As a result, I see no basis for intervening and I would dismiss the appeal.

CONCLUSION

[53] The nature of the discretion to be exercised by the Minister under section 29 is whether to relieve an applicant, whose breach of section 12 he has just confirmed, from the consequences of that breach. The Minister's discretion must be exercised within the framework of the Act and the objectives which Parliament sought to achieve by that legislation. Within that framework, there may be various approaches to the exercise of the Minister's discretion but so long as the discretion is exercised reasonably, the courts will not interfere. In this case, the Minister proceeded by asking Mr. Sellathurai to demonstrate that the funds which were seized came from a legitimate source. The Minister concluded that the evidence provided by Mr. Sellathurai did not satisfy him that the funds came from a legitimate source. It was not unreasonable of the Minister, in those circumstances, to decline to exercise his discretion so as to grant relief from forfeiture.

[54] As a result, I would dismiss the appeal with costs.

NADON J.A.: I agree.

* * *

The following are the reasons for judgment rendered in English by

[55] RYER J.A.: I have reviewed the reasons of my colleague, Pelletier J.A., and concur with his decision that the appeal should be dismissed. However, since I have reached that conclusion by a different path, concurring reasons are warranted.

[56] This is an appeal from a decision of Simpson J. (the application Judge) of the Federal Court ((2007), 63 Admin. L.R. (4th) 161) dated February 23, 2007, dismissing the application of Mr. Gowrkumaran Sellathurai (the appellant) for judicial review of a decision of the Minister of Public Safety and Emergency Preparedness (the Minister), pursuant to paragraph 29(1)(*c*) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (the Act), confirming the forfeiture of certain funds seized from the appellant. Unless otherwise indicated, all statutory references in these reasons are to the corresponding provisions of the Act.

[57] While the appellant concedes that there were valid grounds for the forfeiture at the time of the seizure of the funds, the appellant contends that the evidence that was provided to the Minister subsequent to the seizure was sufficient to dispel these grounds, thereby necessitating the return of the funds to him.

BACKGROUND

[58] The appellant and his wife operated a wholesale jewellery business in Scarborough, Ontario. He has frequently travelled internationally on business. In the course of his departure from Canada on November 10, 2003, when questioned by an officer (the officer) of the Canada Border Services Agency (the CBSA) as to the amount of funds that he was travelling with, the appellant declared that he was carrying C$4000 and US$400 (collectively, the declared funds). An examination of his luggage and his person revealed that, in addition to the declared funds, the appellant was carrying C$119 000 and US$35 (collectively, the undeclared funds). The appellant was also found to be carrying two gold bars that he valued at approximately C$20 000. These items were left with the appellant, as they are not considered to be currency for the purposes of the Act.

[59] After having discovered the undeclared funds, the officer determined that there were reasonable grounds for her to believe that the appellant had contravened subsection 12(1), which by reference to section 2 of the *Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412, requires the disclosure of any amount of currency or monetary instruments in excess of C$10 000 (or its equivalent in a foreign currency) that is being taken out of Canada. As a result, pursuant to subsection 18(1), the officer seized the declared funds and the undeclared funds as forfeit. Subsections 12(1) and 18(1) read as follows:

12. (1) Every person or entity referred to in subsection (3) shall report to an officer, in accordance with the regulations, the importation or exportation of currency or monetary instru- ments of a value equal to or greater than the prescribed amount.

. . .

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

[60] The appellant indicated to the officer that the reason for his trip was to attend the funeral of his father. He stated that he would be absent from Canada for one week and would be spending two of those days in Dubai. The appellant told the officer that his father had died on November 8, 2003, and that he purchased his tickets on November 10, 2003, because the ticket office was closed on November 8, 2003. However, an examination of the tickets revealed that they had, in fact, been purchased by the appellant prior to the date of his father's death. The officer examined the passport of the appellant and found that he had exited the United Arab Emirates on October 13, 2003.

[61] When questioned by the officer as to the use of the declared funds and the undeclared funds, the appellant stated that $92 000 had been loaned to him by two jewellers in Montréal for whom he intended to purchase jewellery on his trip. The appellant did not have any documentation confirming these arrangements and initially was unsure of the names of the two jewellers. Additionally, he did not have any documentation to support a withdrawal from a banking institution of any portion of the funds. Moreover, the officer observed that the funds were not wrapped according to the method used by financial institutions. Instead, they were in mixed denominations that were out of order and were held together with elastics.

[62] Having regard to the circumstances surrounding the seizure of the declared funds and the undeclared funds, the officer determined that the normal require- ment that the seized funds be returned to the person from whom they were seized, subject to a prescribed penalty, was not appropriate. Rather, the officer maintained the forfeiture of the seized funds, as permitted by subsection 18(2), on the basis that she had reasonable grounds to suspect that the seized funds were proceeds of crime or funds for use in the financing of terrorist activities. Subsection 18(2) reads as follows:

18. (1) . . .

(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

[63] Subsection 462.3(1) of the *Criminal Code* defines "proceeds of crime" [as enacted by R.S.C., 1985 (4th Supp.), c. 42, s. 2; S.C. 2001, c. 32, s. 12] to mean "any property obtained directly or indirectly as a result of the commission of a designated offence". That same provision defines "designated offence" [as enacted by S.C. 1996, c. 19, s. 68; 2001, c. 32, s. 12] (a designated indictable offence) as "any indictable offence under the *Criminal Code* and other federal statutes, other than indictable offences" enumerated in section 1 of the *Regulations Excluding Certain Indictable Offences from the Definition of "Designated Offence"*, SOR/2002-63. A list of excluded indictable offences is reproduced in Schedule "A" to the decision of the application Judge. The definitions of "proceeds of crime" and "designated offence" in subsection 462.3(1) of the *Criminal Code* read as follows:

"designated offence" means

(*a*) an indictable offence under this or any other Act of Parliament, other than an indictable offence prescribed by regulation, or

(*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*);

. . .

"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.

DECISION OF THE MINISTER

[64] On November 19, 2003, the appellant made a request, pursuant to section 25, for a decision of the Minister as to whether he had contravened subsection 12(1). Section 25 reads as follows:

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.

[65] In response to the appellant's request, a written notice (the notice of reasons for action) of the circumstances of the seizure of the declared funds and the undeclared funds, as required by subsection 26(1), was provided to the appellant. Subsection 26(1) read as follows:

26. (1) If a decision of the Minister is requested under section 25, the Commissioner shall without delay serve on the person who requested it written notice of the circumstances of the seizure in respect of which the decision is requested.

[66] The notice of reasons for action described the events leading up to the maintenance of the forfeiture of the declared funds and the undeclared funds by the officer pursuant to subsection 18(2) and concluded with a request for evidence to be submitted to demonstrate that these funds had been legitimately obtained.

[67] As permitted by subsection 26(2), the appellant submitted evidence to the Minister, consisting of four

affidavits and three character reference letters. In addition, counsel for the appellant made submissions in relation to the seizure of the funds. Subsection 26(2) reads as follows:

26. (1) . . .

(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.

[68] The evidence provided by the appellant, as permitted by subsection 26(2), contradicted the informa- tion with respect to the sources of the declared funds and the undeclared funds that he had given to the officer and sought to establish that $92 000 of these funds was actually provided by two different business associates, only one of whom was from Montréal, and that the balance came from several withdrawals from the bank account of the appellant's jewellery business.

[69] The three character references did not address the issue of the legitimacy of the origin of the declared funds and the undeclared funds.

[70] The affidavits of the two business associates stated that they had provided the appellant with $92 000 in cash, from the cash sales of jewellery, for the purchase of jewellery in Dubai on their behalf. These affidavits did not contain any information with respect to the sales which allegedly generated the cash that was provided to the appellant

[71] An affidavit provided by the bookkeeper for the appellant's jewellery business indicated that $37 000 of the seized funds (the balance of the seized funds after deducting the portion that had allegedly been loaned to the appellant) had been withdrawn from the bank account of the business through a series of cheques that were payable to the appellant's wife. In his affidavit, the appellant stated that these cheques were issued for business purposes and that he received the money when the cheques were cashed.

[72] In correspondence dated March 15, 2004 (the first notice), a CBSA official (the first adjudicator) advised the appellant that the affidavits of the two business associates did not demonstrate the legitimacy of the portion of the seized funds that those persons allegedly loaned to the appellant and invited further submissions. The first notice contained the following statement:

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.

[73] On April 27, 2004, counsel for the appellant replied to the first notice indicating that, in his view, an independent RCMP investigation demonstrated that the seized funds could not be linked to any terrorist financing.

[74] By correspondence dated May 3, 2004, the first adjudicator indicated that inquiries would be made with respect to the RCMP investigation. In addition, this correspondence reiterated the CBSA's view (the second notice) that the affidavits of the two business associates did not adequately substantiate the legitimacy of the funds that allegedly had been loaned to the appellant and requested documentary evidence to support the legitimacy of the seized currency.

[75] In correspondence dated June 18, 2004, the first adjudicator advised the appellant that the RCMP investigation did not include a consideration of whether the seized funds were proceeds of crime, within the

meaning of subsection 18(2). Once again, the appellant was put on notice (the third notice) that documentary evidence was needed in order to corroborate the affidavits of the two business associates in relation to the alleged loans.

[76] Notwithstanding the requests contained in the first notice, the second notice and the third notice, the appellant did not provide any documentary evidence establishing the source of the funds that had allegedly been loaned by the two business associates to the appellant. Instead, counsel for the appellant asked the Minister to render the decision that had been requested by the appellant pursuant to section 25.

[77] Subsections 27(1) and (3) obligate the Minister to make a decision as to whether a contravention of subsection 12(1) has occurred and to provide written notice of the decision, including reasons, to the person who has made the request for the decision. Subsections 27(1) and (3) read as follows:

> **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.
>
> . . .
>
> (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.

[78] In the circumstances of this case, the Minister delegated her responsibility to make the decisions contemplated by sections 25, 27 [as am. by S.C. 2001, c. 41, s. 62] and 29 to a manager in the Recourse Directorate, Admissibility Branch of the CBSA (the Minister's delegate). In reaching the decision required by subsection 27(1), the Minister's delegate relied, in part, on the file that had been initially prepared by the first adjudicator and completed by another CBSA official (the second adjudicator).

[79] After having reviewed the evidence and submissions that had been provided by the appellant's counsel, as well as other available materials, including the officer's report, the second adjudicator prepared a document (the case synopsis and reasons for the decision) that was signed by her on September 25, 2005 and by the Minister's delegate on October 3, 2005. That document contained the statement from the first notice that is reproduced in paragraph 72 of these reasons.

[80] By correspondence dated October 6, 2005, the Minister's delegate advised the appellant of his decision that there had been a contravention of subsection 12(1) by the appellant, in accordance with subsections 27(1) and (3). Having reached that decision, the Minister's delegate, as required by subsection 29(1), also addressed the issue of whether the seized funds were to be returned to the appellant. The provisions of subsection 29(1) read as follows:

> **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,
>
> (*a*) decide that the currency or monetary instruments or, subject to subsection (2), an amount of money equal to their value on the day the Minister of Public Works and Government Services is informed of the decision, be returned, on payment of a penalty in the prescribed amount or without penalty;
>
> (*b*) decide that any penalty or portion of any penalty that was paid under subsection 18(2) be remitted; or
>
> (*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.
>
> The Minister of Public Works and Government Services shall give effect to a decision of the Minister under paragraph (*a*) or (*b*) on being informed of it.

[81] The decision of the Minister's delegate under subsection 27(1) is not in dispute in this appeal. Rather, the focus of the appellant is on the decision that was made by the Minister's delegate under subsection 29(1).

[82] The Minister's delegate decided to return the declared funds to the appellant pursuant to paragraph 29(1)(*a*) and to confirm the forfeiture of the undeclared funds pursuant to paragraph 29(1)(*c*). The Minister's delegate provided the following reasons in respect of his decision under subsection 29(1) [at paragraph 42]:

> 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. [Emphasis added.]

[83] The appellant brought an application in the Federal Court for judicial review of the decision of the Minister confirming the forfeiture of the undeclared funds pursuant to paragraph 29(1)(*c*) (the subsection 29(1) decision).

DECISION OF THE FEDERAL COURT

[84] The application Judge held that section 29 is silent with respect to the principles that the Minister, or her delegate, must apply in deciding whether to confirm a forfeiture of funds that have been seized under Part 2 of the Act. The application Judge found that, in this case, the Minister's delegate decided to base his subsection 29(1) decision upon a determination of whether the test in subsection 18(2), which was applied by the officer, would still be met, that is to say, whether reasonable grounds to suspect that the seized 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 (reasonable grounds to suspect) still existed at the time of the subsection 29(1) decision.

[85] The application Judge referred to the cross- examination of the Minister's delegate on the affidavit that he had sworn as indicating that because of his reliance on the case synopsis and reasons for the decision and the standard of proof referred to therein, he may have thought that to dispel reasonable grounds to suspect, the appellant was obligated to prove an innocent explanation beyond all doubt.

[86] The application Judge determined that the standard of proof that is necessary to establish reasonable grounds to suspect requires more than a subjective suspicion or a hunch. Instead, the application Judge held that evidence to substantiate reasonable grounds to suspect must be credible and objective.

[87] The application Judge then went on to state that the standard of proof referred to in the case synopsis and reasons for the decision, namely, proof beyond all doubt, was erroneous and that to dispel reasonable grounds to suspect, only proof beyond a reasonable doubt is required.

[88] In the circumstances, the application Judge found that this error on the part of the Minister's delegate was immaterial, stating, at paragraph 75:

> [The appellant's] 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.

Accordingly, the application Judge held that the error in the specification of the requisite standard of proof to dispel reasonable grounds to suspect was insufficient to allow the application for judicial review to succeed.

[89] The application Judge also found no merit in the appellant's argument that there are no reasonable grounds to suspect that the undeclared funds are proceeds of crime. Moreover, the application Judge found that the return of the declared funds did not contradict the confirmation of the forfeiture of the undeclared funds so as to render the decision of the Minister unreasonable.

[90] Accordingly, the application Judge dismissed the application for judicial review.

ISSUE

[91] The issue in this appeal is whether the Minister's delegate erred in making the subsection 29(1) decision, in which the forfeiture of the undeclared funds was confirmed pursuant to paragraph 29(1)(*c*).

ANALYSIS

The Nature of the Subsection 29(1) Decision

[92] Subsection 29(1) provides the Minister with broad discretionary powers to determine the monetary sanction, if any, that is to be imposed on a person who has been determined, pursuant to subsection 27(1), to have contravened subsection 12(1). In particular, paragraph 29(1)(*a*) empowers the Minister to reverse a forfeiture of seized funds, with or without a penalty, paragraph 29(1)(*b*) empowers the Minister to remit all or a portion of any penalty imposed under subsection 18(2) and paragraph 29(1)(*c*) empowers the Minister to confirm a forfeiture of seized funds. As correctly observed by the application Judge, the basis upon which the Minister is to exercise her discretion under subsection 29(1) is not spelled out in that provision or elsewhere in the Act. Moreover, the Minister is under no obligation to provide reasons for a decision made pursuant to subsection 29(1) (see *Tourki v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2008] 1 F.C.R. 331 (C.A.)).

The Decision Under Review

[93] It is at this point that I must respectfully diverge from the reasons of my colleague, Pelletier J.A.

[94] The application Judge, at paragraph 63 of her reasons, acknowledges the absence of guiding principles with respect to the basis for a decision under subsection 29(1) but goes on to find that the Minister's delegate adopted the test in subsection 18(2) as the basis for his subsection 29(1) decision. That paragraph reads as follows:

> 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 Minister's Delegate was determining whether such reasonable grounds still existed.

[95] At the hearing of the appeal, counsel for the respondent confirmed that the Minister's delegate exercised the discretion provided in subsection 29(1) in accordance with this finding by the application Judge. This confirmation is consistent with the position taken by counsel for the respondent in paragraphs 67 and 68 of his memorandum of fact and law. Those paragraphs are as follows:

In order to respond to this argument, it is important to first understand the nature of the ministerial review conducted by the Respondent, which is not a criminal prosecution. It is an administrative review of an *in rem* property seizure where the sole issue is whether there are reasonable grounds to suspect that the currency is proceeds of crime, not whether the person who failed to declare the currency has committed a crime. Similarly, currency may be seized and forfeited whether or not it is in fact associated with money laundering or terrorism. The test, as set out in the *PCMLTFA*, is only that there are reasonable grounds to suspect that the currency is proceeds of crime.

The exercise conducted by the Respondent decision-maker in the case at bar was to review the totality of the factual record before him and to reach a conclusion on whether or not reasonable grounds existed to suspect that the currency is proceeds of crime. This flows from the fact that the Respondent was reviewing the Customs officer's determination that she had reasonable grounds to suspect that the currency was proceeds of crime and therefore could not return the currency to the Applicant pursuant to s. 18(2) of the *PCMLTFA*.

[96] The adoption by the Minister's delegate of the reasonable grounds to suspect test in subsection 18(2) is further evident from paragraphs 14 and 24 of his affidavit, the relevant portions of which read as follows:

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*. . ..

. . .

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*.

[97] At no stage in the proceedings has it been argued that the Minister's delegate did not, in fact, adopt the reasonable grounds to suspect test, in subsection 18(2), as the basis upon which he exercised his discretion under subsection 29(1). Moreover, there has been no argument that the adoption of that test was an improper exercise of the discretion given to the Minister's delegate under subsection 29(1).

[98] I would hasten to add that, in my view, the Minister's delegate was not required to adopt the reasonable grounds to suspect test as the basis upon which to make his subsection 29(1) decision. That test is not the only basis upon which a subsection 29(1) decision can be made. Indeed, by choosing to adopt that test, it may be that the Minister's delegate has set a higher standard for himself than he needed to.

[99] Accordingly, unlike my colleague Pelletier J.A., I am of the view that this appeal must proceed on the basis that the Minister's delegate, in fact, adopted the reasonable grounds to suspect test in subsection 18(2) and that the issue is whether the Minister's delegate properly applied that test.

[100] In concluding that the Minister's delegate applied the subsection 18(2) test by considering whether reasonable grounds to suspect "still existed", the application Judge, in effect, found that the Minister's delegate was reviewing the decision of the officer to impose the forfeiture in light of the evidence and submissions that had been provided by the appellant subsequent to the seizure of the funds. This explains the approach of the application Judge in determining the standard of proof that was required of the appellant to "dispel" the reasonable grounds to suspect, as found by the officer.

[101] Indeed, this approach is also adopted by the appellant who takes issue with the application Judge only to the extent that she determined the requisite standard of proof to be beyond a reasonable doubt. According to the appellant, a lower standard of proof, namely, one that lies "midway between the civil standard of proof on a balance of probabilities and the criminal standard of proof beyond a reasonable doubt", is sufficient to "dispel" the reasonable grounds to suspect that the officer found to be present at the time of the seizure of the funds.

[102] The respondent argues that the focus on the standard of proof required to "dispel" the reasonable grounds to suspect that were found by the officer is misguided. According to the respondent, the exercise that was undertaken by the Minister's delegate in making the subsection 29(1) decision was in the nature of a *de novo* consideration by the Minister's delegate of the question of whether reasonable grounds to suspect existed at the time of the *de novo* consideration.

[103] I am inclined to accept the respondent's characterization of the nature of the decision that was undertaken by the Minister's delegate. This characterization is supported by the following excerpt from the October 6, 2005, correspondence of the Minister's delegate:

> 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.

Further support is contained in paragraph 24 of the affidavit of the Minister's delegate, which is produced in paragraph 45 of the reasons of the application Judge and reads as follows:

> 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*.

[104] In my view, where the Minister exercises the discretion provided in subsection 29(1) by adopting the reasonable grounds to suspect test in subsection 18(2) as the basis upon which to decide upon the monetary sanction that is to be imposed upon a person whose funds have been subject to forfeiture and who has been determined by the Minister to have contravened subsection 12(1), the Minister is then required to make a fresh consideration of whether, at the time of her decision, there are reasonable grounds to suspect. This obligates the Minister to come to her own conclusion as to the existence of reasonable grounds to suspect. In that regard, the Minister's decision must be based upon the entirety of the record before her, which would include the evidence that was available to the officer at the time of the seizure of the funds, as well as any evidence and submissions that are provided to the Minister after that time. As such, the consideration by the Minister is not a *de novo* review in the sense of a trial *de novo*, in which the case is decided only on the new record and without regard to evidence adduced in prior proceedings (see *Molson Breweries v. John Labatt Ltd.*, [2000] 3 F.C. 145 (C.A.), at paragraph 46). Thus, in such circumstances, the Minister's *de novo* consideration would necessarily entail a determination of the legal test for reasonable grounds to suspect and thereafter, an application of that test to the facts before her.

[105] In view of the misconception, on the part of the application Judge, of the approach that was required to be taken, and was in fact taken, by the Minister's delegate in rendering his subsection 29(1) decision, that decision was not appropriately reviewed by the application Judge. Accordingly, I will undertake that review.

The Standard of Review

[106] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, Justices Bastarache and LeBel provided the following guidance, at paragraph 62:

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[107] In *Dag v. Canada (Minister of Public Safety and Emergency Preparedness)* (2008), 70 Admin. L.R. (4th) 214, this Court held that the applicable standard of review of a decision of the Minister under subsection 29(1) is reasonableness. In *Dag*, as in this case, the Minister made the determination that the decision as to the monetary sanction that was to be imposed in light of a contravention of subsection 12(1) would be made on the basis of the application of the reasonable grounds to suspect test in subsection 18(2). This is evident from paragraph 5 of the decision, which reads as follows:

> With respect to the substantive issue which was before Blais J., we are of the view, applying this standard, that he committed no error when he held that the record allowed the Minister to conclude in the present case that there were "reasonable grounds to suspect" that the currency was "proceeds from crime within the meaning of subsection 462.3(1) of the *Criminal Code* or funds for use in the financing of terrorist activities".

[108] It is apparent that in *Dag*, no issue was taken with respect to the proper interpretation of the reasonable grounds to suspect element of the test in subsection 18(2).

[109] While the question posed by subsection 18(2) is one of mixed fact and law, the proper interpretation of the reasonable grounds to suspect element of that question may be seen as a legal question. In that regard, *Dunsmuir* informs that where a legal issue that is intertwined with factual issues can nonetheless be easily separated from those factual issues and where the legal issue is one of general law, the standard of correctness will apply in relation to that issue. In my view, both of those requirements are present with respect to the proper interpretation of reasonable grounds to suspect as found in subsection 18(2). Accordingly, the issue of the proper interpretation of that phraseology not having arisen in *Dag*, I am of the view that the question of whether that phraseology was properly interpreted by the Minister's delegate in making the subsection 29(1) decision must be reviewed on the standard of correctness.

[110] The application of the legal test for reasonable grounds to suspect by the Minister's delegate to the facts that were before him is, in accordance with *Dag*, required to be reviewed on the standard of reasonableness.

The Legal Test for Reasonable Grounds to Suspect

[111] The application Judge analysed the issue of the standard of proof that is required to establish reasonable grounds to suspect. She found that there must be more than a mere subjective suspicion. Instead, the application Judge found that to substantiate reasonable grounds to suspect, there must be objective and credible evidence.

[112] This finding of the application Judge is consistent with the conclusion of the Supreme Court of Canada in its recent decision in *R. v. Kang-Brown*, [2008] 1 S.C.R. 456. In that case, the standard of proof that is required to establish a "reasonable suspicion" is described, in paragraph 75, as one that requires objectively ascertainable facts that are capable of judicial assessment. In my view, there is little to differentiate a "reasonable suspicion" from "reasonable grounds to suspect". Accordingly, I am of the view that the standard of proof described in *Kang-Brown* is an appropriate one to be applied to the determination of whether reasonable grounds to suspect may be said to exist. I would hasten to add that I see no material difference between that standard of proof and the standard of proof as formulated by the application Judge.

[113] The record does not demonstrate a clear and specific enunciation by the Minister's delegate of the appropriate standard of proof required to establish reasonable grounds to suspect. However, a review of both the case synopsis and reasons for the decision and the affidavit of the Minister's delegate indicates that credible and objectively ascertainable evidence was sought as the basis upon which to ground the subsection 29(1) decision. It is clear to me that the Minister's delegate was looking for more than a subjective suspicion or a "hunch" as the basis

for that decision. Moreover, the requests in the first notice, the second notice and the third notice, for additional documentary support with respect to the origin of the portion of the seized funds that were allegedly loaned to the appellant, clearly demonstrate that the first adjudicator sought credible and objectively ascertainable evidence from the appellant to include in the record upon which the Minister's delegate based his subsection 29(1) decision. Accordingly, I am of the view that the record dem- onstrates a sufficient awareness on the part of the Minister's delegate of the legal standard that is necessary to establish reasonable grounds to suspect. As such, the subsection 29(1) decision is unassailable in terms of whether it was based upon a correct understanding of the appropriate legal standard that underpins the reasonable grounds to suspect test.

[114] In light of the standard of proof that has been determined, reasonable grounds to suspect may be found where there are objectively ascertainable facts indicating that the seized funds are for use in the financing of terrorist activities. "Terrorist activity" [as enacted by S.C. 2001, c. 41, s. 2] is defined in section 2 as having "the same meaning as in subsection 83.01(1)" of the *Criminal Code*. Alternatively, reasonable grounds to suspect may be found where objectively ascertainable facts indicate that the seized funds are "proceeds of crime", within the meaning of subsection 462.3(1) of the *Criminal Code*. Both of these possibilities were considered by the Minister's delegate, as indicated in paragraph 9 of his affidavit, but the subsection 29(1) decision was ultimately based upon a reasonable suspicion that the seized funds were proceeds of crime.

[115] The definition of "proceeds of crime" provides an expansive, although not unlimited, scope as to what may be considered a criminally acquired asset. The designated indictable offences which may give rise to proceeds of crime include a number of the more serious offences under the *Criminal Code* and other federal statutes, such as illegal drug trafficking, bribery, fraud, robbery, counterfeit money, stock manipulation and money laundering (where the Crown proceeds by way of indictment).

[116] It is clear that not all crimes or offences are designated indictable offences. Importantly, it is only those crimes and offences that are designated indictable offences that have the requisite degree of criminality that will permit seized funds to be characterized as proceeds of crime for the purposes of the reasonable grounds to suspect test in subsection 18(2).

[117] Thus, the record before the Minister or her delegate may indicate that the seized funds are associated with crime, albeit not necessarily a designated indictable offence. In my view, the determination of whether there are reasonable grounds to suspect that seized funds are "proceeds of crime" within the meaning of subsection 462.3(1) of the *Criminal Code* can be approached, where it is helpful to do so, by breaking the analysis into two parts. Viewed in this manner, the analysis involves a consideration of whether there is a reasonable suspicion that the seized funds are associated with criminality, and that such criminality is a designated indictable offence. I would add that this approach is equally applicable to an officer who is obligated to consider the reasonable grounds to suspect test in subsection 18(2) as it is to the Minister, or her delegate, where that test is adopted for the purposes of a subsection 29(1) decision.

[118] It is apparent that the second part of this approach is the more difficult of the two. Evidence linking the seized funds to criminality in general is likely to be available. However, evidence indicating a linkage between the seized funds and a particular designated indictable offence is less likely to be available.

[119] In my view, requiring an officer or the Minister to establish a direct linkage between the seized funds and

the commission of a specific designated indictable offence, in order to meet the reasonable grounds to suspect test, imposes too onerous a standard. In the context of forfeitures of funds under certain provisions of the *Criminal Code*, it has been observed that where the Crown is unable to directly establish a specific offence as the source of alleged proceeds of crime, a forfeiture of the funds may nonetheless be upheld where an appropriate inference that the funds are connected to the particular offence or class of offences can be drawn from the facts. See for example *R. v. Shah*, [1992] B.C.J. No. 2716 (Prov. Ct.) (QL); *R. v. Clymore* (1992), 74 C.C.C. (3d) 217 (B.C.S.C.); *R. v. Hicks*, [2000] B.C.J. No. 2653 (Prov. Ct. (Crim. Div.)) (QL).

[120] In my view, it is entirely appropriate to rely upon properly drawn inferences that seized funds that have been derived from some type of criminality have been derived from a designated indictable offence, as required by the reasonable grounds to suspect test in subsection 18(2).

Application of the Legal Test

[121] The question at this point is whether, in accordance with *Dag*, the subsection 29(1) decision of the Minister's delegate is reasonable.

[122] As stated in the October 6, 2005 correspondence, in the subsection 29(1) decision the Minister's delegate determined that a reasonable suspicion existed since the evidence provided by the appellant after the seizure of the funds was not verifiable and did not point to a legitimate origin of the seized funds. The Minister's delegate expanded upon this reasoning in paragraph 24 of his affidavit that is reproduced in paragraphs 96 and 103 of these reasons, wherein the Minister's delegate stated that he had concluded, based on all of the material in the record, that it was reasonable to suspect that the undeclared funds were "proceeds of crime" within the meaning of subsection 462.3(1) of the *Criminal Code*.

[123] As explained in his affidavit, the relevant portions of which are reproduced in paragraph 45 of the reasons of the application Judge, the following facts relied on by the Minister's delegate in arriving at the subsection 29(1) decision pointed to a reasonable suspicion that the undeclared funds were associated with criminality, in accordance with the first stage of the analysis as described above:

(a) the appellant had attempted to export a large amount of funds and had chosen to report a small fraction of this amount to the officer;

(b) the appellant had provided vague answers in response to the officer's questions;

(c) further to his request for a ministerial decision, the appellant provided an explanation as to the origin of the seized funds that differed from that originally given to the officer; and

(d) the ultimate explanation provided by the appellant in respect of the origin of the seized funds was not corroborated by sufficient supporting documentation.

[124] With respect to the first ground, the Minister's delegate was of the view that the appellant's behaviour in choosing not to report the undeclared funds, when explicitly questioned by the officer as to the amount of funds that he was travelling with, was suspicious, particularly since the appellant was a frequent inter- national traveller who would have been aware of currency reporting requirements. The Minister's delegate pointed to the fact that individuals wishing to transfer large amounts of legitimate funds between countries usually prefer to use the services of financial institutions because such transactions are faster, cheaper and more secure than bulk cash transportation. Additionally, the Minister's delegate commented that, unlike American currency, Canadian currency is not readily used or accepted in many other countries. For that reason, the Minister's delegate found it implausible that large quantities of legitimate Canadian currency would have been brought by a traveller to a country such as the United

Arab Emirates in order to conduct legitimate business.

[125] With respect to the second ground, the Minister's delegate referred to the fact that when asked by the officer to explain the origin of the declared funds and the undeclared funds, the appellant initially advised that he was unsure of the identities of the individuals who had given him the currency and only later produced the names of two business associates in Montréal who had provided him with $92 000 to purchase jewellery. Furthermore, when questioned by the officer, the appellant had "sweat pouring down his face" and was visibly nervous. According to the Minister's delegate, for the rare international traveller who transports large sums of legitimately earned currency destined for legal purposes it can be expected that he or she will be able to clearly explain both the source and intended use of that currency, whereas an inability to clearly provide such an explanation suggests an awareness that the currency was not earned through legitimate means or is intended for illicit use.

[126] With respect to the third ground, the Minister's delegate referred to the fact that four months after the seizure of the declared funds and the undeclared funds, the appellant provided an explanation for the origin of the funds that contradicted the explanation that he had given to the officer. The appellant sought to establish that $92 000 had actually been provided by two individuals that differed from those initially identified and only one of whom was from Montréal, and, for the first time, the appellant explained that the balance of the seized funds had been withdrawn from the bank account of his jewellery business. The Minister's delegate was of the view that the fact that the appellant provided a new explanation for the origin of the seized funds which differed from that provided at the time of the forfeiture raised a suspicion that the funds were illicit.

[127] With respect to the fourth ground, the Minister's delegate referred to the fact that while the affidavits of the two business associates maintained that they had provided the appellant with $92 000 to purchase certain vaguely described jewellery in the United Arab Emirates on their behalf, neither had provided contracts, receipts or any other documentation to support the existence of such a significant financial obligation. The Minister's delegate did not find it 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 without documenting this arrangement in some form and by providing vague instructions about the type and quantity of jewellery to buy. Moreover, while copies of cheques and bank statements were provided in the affidavit of the bookkeeper to show that six cheques totalling $37 000 made payable to the appellant's wife were drawn against the bank account of the jewellery business in September and early November 2003, the Minister's delegate stated that there was no indication that the balance of the seized funds had indeed originated from these withdrawals. According to the Minister's delegate, the fact that the appellant chose to provide an implausible and unsubstantiated explanation for the origin of the seized funds rendered it reasonable to suspect that the currency was in fact illicit.

[128] As previously indicated, it is not sufficient to simply establish a reasonable suspicion that the undeclared funds were associated with criminality. The test for reasonable grounds to suspect in subsection 18(2) also requires a reasonable suspicion that such criminality is a designated indictable offence.

[129] In this case, the Minister's delegate concluded that it was reasonable to suspect that the undeclared funds were "proceeds of crime" within the meaning of subsection 462.3(1) of the *Criminal Code*. This demonstrates that the Minister's delegate determined that it was reasonable to suspect that the undeclared funds were the proceeds of a designated indictable offence. In my view, the fact that the undeclared funds consisted of C$119 000 in mixed denominations that were out of order and held together with elastics, supports a reasonable inference that the criminality reasonably suspected of being associated with the undeclared funds was not a minor offence but rather an indictable offence that constituted a designated indictable offence. The reasonableness of such an inference is supported by the failure of the appellant to provide any credible and objective evidence of any legitimate source for the undeclared funds.

[130] In my view, the record before the Minister's delegate was sufficient for him to reach his decision that there are reasonable grounds to suspect that the undeclared funds are proceeds of crime. Accordingly, I am satisfied that the subsection 29(1) decision of the Minister's delegate, upholding the forfeiture of the undeclared funds, is reasonable.

DISPOSITION

[131] For the foregoing reasons, I would dismiss the appeal with costs.