Federal Court of Appeal  Cour d'appel fédérale

Date: 20141010

Docket: A-307-13

Citation: 2014 FCA 228

CORAM: **DAWSON J.A.**
GAUTHIER J.A.
TRUDEL J.A.

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

ROBERT BO DA HUANG

Respondent

Heard at Vancouver, British Columbia, on May 5, 2014.

Judgment delivered at Ottawa, Ontario, on October 10, 2014.

REASONS FOR JUDGMENT BY: DAWSON J.A.

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

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The central issue raised on this appeal is whether paragraph 29(1)(*a*) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (Act) permits the Minister of Public Safety and Emergency Preparedness to return a portion of seized currency established to have been legitimately obtained if there are reasonable grounds to suspect that the remainder of the currency is proceeds of crime?

[2] The Minister takes the position the Act does not authorize the partial return of seized currency; in the present case the Minister applied the Act in accordance with that understanding.

[3] For reasons reported as 2013 FC 729, [2013] F.C.J. No. 803, a judge of the Federal Court concluded to the contrary. Therefore, the Federal Court held that the Minister's decision to confirm forfeiture of seized funds, including legitimately acquired funds, was unreasonable.

[4] This is an appeal from that decision.

I. **Factual Background**

[5] On January 5, 2011, the respondent, Mr. Robert Bo Da Huang, was approached by a Canada Border Services Agency (CBSA) customs officer in the departures area of the Vancouver International Airport. Mr. Huang was awaiting a flight to Hong Kong. When the customs officer began advising Mr. Huang of the cross-border currency reporting requirements imposed by the Act on travellers carrying over $10,000, Mr. Huang responded "Yeah, I know. I have $15,000. Sorry." The customs officer subsequently verified that the actual amount of the currency carried by Mr. Huang was $15,760.

[6] After interviewing Mr. Huang, the customs officer suspected the currency was proceeds of crime and seized the entire $15,760 under subsection 12(1) of the Act (Seized Funds). Mr. Huang requested a ministerial review of the forfeiture pursuant to section 25 of the Act. The ministerial review was conducted by officials in the CBSA Recourse Directorate.

[7] The officials in the Recourse Directorate accepted that $6,700 of the Seized Funds was legitimately obtained from the sale of a car owned by Mr. Huang (Legitimate Funds). However, for various reasons the officials of the Recourse Directorate still suspected the remaining $9,060 to be proceeds of crime (Illicit Funds). Accordingly, all of the Seized Funds were retained as forfeit.

II. **The Legislative Scheme**

[8] As stated above, this case is about the interpretation of section 29 of the Act. To properly understand that provision, it is necessary to review the scheme of the Act as it relates to the seizure and forfeiture of currency. For simplicity these reasons will refer only to "currency", notwithstanding that the Act deals with both currency and monetary instruments. The relevant provisions of the Act are subsections 12(1) and (3), subsections 18(1) and (2), sections 23 and 24, subsections 24.1(1) and (2), and sections 25, 28 and 29.

[9] Also relevant to the interpretation of section 29 is section 3 of the Act, which sets out the objects of the Act, and that portion of subsection 462.3(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, which defines "proceeds of crime". This definition is incorporated by reference in subsection 18(2) of the Act.

[10] All of these provisions are set out in the appendix to these reasons. However, for the purpose of these reasons, the key aspects of the legislative scheme are as follows.

[11] Under the Act, seizures and forfeitures take place in three main stages.

[12] First, subsections 12(1) and (3) require declaration of imported or exported currency over a regulated limit.

[13] Second, in order to seize non-declared currency, a customs officer must have reasonable grounds to believe that a person or entity failed to declare currency over the regulated limit (subsection 18(1)).

[14] Third, the officer may seize the undeclared currency as forfeit (subsection 18(1)). At this point, if the officer does not have reasonable grounds to believe the funds were either the proceeds of crime (within the meaning of subsection 462.3(1) of the *Criminal Code*), or funds for use in terrorist activities, then subsection 18(2) mandates that the funds shall be returned, subject to the payment of a prescribed penalty. If the officer has reasonable grounds to believe the funds were the proceeds of crime or for use in terrorist activities, the funds are retained. By reference to the *Criminal Code*, the Act defines "proceeds of crime" to mean 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 committed anywhere that, if it had occurred in Canada, would have constituted a designated offence.

[15] Finally, pursuant to section 23 of the Act, any funds properly seized under subsection 18(1), and not returnable under subsection 18(2), are considered forfeit to the Crown from the moment the person or entity breaches subsection 12(1).

[16] The forfeiture of currency is final and not subject to review except as provided by sections 24.1 and 25 (section 24).

[17] Within 30 days after a seizure or an assessment of a penalty, the Minister may cancel the seizure or cancel or refund the penalty if the Minister is satisfied there was no contravention of the Act. If satisfied there was a contravention and that there was an error with respect to the penalty assessed or collected, and that the penalty should be reduced, the Minister may reduce the penalty or refund the excess amount of the penalty (section 24.1).

[18] Within 90 days after a seizure, the person from whom currency was seized, or the lawful owner of the currency may request a decision of the Minister as to whether subsection 12(1) was contravened (section 25).

[19] If the Minister decides that subsection 12(1) was not contravened, the Minister of Public Works and Government Services shall return the penalty that was paid or the currency (section 28).

[20] If the Minister decides that subsection 12(1) was contravened, the Minister may decide that the currency be returned on payment of a penalty in the proscribed amount. Alternatively, the Minister may decide that any penalty or a portion of any penalty may be remitted. As a further alternative, the Minister may confirm that the currency is forfeited (subsection 29(1)).

[21] In *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255, [2009] 2 F.C.R. 576, Justice Pelletier (writing for the majority, Justice Ryer concurring in the result) concluded, at paragraphs 33 through 34 that, since a violation of subsection 12(1) is a precondition for review under section 29, the starting point for the Minister's exercise of discretion is that the forfeited currency is already the property of the Crown. An application under section 29 is, therefore, essentially an application for relief from forfeiture.

[22] In consequence, once the Minister begins a review under section 29, "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" (*Sellathurai* at paragraph 36); the only issue is whether the Minister is satisfied that the seized funds are not proceeds of crime and is persuaded to exercise his discretion to grant relief from forfeiture (*Sellathurai* at paragraphs 36 and 50).

III. **Decision of the Recourse Directorate**

[23] In a letter dated May 24, 2012, the Recourse Directorate, acting as the Minister's delegate, set out the basis for the customs officer's reasonable grounds to suspect that the currency was proceeds of crime. It then informed Mr. Huang that because he had failed to substantiate the legitimacy of the Illicit Funds, all of the Seized Funds would be held forfeit. The Minister's delegate found that, as a matter of law, it was not possible to exercise his discretion to release any of the forfeit currency, including the legitimately earned $6,700. Mr. Huang sought judicial review of that decision in the Federal Court.

[24] Parenthetically, I note for completeness that there is no suggestion on the record that there was ever any suspicion that the currency at issue was to be used to finance terrorist activities. It follows that in this case there is no need to consider that element of subsection 18(2) of the Act.

IV. **Decision of the Federal Court**

[25] On judicial review to the Federal Court, the Judge found that it was reasonable for the Minister to have confirmed the forfeiture of all the Seized Funds, except for those found to have been obtained from the sale of Mr. Huang's car. To that end, she identified the main issue before her as whether section 29 of the Act permits the Minister to hold forfeit only those funds that were reasonably suspected to have been illicitly obtained; framed another way, the issue was whether the Act allowed the Minister to return the Legitimate Funds?

[26] As part of her statutory interpretation analysis the Judge then considered the relevant provisions governing the Act's seizure and forfeiture rules. With regard to subsection 18(1), she found the provision was intended to make a penalty payable for any failure to report funds under subsection 12(1); it permits the Crown to seize for forfeit only those funds that a customs officer has reasonable grounds to suspect are the proceeds of crime. In the Judge's view, nothing in subsection 18(1) precluded the retention of only that portion of the unreported funds that was subject to reasonable suspicion.

[27] Similarly, the Judge found that nothing in section 29 expressly precludes the Minister from returning a portion of seized funds once their legitimate origin had been established.

[28] The Minister argued that the implied exclusion principle of statutory interpretation necessarily led to the conclusion that the Minister cannot exercise his discretion to return a portion of the Seized Funds. The Minister supported this argument by drawing comparisons between paragraph 29(1)(*b*), which allows the Minister to remit "any penalty or portion of any penalty", with paragraph 29(1)(*a*), which simply allows the Minister to return "the currency or monetary instruments". Since paragraph 29(1)(*b*) makes reference to a "portion of" a penalty, while paragraph 29(1)(*a*) only refers to "the currency" without further qualifications, the Minister argued that Parliament intentionally chose not to permit the return of a portion of seized currency: once any portion of funds are found to have been illicitly obtained, the entire amount must be held forfeit. The Minister emphasized the differential treatment of "proximate concepts" only subparagraphs apart.

[29] The Minister also referred to numerous cases from the Federal Court which supported this interpretation, arguing that principle of judicial comity demanded that the Judge follow the decisions of her colleagues.

[30] The Judge did not agree. In her view, paragraph 29(1)(*a*) of the Act did not preclude the Minister from returning a portion of seized funds if that portion was legitimately obtained. She then outlined the following "strong reasons to the contrary" which she stated had not been referenced in previous Federal Court decisions and justified departing from her colleagues' decisions:

i. Confiscating legitimate funds would not further the objectives of the Act as set out in section 3;

ii. The relatively small penalty Mr. Huang would have had to pay ($250) for failing to report the Legitimate Funds (i.e. $6,700) meant the seizure of that amount imposed a draconian penalty not expressly required by the Act;

iii. If Parliament had intended to confiscate legitimate funds it would have stated that fact in unequivocal terms;

iv. If Mr. Huang had the documents about the sale of his car with him at the airport, the customs officer would have been required by subsection 18(2) to return the Legitimate Funds to him at that time, subject to the payment of a penalty. It would be absurd to require the Minister to now confiscate these funds simply because Mr. Huang provided the documentation after the funds were seized. Such an absurdity could not have been intended by Parliament;

v. The Minister's interpretation could lead to further absurd results, such as the confiscation of very large sums of legitimate funds on the commingling of only minor suspicious funds. This would be an inequitable consequence that is incompatible with the objects of the Act;

vi. Paragraph 29(1)(*b*) only refers to penalties, which are limited to $5,000. Since the amount of funds caught by paragraph 29(1)(*a*) could be vastly larger, the penalty for failing to report and the forfeiture of suspicious funds are not "proximate concepts" warranting recourse to the implied exclusion principle.

[31] In the result, the Judge found paragraph 29(1)(*a*) allows the Minister to return a portion of seized funds. The Minister's decision to confirm the forfeiture of the entire Seized Funds was, therefore, an unreasonable exercise of discretion. In consequence, the Judge set aside the decision and returned the matter to the Minister to reconsider Mr. Huang's request for the Legitimate Funds.

V. **Issues**

[32] The respondent did not appear on this appeal.

[33] The Minister frames the issues to be:

A. What is the standard of review to be applied to the decision of the Federal Court and to the Minister's interpretation of the Act?

B. Does section 29 of the Act allow the Minister to grant relief from forfeiture in respect of a portion of seized currency?

C. Was the Judge bound to accept the Minister's interpretation on the basis of judicial comity?

[34] I agree this is a proper summary of the issues raised on this appeal.

VI. **Consideration of the Issues**

A. *What is the standard of review to be applied to the decision of the Federal Court and to the Minister's interpretation of the Act?*

[35] On an appeal from a decision on an application for judicial review, the role of this Court is to first determine whether the reviewing judge chose and applied the correct standard of review (*Dr. Q v. College of Physicians and Surgeons of British Colombia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paragraph 43).

[36] With respect to the Minister's decision, this Court has generally held that decisions made under section 29 of the Act are discretionary and subject to deference. As such, this Court will only interfere with a decision under section 29 if it is unreasonable (*Sellathurai*, at paragraph 25, citing *Dag v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 95, 70 Admin. L.R. (4th) 214 at paragraph 4).

[37] Moreover, since the Minister acts as an administrative decision-maker when exercising his discretion under section 29, his interpretation of the extent of his discretion is presumptively entitled to deference (*McLean v. British Colombia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at paragraph 33).

[38] The Judge concluded that the Minister's decision was unreasonable; this is consistent with the application of the reasonableness standard of review. The Minister argues, however, that a close analysis of the Judge's reasons reveals that she actually applied the correctness standard of review.

[39] In my view, in the circumstances of this case, it is unnecessary to engage in this analysis. As developed below, I have concluded that the applicable principles of statutory interpretation

lead to a single reasonable interpretation of the scope of the Minister's discretion: the Minister may grant relief from forfeiture in respect of a portion of seized currency. The Minister adopted the opposite interpretation. It follows that his decision was necessarily unreasonable (*McLean* at paragraph 38).

B. *Does section 29 of the Act allow the Minister to grant relief from forfeiture in respect of a portion of seized currency?*

(i) Applicable principles of Statutory Interpretation

[40] The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at paragraph 29.

[41] The Supreme Court restated this principle in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose

> on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [emphasis added]

[42] This formulation of the proper approach to statutory interpretation was repeated in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at paragraph 21, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paragraph 27.

[43] Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context, as well as the apparent purposes, the Court aims to ascertain legislative intent, which is "[t]he most significant element of this analysis" (*R. v. Monney*, [1999] 1 S.C.R. 652, 1999 CanLII 678 (S.C.C.) at paragraph 26).

[44] I therefore turn to the required textual, contextual and purposive analysis.

(ii) Textual Analysis

[45] The text of subsection 29(1) of the Act is:

29. (1) If the Minister decides that subsection 12(1) was contravened, the Minister may, subject to the terms and conditions that the Minister may determine,	29. (1) S'il décide qu'il y a eu contravention au paragraphe 12(1), le ministre peut, aux conditions qu'il fixe :

(*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;	*a*) soit restituer les espèces ou effets ou, sous réserve du paragraphe (2), la valeur de ceux-ci à la date où le ministre des Travaux publics et des Services gouvernementaux est informé de la décision, sur réception de la pénalité réglementaire ou sans pénalité;
(*b*) decide that any penalty or portion of any penalty that was paid under subsection 18(2) be remitted; or	*b*) soit restituer tout ou partie de la pénalité versée en application du paragraphe 18(2);
(*c*) subject to any order made under section 33 or 34, confirm that the currency or monetary instruments are forfeited to Her Majesty in right of Canada.	*c*) soit confirmer la confiscation des espèces ou effets au profit de Sa Majesté du chef du Canada, sous réserve de toute ordonnance rendue en application des articles 33 ou 34.
The 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. [emphasis added]	Le ministre des Travaux publics et des Services gouvernementaux, dès qu'il en est informé, prend les mesures nécessaires à l'application des alinéas *a*) ou *b*). [Non souligné dans l'original.]

[46] The Minister points out that his authority differs depending upon whether the sanction under consideration is forfeiture or a penalty; the Minister argues that there is a marked difference between the authority bestowed by paragraphs 29(1)(*a*) and (*c*) (relating to forfeiture) and paragraph 29(1)(*b*) (relating to penalties).

[47] More specifically, paragraphs 29(1)(*a*) and (*c*) speak of "the currency or monetary instruments". This is to be contrasted with the wording in paragraph 29(1)(*b*) which speaks to both "any penalty or portion of any penalty".

[48] Relying upon the implied exclusion principle of statutory interpretation (sometimes referred to as the *expressio unius est exclusio alterius* maximum of statutory interpretation) the

Minister argues that the use of different language illustrates Parliament's intent that the Minister not have discretion to afford partial relief from forfeiture of the currency or monetary instruments seized pursuant to section 18 of the Act.

[49] I begin consideration of the Minister's submission by observing that, while the Minister acknowledges the applicability of the modern approach to statutory interpretation, his analysis is almost exclusively textual. Both in written and oral submissions the Minister made a brief submission that his interpretation of the Act facilitates its purpose: to encourage self-reporting of large cross-border currency movements. The Minister contends that this objective will be furthered if travellers risk losing the legitimate portion of any currency they export or import if they do not make a declaration at the border. This argument will be dealt with in the purposive analysis of the provision at issue. The Minister advanced no well-developed submissions based upon the context of the Act.

[50] Turning to the substance of the submission, as Chief Justice Laskin wrote in *Jones v. New Brunswick (Attorney General)*, [1975] 2 S.C.R. 182, 1974 CanLII 164 (S.C.C.) at 195-196, the implied exclusion principle "provides at the most merely a guide to interpretation; it does not pre-ordain conclusions".

[51] As noted by Professor Ruth Sullivan in *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: Lexis Nexis, 2008) at 250-251, there are several ways to rebut an argument based upon the implied exclusion principle. Citing *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505, 1990 CanLII 3820 (S.C.C.), Professor Sullivan states that one way of rebutting

the principle is to offer an explanation as to why Parliament would expressly address some things in some places, while remaining silent in other places. Express reference may be appropriate in one context, but inappropriate in another.

[52] The Judge was not satisfied that the implied exclusion principle of statutory interpretation was applicable. She reasoned that the penalty on failing to report and the forfeiture of suspicious funds are not "proximate concepts" (reasons at paragraph 28(vi)).

[53] I prefer to base my conclusion on the following analysis.

[54] Subparagraphs 29(1)(*a*) and (*b*) set up a dichotomy with respect to the forfeiture of currency or monetary instruments: the Minister may order their return or confirm their forfeiture.

[55] Two relevant principles emerge from the decision of this Court in *Sellathurai*. First, the Minister's discretion must be exercised within the framework of the Act (*Sellathurai* at paragraphs 38 and 53). Second, if currency can be shown to come from a legitimate source, by virtue of the definition of proceeds of crime, the currency cannot be proceeds of crime. In a decision rendered under subsection 29(1) of the Act, the only issue is whether an applicant can persuade the Minister to exercise his discretion to grant relief from forfeiture. An applicant does this by satisfying the Minister that the seized funds are not proceeds of crime. The obvious way to do this is to demonstrate that the funds come from a legitimate source (*Sellathurai* at paragraphs 49 and 50).

[56] The question the Minister must decide is whether he is satisfied that funds come from a legitimate source. Therefore, it was unnecessary for Parliament to allow for partial relief from forfeiture in paragraph 29(1)(*a*). This flows from the fact that pursuant to subsection 18(2) of the Act, the only basis for seizure (and the resultant forfeiture under section 23) is a customs officer's suspicion that monies are the proceeds of crime as defined by subsection 462.3(1) of the *Criminal Code*. While the customs officer may well have had reasonable grounds to seize the currency, once the Minister is satisfied that funds come from a legitimate source there is no basis at law for continued retention and forfeiture of the funds. In that circumstance it would be unnecessary to state that, to the extent the Minister was satisfied that an ascertainable amount of the seized funds had a legitimate source the Minister could exercise his discretion to relieve from forfeiture.

[57] It follows from this analysis that the text of subsection 29(1) is reasonably open to more than one interpretation. It further follows that the text of subsection 29(1) does not play a dominant role in the interpretive process.

(iii) Contextual Analysis

[58] At paragraphs 8 to 22 above, I have described the legislative scheme.

[59] As noted above, *Sellathurai* decided that the Minister undertakes a *de novo* review of the decision to seize non-declared currency. Thus, on ministerial review, a customs officer's decision that he or she had reasonable grounds to suspect that seized currency was the proceeds of crime is spent. It is inconsistent with this scheme if on ministerial review the Minister's

discretion would be bound by the customs officer's decision so that the Minister would not be able to relieve from forfeiture funds shown to originate from a legitimate source, even where doubt exists about the provenance of other currency.

[60] Moreover, a comparison of section 28 and section 29 of the Act provides an alternative hypothesis to the Minister's submission based upon the implied exclusion principle of statutory interpretation.

[61] Parliament's use of the language of "portion" in relation to the penalty in section 29, but not in section 28, is consistent with a simple intention to distinguish the Minister's discretion with regard to the return of penalties depending upon whether an individual has or has not contravened section 12.

[62] While section 29 stipulates what action the Minister may take if he finds that subsection 12(1) was breached, section 28 stipulates what action the Minister of Public Works and Government Services must take if the Minister concludes that subsection 12(1) was not violated. Section 28, unlike section 29, states that the Minister of Public Works and Government Services shall "return the penalty that was paid" and does not stipulate that a "portion" of the penalty may be remitted. This makes sense. If the Minister finds that subsection 12(1) was not violated, then an individual should not have been penalized at all and the penalty must be returned.

[63] Where an individual has been found by the Minister to have contravened section 12, then section 29 gives the Minister the discretion to return the penalty in full or in part, or to not return it at all. By explicitly stipulating that a "portion" of the penalty may be returned Parliament clarified that, unlike section 28, the partial return of a penalty would be an option where an individual has contravened section 12.

[64] Where an individual contravenes subsection 12(1), the Minister may well not want to remit the penalty in full to the individual because a penalty is intended to punish and deter individuals from failing to fulfill their duty to report. However, there may well be circumstances in which the Minister may want to remit a portion of the penalty. Section 18 of the Regulations provides that the applicable penalty may vary between $250 and $5000. By expressly stipulating that a portion of the penalty may be returned, Parliament is ensuring that the Minister will have the discretion to return some of the penalty, where it is decided that the original penalty paid was too high in light of the circumstances.

[65] Section 24.1 further supports this view. Much like section 28, if an individual is found to have fulfilled his reporting duties, there is no mention of a portion of the penalty being returned. However, subparagraph 24.1(1)(*b*) states that if, within a given period of time, the Minister decides that section 12 has been contravened, he has the discretion to reduce the penalty or refund the excess of the amount of the penalty, providing that the Minister finds that "there was an error with respect to the penalty assessed or collected and that the penalty should be reduced".

[66] Finally, a further, relevant contextual factor is subsection 462.37(2.03) of the *Criminal Code*.

[67] As set out above, subsection 18(1) of the Act incorporates by reference the definition of "proceeds of crime" found in subsection 462.3(1) of the *Criminal Code*. Subsection 462.3(1) is the first section found in Part XII.2 of the *Criminal Code* that deals with "proceeds of crime". Part XII.2 creates certain offences (section 462.31), provides for the seizure of certain property (section 462.32) and provides a mechanism for the forfeiture of any property that is proceeds of crime (section 462.37). Subsection 462.37(2.03) excludes from forfeiture any property that is established, on a balance of probability, not to be proceeds of crime.

[68] Parliament's exclusion of legitimate funds from forfeiture in the *Criminal Code* is consistent with interpreting subsection 29(1) of the Act to allow the Minister to return any portion of seized property he is satisfied is not "proceeds of crime".

(iv) Purposive Analysis

[69] Section 3 of the Act sets out its objects. A review of this provision shows a focus on curbing money laundering, terrorist financing, and organized crime. Paragraph 3(*a*) states that the various administrative measures established by the Act were created to detect, deter, investigate and prosecute money laundering and terrorist financing offences. These measures include record-keeping and client identification requirements, reporting requirements for suspicious transactions or cross-border currency movement and the establishment of the Financial Transactions and Reports Analysis Center of Canada. Paragraph 3(*b*) requires a

balance between the need to respond to the threat of organized crime by providing necessary information to law enforcement officials and the protection against intrusions on personal privacy. Finally, paragraph 3(*c*) recognizes the Act's role in fulfilling Canada's international commitments in the fight against transnational crime, particularly money laundering and terrorist activities.

[70] The provisions at issue were added to the Act on the coming into force of Bill C-22, An Act to facilitate combatting the laundering of proceeds of crime, to establish the Financial Transactions and Reports Analysis Centre of Canada and to amend and repeal certain Acts in consequence, 1st Sess., 36th Parl., 2000 (assented to 29 June, 2000). A Legislative Summary was prepared by the Library of Parliament, "An Act to facilitate combating the laundering of proceeds of crime, to establish the Financial Transactions and Reports Analysis Centre of Canada and to amend and repeal certain Acts in consequence" by Geoffrey Kieley, LS-355E (9 February 2000; revised 5 May 2000).

[71] At pages 2 to 3, the Legislative Summary noted that "the broad purpose of [Bill C-22] was to remedy shortcomings in Canada's anti-money laundering legislation, as identified by the G-7s Financial Action Task Force [FATF] on Money Laundering in its 1997-1998 report". The FATF is an inter-governmental body whose purpose is to develop and promote policies to combat money laundering. In 1990, the FATF developed 40 Recommendations that countries were encouraged to adopt, Financial Action Task Force, The Forty Recommendations of the Financial Action Task Force on Money Laundering 1990 (Paris: FATF, 1990). The 40

Recommendations set out a basic framework for anti-money laundering efforts and were designed to be of universal application.

[72] During the period from 1997 to 1998, Canada was examined by the FATF in order to assess the extent it had implemented effective measures to counter money laundering. The Canadian anti-money laundering system as a whole was found to be substantially in compliance with almost all of the Recommendations issued in 1990. That said, as stated in the Legislative Summary, a deficiency was identified. The Legislative Summary quoted this deficiency:

> The only major weakness is the inability to effectively and efficiently respond to requests for assistance in relation to restraint and forfeiture. The use of domestic money laundering proceedings to seize, restrain, [and] forfeit the proceeds of offences committed in other countries is recognized as sometimes ineffective, and legislation to allow Canada to enforce foreign forfeiture requests directly should be introduced.

[73] Other deficiencies noted by the FATF included Canada's inability to enforce forfeiture orders directly with respect to foreign criminal proceeds and the need to mandate the reporting of significant cross-border transportation of cash and monetary instruments.

[74] In my view, none of these statements of purpose shed light on the interpretation of subsection 29(1) of the Act. Some assistance is, however, contained in the 40 Recommendations. Specifically, Recommendation 8 provided:

> Countries should adopt measures similar to those set forth in the Vienna Convention, as may be necessary, including legislative ones, to enable their competent authorities to confiscate property laundered, proceeds from, instrumentalities used in or intended for use in the commission of any money laundering offense, or property of corresponding value.
>
> Such measures should include the authority to: 1) identify, trace and evaluate property which is subject to confiscation; 2) carry out provisional measures, such

> as freezing and seizing, to prevent any dealing, transfer or disposal of such property; and 3) take any appropriate investigative measures.
>
> In addition to confiscation and criminal sanctions, countries also should consider monetary and civil penalties, and/or proceedings including civil proceedings, to void contracts entered by parties, where parties knew or should have known that as a result of the contract, the State would be prejudiced in its ability to recover financial claims, e.g. through confiscation or collection of fines and penalties.
>
> [emphasis added]

[75] This recommendation demonstrates that:

i) the property to be confiscated was property related to the crime of money laundering and such property was to be identified and traced to money laundering; and

ii) in addition to confiscation and criminal sanctions, countries were encouraged to consider monetary and civil penalties.

[76] In my view, the content and purpose of Recommendation 8 is consistent with interpreting subsection 29(1) of the Act to allow the Minister to relieve from forfeiture a portion of monies seized when the Minister is satisfied that an ascertainable portion of seized funds is not the proceeds of crime. This is because Recommendation 8 ties forfeiture to criminal, not legitimate, activity. Importantly, the property subject to forfeiture is to be traced to criminal activity. To the extent the Minister argues that the forfeiture of legitimate funds will encourage reporting large cross-border currency movements, this purpose is fulfilled through the penalties the Governor in Council chooses to prescribe in the *Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412.

[77] The interpretation that the purpose of Bill C-22 is consistent with interpreting subsection 29(1) to allow the Minister to partially relieve from forfeiture is also consistent with remarks made by the Secretary of State (International Financial Institutions) on the second reading of Bill C-22. Speaking for the Minister of Finance, Secretary Jim Peterson observed that "[t]his bill is aimed at doing one thing, and that is to help take the profit out of crime" [underlining added].

(v) Conclusion with respect to Statutory Interpretation Analysis

[78] Having conducted the required textual, contextual and purposive analysis I am satisfied that subsection 29(1) of the Act allows the Minister to grant relief from forfeiture in respect of a portion of seized currency when he is satisfied the currency is not proceeds of crime. While the text of the Act may be somewhat ambiguous, the Act's context and purpose permit only one reasonable interpretation since this is one of those cases in which the ordinary tools of statutory interpretation lead to a single reasonable interpretation (see: *McLean* at paragraph 38). The Minister's interpretation was, therefore, unreasonable.

C. *Was the Judge bound to accept the Minister's interpretation on the basis of judicial comity?*

[79] The Minister also argues that the Judge refused, without proper justification, to apply the doctrine of judicial comity. This argument does not assist the Minister for the following reasons.

[80] First, the Minister argues that the Judge ought to have issued an order consistent with the law as established by the jurisprudence, while expressing her disagreement and the reasons for

her disagreement in her reasons for order. However, after considering the applicable principles of statutory interpretation, I have found that the Minister's interpretation was unreasonable. By implication, the prior jurisprudence of the Federal Court was incorrectly decided. Therefore, nothing turns on the Judge's decision not to follow that jurisprudence.

[81] Second, the prior jurisprudence of the Federal Court, beginning with *Admasu v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 451, 408 F.T.R. 134, was based upon a textual analysis of subsection 29(1). As a contextual and purposive analysis was also required, this warranted the Judge's departure from the jurisprudence. The Judge did give reasons for her departure from the jurisprudence, the first of which was based upon a purposive analysis of the provision at issue.

VII. **Conclusion**

[82] For these reasons, I would dismiss the appeal.

"Eleanor R. Dawson"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Johanne Trudel J.A."

APPENDIX

Section 3, subsections 12(1) and (3), subsections 18(1) and (2), sections 23 and 24, subsections 24.1(1) and (2), and sections 25, 28 and 29 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 read as follows:

3. The object of this Act is	3. La présente loi a pour objet :
(*a*) to implement specific measures to detect and deter money laundering and the financing of terrorist activities and to facilitate the investigation and prosecution of money laundering offences and terrorist activity financing offences, including	*a*) de mettre en oeuvre des mesures visant à détecter et décourager le recyclage des produits de la criminalité et le financement des activités terroristes et à faciliter les enquêtes et les poursuites relatives aux infractions de recyclage des produits de la criminalité et aux infractions de financement des activités terroristes, notamment :
(i) establishing record keeping and client identification requirements for financial services providers and other persons or entities that engage in businesses, professions or activities that are susceptible to being used for money laundering or the financing of terrorist activities,	(i) imposer des obligations de tenue de documents et d'identification des clients aux fournisseurs de services financiers et autres personnes ou entités qui se livrent à l'exploitation d'une entreprise ou à l'exercice d'une profession ou d'activités susceptibles d'être utilisées pour le recyclage des produits de la criminalité ou pour le financement des activités terroristes,
(ii) requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments, and	(ii) établir un régime de déclaration obligatoire des opérations financières douteuses et des mouvements transfrontaliers d'espèces et d'effets,
(iii) establishing an agency that is responsible for ensuring compliance with Parts 1 and 1.1 and for dealing with reported and other information;	(iii) constituer un organisme chargé du contrôle d'application des parties 1 et 1.1 et de l'examen de renseignements, notamment ceux portés à son attention au titre du sous-alinéa (ii);
(*b*) to respond to the threat posed by organized crime by providing law	*b*) de combattre le crime organisé en fournissant aux responsables de

enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves;

(*c*) to assist in fulfilling Canada's international commitments to participate in the fight against transnational crime, particularly money laundering, and the fight against terrorist activity; and

(*d*) to enhance Canada's capacity to take targeted measures to protect its financial system and to facilitate Canada's efforts to mitigate the risk that its financial system could be used as a vehicle for money laundering and the financing of terrorist activities.

[…]

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

l'application de la loi les renseignements leur permettant de priver les criminels du produit de leurs activités illicites, tout en assurant la mise en place des garanties nécessaires à la protection de la vie privée des personnes à l'égard des renseignements personnels les concernant;

c) d'aider le Canada à remplir ses engagements internationaux dans la lutte contre le crime transnational, particulièrement le recyclage des produits de la criminalité, et la lutte contre les activités terroristes;

d) de renforcer la capacité du Canada de prendre des mesures ciblées pour protéger son système financier et de faciliter les efforts qu'il déploie pour réduire le risque que ce système puisse servir de véhicule pour le recyclage des produits de la criminalité et le financement des activités terroristes.

[. . .]

12. (1) Les personnes ou entités visées au paragraphe (3) sont tenues de déclarer à l'agent, conformément aux règlements, l'importation ou l'exportation des espèces ou effets d'une valeur égale ou supérieure au montant réglementaire.

[. . .]

(3) Le déclarant est, selon le cas :

a) la personne ayant en sa possession effective ou parmi ses bagages les espèces ou effets se trouvant à bord du moyen de transport par lequel elle arrive au Canada ou quitte le pays ou

being carried on board the same conveyance, by that person or, in prescribed circumstances, by the person in charge of the conveyance;

la personne qui, dans les circonstances réglementaires, est responsable du moyen de transport;

(*b*) in the case of currency or monetary instruments imported into Canada by courier or as mail, by the exporter of the currency or monetary instruments or, on receiving notice under subsection 14(2), by the importer;

b) s'agissant d'espèces ou d'effets importés par messager ou par courrier, l'exportateur étranger ou, sur notification aux termes du paragraphe 14(2), l'importateur;

(*c*) in the case of currency or monetary instruments exported from Canada by courier or as mail, by the exporter of the currency or monetary instruments;

c) l'exportateur des espèces ou effets exportés par messager ou par courrier;

(*d*) in the case of currency or monetary instruments, other than those referred to in paragraph (a) or imported or exported as mail, that are on board a conveyance arriving in or departing from Canada, by the person in charge of the conveyance; and

d) le responsable du moyen de transport arrivé au Canada ou qui a quitté le pays et à bord duquel se trouvent des espèces ou effets autres que ceux visés à l'alinéa a) ou importés ou exportés par courrier;

(*e*) in any other case, by the person on whose behalf the currency or monetary instruments are imported or exported.

e) dans les autres cas, la personne pour le compte de laquelle les espèces ou effets sont importés ou exportés.

[…]

[. . .]

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.

18. (1) S'il a des motifs raisonnables de croire qu'il y a eu contravention au paragraphe 12(1), l'agent peut saisir à titre de confiscation les espèces ou effets.

(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

(2) Sur réception du paiement de la pénalité réglementaire, l'agent restitue au saisi ou au propriétaire légitime les espèces ou effets saisis sauf s'il soupçonne, pour des motifs raisonnables, qu'il s'agit de produits de la criminalité au sens du

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.

paragraphe 462.3(1) du *Code criminel* ou de fonds destinés au financement des activités terroristes.

[…]

[. . .]

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.

23. Sous réserve du paragraphe 18(2) et des articles 25 à 31, les espèces ou effets saisis en application du paragraphe 18(1) sont confisqués au profit de Sa Majesté du chef du Canada à compter de la contravention au paragraphe 12(1) qui a motivé la saisie. La confiscation produit dès lors son plein effet et n'est assujettie à aucune autre formalité.

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 24.1 and 25.

24. La saisie-confiscation d'espèces ou d'effets effectuée en vertu de la présente partie est définitive et n'est susceptible de révision, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues aux articles 24.1 et 25.

24.1 (1) The Minister, or any officer delegated by the President for the purposes of this section, may, within 90 days after a seizure made under subsection 18(1) or an assessment of a penalty referred to in subsection 18(2),

24.1 (1) Le ministre ou l'agent que le président délègue pour l'application du présent article peut, dans les quatre-vingt-dix jours suivant la saisie effectuée en vertu du paragraphe 18(1) ou l'établissement de la pénalité réglementaire visée au paragraphe 18(2) :

(*a*) cancel the seizure, or cancel or refund the penalty, if the Minister is satisfied that there was no contravention; or

a) si le ministre est convaincu qu'aucune infraction n'a été commise, annuler la saisie, ou annuler ou rembourser la pénalité;

(*b*) reduce the penalty or refund the excess amount of the penalty collected if there was a contravention but the Minister considers that there was an error with respect to the penalty

b) s'il y a eu infraction mais que le ministre est d'avis qu'une erreur a été commise concernant la somme établie ou versée et que celle-ci doit être réduite, réduire la pénalité ou

assessed or collected, and that the penalty should be reduced.

(2) If an amount is refunded to a person or entity under paragraph (1)(*a*), the person or entity shall be given interest on that amount at the prescribed rate for the period beginning on the day after the day on which the amount was paid by that person or entity and ending on the day on which it was refunded.

[…]

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 to the Minister in writing or by any other means satisfactory to the Minister.

[…]

28. If the Minister decides that subsection 12(1) was not contravened, the Minister of Public Works and Government Services shall, on being informed of the Minister's decision, return the penalty that was paid, or the currency or monetary instruments or an amount of money equal to their value at the time of the seizure, as the case may be.

29. (1) If the Minister decides that subsection 12(1) was contravened, the Minister may, subject to the terms and conditions that the Minister may determine,

rembourser le trop-perçu.

(2) La somme qui est remboursée à une personne ou entité en vertu de l'alinéa (1)*a*) est majorée des intérêts au taux réglementaire, calculés à compter du lendemain du jour du paiement de la somme par celle-ci jusqu'à celui de son remboursement.

[. . .]

25. La personne entre les mains de qui ont été saisis des espèces ou effets en vertu de l'article 18 ou leur propriétaire légitime peut, dans les quatre-vingt-dix jours suivant la saisie, demander au ministre au moyen d'un avis écrit ou de toute autre manière que celui-ci juge indiquée de décider s'il y a eu contravention au paragraphe 12(1).

[. . .]

28. Si le ministre décide qu'il n'y a pas eu de contravention au paragraphe 12(1), le ministre des Travaux publics et des Services gouvernementaux, dès qu'il est informé de la décision du ministre, restitue la valeur de la pénalité réglementaire, les espèces ou effets ou la valeur de ceux-ci au moment de la saisie, selon le cas.

29. (1) S'il décide qu'il y a eu contravention au paragraphe 12(1), le ministre peut, aux conditions qu'il fixe :

(*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;

a) soit restituer les espèces ou effets ou, sous réserve du paragraphe (2), la valeur de ceux-ci à la date où le ministre des Travaux publics et des Services gouvernementaux est informé de la décision, sur réception de la pénalité réglementaire ou sans pénalité;

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

b) soit restituer tout ou partie de la pénalité versée en application du paragraphe 18(2);

(*c*) subject to any order made under section 33 or 34, confirm that the currency or monetary instruments are forfeited to Her Majesty in right of Canada.

c) soit confirmer la confiscation des espèces ou effets au profit de Sa Majesté du chef du Canada, sous réserve de toute ordonnance rendue en application des articles 33 ou 34.

The 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.

Le ministre des Travaux publics et des Services gouvernementaux, dès qu'il en est informé, prend les mesures nécessaires à l'application des alinéas *a*) ou *b*).

(2) The total amount paid under paragraph (1)(*a*) shall, if the currency or monetary instruments were sold or otherwise disposed of under the Seized Property Management Act, not exceed the proceeds of the sale or disposition, if any, less any costs incurred by Her Majesty in respect of the currency or monetary instruments.

(2) En cas de vente ou autre forme d'aliénation des espèces ou effets en vertu de la Loi sur l'administration des biens saisis, le montant de la somme versée en vertu de l'alinéa (1)*a*) ne peut être supérieur au produit éventuel de la vente ou de l'aliénation, duquel sont soustraits les frais afférents exposés par Sa Majesté; à défaut de produit de l'aliénation, aucun paiement n'est effectué.

Subsection 462.3(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, which defines "proceeds of crime" reads as follows:

"proceeds of crime" means any property, benefit or advantage, within or outside Canada, obtained or derived

« produits de la criminalité » Bien, bénéfice ou avantage qui est obtenu ou qui provient, au Canada ou à

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.

l'extérieur du Canada, directement ou indirectement :

a) soit de la perpétration d'une infraction désignée;

b) soit d'un acte ou d'une omission qui, au Canada, aurait constitué une infraction désignée.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-307-13
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. ROBERT BO DA HUANG
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 5, 2014
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	GAUTHIER J.A. TRUDEL J.A.
DATED:	OCTOBER 10, 2014

APPEARANCES:

Jan Brongers Philippe Alma	FOR THE APPELLANT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPELLANT