

**Date: 20070511**

**Docket: A-71-06**

**Citation: 2007 FCA 186**

**CORAM : DESJARDINS J.A.  
NOËL J.A.  
PELLETIER J.A.**

**BETWEEN:**

**SKANDER TOURKI**

**Appellant**

**and**

**THE MINISTER OF PUBLIC SAFETY  
AND EMERGENCY PREPAREDNESS**

**Respondent**

Hearing held at Montréal, Quebec, on February 7, 2007.

Judgment delivered at Ottawa, Ontario, on May 11, 2007.

**REASONS FOR JUDGMENT BY:**

**DESJARDINS J.A.**

**CONCURRED IN BY:**

**NOËL J.A.  
PELLETIER J.A.**

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**REASONS FOR JUDGMENT**

**DESJARDINS J.A.**

[1] This is an appeal from the decision of the Federal Court (Harrington J.) (2006 FC 50) dismissing the action brought by the appellant, Mr. Tourki, under subsection 30(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (the Act). Harrington J. held, *inter alia*, that in an action under section 30 of the Act, the Federal Court has no jurisdiction to review the decision of the Minister of Public Safety and Emergency Preparedness (the Minister) to confirm that currency seized under the Act is forfeited, the appropriate procedure being an application for judicial review.

## **Facts**

[2] On July 5, 2003, the appellant boarded a flight from Montréal to Paris. The private security corporation that was responsible for the security checkpoint had informed customs that Mr. Tourki had told them that his briefcase contained \$25,000 in currency from the sale of an automobile. Before the plane left, two officers asked Mr. Tourki to disembark. When his person and baggage were searched, a briefcase containing banknotes totalling \$102,642.33 was found. The notes were seized as forfeit by a customs officer. The Minister subsequently confirmed the forfeiture.

[3] The appellant brought an action under section 30 of the Act. He challenged the Minister's decision that the appellant had violated section 12 of the Act and the Minister's decision to confirm the forfeiture of the notes. The appellant also challenged the validity of sections 12, 15, 16, 18, 19 and 22 to 29 of the Act on the ground that they were inconsistent with sections 7, 8 and 11(d) of the *Canadian Charter of Rights and Freedoms* (the Charter).

[4] The trial judge dismissed the action. He held that, in an action under section 30 of the Act, the Federal Court does not have jurisdiction to review the Minister's decision to confirm the forfeiture of the currency. In addition, the trial judge was of the opinion that the appellant had violated section 12 of the Act by failing to report to customs the exportation of money of a value greater than \$10,000.00. He also held that the Act did not violate the rights guaranteed by sections 7, 8 and 11(d) of the Charter.

## Relevant Legislation

[5] I will first set out the relevant sections of the Act.

### Object

3. The object of this Act is  
(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

(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,

(ii) requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments, and

(iii) establishing an agency that is responsible for dealing with reported and other information;

### Objet

3. La présente loi a pour objet :  
a) de mettre en œuvre 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) 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) établir un régime de déclaration obligatoire des opérations financières douteuses et des mouvements transfrontaliers d'espèces et d'effets,

(iii) constituer un organisme chargé de l'examen de renseignements, notamment

ceux portés à son attention en application du sous-alinéa (ii);

(b) to respond to the threat posed by organized crime by providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves; and

b) de combattre le crime organisé en fournissant aux responsables de l'application de la loi les renseignements leur permettant de priver les criminels du produit de leurs activités illicites, tout en assurant la mise en place des garanties nécessaires à la protection de la vie privée des personnes à l'égard des renseignements personnels les concernant;

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

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

### **Currency and monetary instruments**

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

### **Déclaration**

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

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;

...

**Seizure and forfeiture**

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.

(3) An officer who seizes currency or monetary instruments under subsection (1) shall

(a) if they were not imported or exported as mail, give the

possession effective ou parmi ses bagages les espèces ou effets se trouvant à bord du moyen de transport par lequel elle est arrivée au Canada ou a quitté le pays ou la personne qui, dans les circonstances réglementaires, est responsable du moyen de transport;

[...]

**Saisie et confiscation**

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) Sur réception du paiement de la pénalité réglementaire, l'agent restitue au saisi ou au propriétaire légitime les espèces ou effets saisis sauf s'il soupçonne, pour des motifs raisonnables, qu'il s'agit de produits de la criminalité au sens du paragraphe 462.3(1) du Code criminel ou de fonds destinés au financement des activités terroristes.

(3) L'agent qui procède à la saisie-confiscation prévue au paragraphe (1) :

a) donne au saisi, dans le cas où les espèces ou effets sont

person from whom they were seized written notice of the seizure and of the right to review and appeal set out in sections 25 and 30;

*(b)* if they were imported or exported as mail and the address of the exporter is known, give the exporter written notice of the seizure and of the right to review and appeal set out in sections 25 and 30; and

*(c)* take the measures that are reasonable in the circumstances to give notice of the seizure to any person whom the officer believes on reasonable grounds is entitled to make an application under section 32 in respect of the currency or monetary instruments.

#### **Power to call in aid**

19. An officer may call on other persons to assist the officer in exercising any power of search, seizure or retention that the officer is authorized under this Part to exercise, and any person so called on is authorized to exercise the power.

#### **Recording of reasons for decision**

19.1 If an officer decides to exercise powers under subsection 18(1), the officer shall record in writing reasons for the decision.

...

importés ou exportés autrement que par courrier, un avis écrit de la saisie et du droit de révision et d'appel établi aux articles 25 et 30;

*b)* donne à l'exportateur, dans le cas où les espèces ou effets sont importés ou exportés par courrier et son adresse est connue, un avis écrit de la saisie et du droit de révision et d'appel établi aux articles 25 et 30;

*c)* prend les mesures convenables, eu égard aux circonstances, pour aviser de la saisie toute personne dont il croit, pour des motifs raisonnables, qu'elle est recevable à présenter, à l'égard des espèces ou effets saisis, la requête visée à l'article 32.

#### **Main-forte**

19. L'agent peut requérir main-forte pour se faire assister dans l'exercice des pouvoirs de fouille, de rétention ou de saisie que lui confère la présente partie. Toute personne ainsi requise est autorisée à exercer ces pouvoirs.

#### **Enregistrement des motifs**

19.1 L'agent qui décide d'exercer les attributions conférées par le paragraphe 18(1) est tenu de consigner par écrit les motifs à l'appui de sa décision.

[...]

**When forfeiture under s. 14(5)**

22. (1) An officer who retains currency or monetary instruments forfeited under subsection 14(5) shall send the currency or monetary instruments to the Minister of Public Works and Government Services.

(2) An officer who seizes currency or monetary instruments or is paid a penalty under subsection 18(2) shall send the currency or monetary instruments or the penalty, as the case may be, to the Minister of Public Works and Government Services.

**Time of forfeiture**

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.

**Review of forfeiture**

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

**Confiscation aux termes du paragraphe 14(5)**

22. (1) En cas de confiscation aux termes du paragraphe 14(5) des espèces ou effets retenus, l'agent les remet au ministre des Travaux publics et des Services gouvernementaux.

(2) En cas de saisie d'espèces ou d'effets ou de paiement d'une pénalité réglementaire aux termes du paragraphe 18(2), l'agent les remet au ministre des Travaux publics et des Services gouvernementaux.

**Moment de la confiscation**

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.

**Conditions de révision**

24. La confiscation d'espèces ou d'effets saisis en vertu de la présente partie est définitive et n'est susceptible de révision, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités



to 30.

**Request for Minister's decision**

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.

**Notice of President**

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

(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.

prévues aux articles 25 à 30.

**Demande de révision**

25. La personne entre les mains de qui ont été saisis des espèces ou effets en vertu de l'article 18 ou leur propriétaire légitime peut, dans les quatre-vingt-dix jours suivant la saisie, demander au ministre de décider s'il y a eu contravention au paragraphe 12(1) en donnant un avis écrit à l'agent qui les a saisis ou à un agent du bureau de douane le plus proche du lieu de la saisie.

**Signification du président**

26. (1) Le président signifie sans délai par écrit à la personne qui a présenté la demande visée à l'article 25 un avis exposant les circonstances de la saisie à l'origine de la demande.

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

**Decision of the Minister**

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.

(2) If charges are laid with respect to a money laundering offence or a terrorist activity financing offence in respect of the currency or monetary instruments seized, the Minister may defer making a decision but shall make it in any case no later than 30 days after the conclusion of all court proceedings in respect of those charges.

(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.

**If there is no contravention**

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.

**Décision du ministre**

27. (1) Dans les quatre-vingt-dix jours qui suivent l'expiration du délai mentionné au paragraphe 26(2), le ministre décide s'il y a eu contravention au paragraphe 12(1).

(2) Dans le cas où des poursuites pour infraction de recyclage des produits de la criminalité ou pour infraction de financement des activités terroristes ont été intentées relativement aux espèces ou effets saisis, le ministre peut reporter la décision, mais celle-ci doit être prise dans les trente jours suivant l'issue des poursuites.

(3) Le ministre signifie sans délai par écrit à la personne qui a fait la demande un avis de la décision, motifs à l'appui.

**Cas sans contravention**

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.

**If there is a contravention**

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.

(2) The total amount paid under paragraph (1)(a) shall, if the currency or monetary instruments were sold or

**Cas de contravention**

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

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

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

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) En cas de vente ou autre forme d'aliénation des espèces ou effets en vertu de la Loi sur l'administration des biens

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.

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.

**Appeal to Federal Court**

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.

**Cour fédérale**

30. (1) La personne qui a présenté une demande en vertu de l'article 25 peut, dans les quatre-vingt-dix jours suivant la communication de la décision, en appeler par voie d'action devant la Cour fédérale à titre de demandeur, le ministre étant le défendeur.

(2) The Federal Courts Act and the rules made under that Act that apply to ordinary actions apply to actions instituted under subsection (1) except as varied by special rules made in respect of such actions.

(2) La Loi sur les Cours fédérales et les règles prises aux termes de cette loi applicables aux actions ordinaires s'appliquent aux actions intentées en vertu du paragraphe (1), avec les adaptations nécessaires occasionnées par les règles propres à ces actions.

(3) The Minister of Public Works and Government Services shall give effect to the decision of the Court on being informed of it.

(3) Le ministre des Travaux publics et des Services gouvernementaux, dès qu'il en a été informé, prend les mesures nécessaires pour donner effet à la décision de la Cour.

[Emphasis added.]

[Je souligne.]

### Standard of Review

[6] The jurisdiction of the Federal Court under section 30 of the Act is a question of statutory construction that is reviewable on the correctness standard. The question of whether the appellant contravened subsection 12(1) of the Act is a question of mixed fact and law that is reviewable on the palpable and overriding error standard: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

### Jurisdiction of the Federal Court under Section 30 of the Act

[7] Section 24 of the Act contains the following privative clause:

#### **Review and Appeal**

##### **Review of forfeiture**

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.

#### **Révision et appel**

##### **Conditions de révision**

24. La confiscation d'espèces ou d'effets saisis en vertu de la présente partie est définitive et n'est susceptible de révision, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues aux articles 25 à 30.

[8] That section provides that the forfeiture of currency seized may be reviewed by way of an action under section 30 of the Act. The English version of section 24 is also very clear on this point.

[9] The word "forfeiture" ("confiscation") means, in law, "a divestiture of specific property without compensation" (*Black's Law Dictionary*, 8th ed. 2004, p. 667). That definition was cited by the Supreme Court of Canada in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867 at paragraph 44, which dealt with the word "forfeiture" ("confiscation") in subsection 72(1) of the *Fisheries Act*, R.S.C. 1985, c. F-14.

[10] Section 30 of the Act, however, provides as follows:

**Appeal to Federal Court**

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.

(2) The Federal Courts Act and the rules made under that Act that apply to ordinary actions apply to actions instituted under subsection (1) except as varied by special rules made in respect of such actions.

(3) The Minister of Public Works and Government Services shall give effect to the decision of the Court on being informed of it.

[Emphasis added.]

**Cour fédérale**

30. (1) La personne qui a présenté une demande en vertu de l'article 25 peut, dans les quatre-vingt-dix jours suivant la communication de la décision, en appeler par voie d'action devant la Cour fédérale à titre de demandeur, le ministre étant le défendeur.

(2) La Loi sur les Cours fédérales et les règles prises aux termes de cette loi applicables aux actions ordinaires s'appliquent aux actions intentées en vertu du paragraphe (1), avec les adaptations nécessaires occasionnées par les règles propres à ces actions.

(3) Le ministre des Travaux publics et des Services gouvernementaux, dès qu'il en a été informé, prend les mesures nécessaires pour donner effet à la décision de la Cour.

[Je souligne.]

[11] That section allows anyone who has made a request under section 25 to appeal by way of an action before the Federal Court in which the person is the plaintiff, within 90 days "after being notified of the decision". The Act does not specify which decision. Subsection 30(1), however, refers to a request under section 25, which provides as follows:

**Request for Minister's decision**

25. A person from whom currency or monetary instruments were seized under section 18, or the lawful owner

**Demande de révision**

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

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.

[Emphasis added.]

jours suivant la saisie, demander au ministre de décider s'il y a eu contravention au paragraphe 12(1) en donnant un avis écrit à l'agent qui les a saisis ou à un agent du bureau de douane le plus proche du lieu de la saisie.

[Je souligne.]

[12] Section 25 refers to the decision of the Minister as to whether subsection 12(1) of the Act was contravened. It is therefore that decision that is at issue in subsection 30(1). The Minister makes that decision under section 27 of the Act, which provides:

**Decision of the Minister**

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.

(2) If charges are laid with respect to a money laundering offence or a terrorist activity financing offence in respect of the currency or monetary instruments seized, the Minister may defer making a decision but shall make it in any case no later than 30 days after the conclusion of all court proceedings in respect of those charges.

**Décision du ministre**

27. (1) Dans les quatre-vingt-dix jours qui suivent l'expiration du délai mentionné au paragraphe 26(2), le ministre décide s'il y a eu contravention au paragraphe 12(1).

(2) Dans le cas où des poursuites pour infraction de recyclage des produits de la criminalité ou pour infraction de financement des activités terroristes ont été intentées relativement aux espèces ou effets saisis, le ministre peut reporter la décision, mais celle-ci doit être prise dans les trente jours suivant l'issue des poursuites.

(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.

[Emphasis added.]

(3) Le ministre signifie sans délai par écrit à la personne qui a fait la demande un avis de la décision, motifs à l'appui.

[Je souligne.]

[13] There is no doubt that the action that may be brought relates to the decision made by the Minister under section 27.

[14] If the Minister decides that subsection 12(1) of the Act was contravened, the Minister must then, on his own initiative, make another decision. Section 29 provides as follows:

**If there is a contravention**

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;

(c) subject to any order made under section 33 or 34, confirm that the currency or monetary instruments are forfeited to

**Cas de contravention**

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

a) soit décide de 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;

c) soit confirme la confiscation des espèces ou effets au profit de Sa Majesté du chef du Canada, sous réserve de toute



Her Majesty in right of Canada.	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.

[Emphasis added.]

[Je souligne.]

[15] Is this second decision also covered by section 30?

[16] In *Dokaj v. Canada (Minister of National Revenue)*, 2005 FC 1437, [2005] F.C.J. No. 1783 (QL), Layden-Stevenson J. answered this question in the negative. She stated, at paragraphs 35 and 37:

[35] The decisions of the Minister pursuant to sections 27 and 29 are discrete decisions.

[35] Les décisions rendues par le ministre en application des articles 27 et 29 sont des

One deals with contravention; the other deals with penalty and forfeit. Section 27 stipulates that the Minister shall decide whether subsection 12(1), i.e. the requirement to report, was contravened. The wording is unequivocal and leaves no room for doubt. Section 29 provides that, in circumstances where the Minister determines that there was a failure to report, the Minister is to review the quantum of the sanction imposed by the customs official under subsection 18(2), i.e. full forfeiture or a penalty ranging from \$250 to \$5,000. The Minister will either confirm the customs official's determination with respect to sanction or reduce it to some lesser penalty.

...

[37] There is no ambiguity in the language. The Act authorizes an appeal in relation to a decision of the Minister under section 25. Section 25 relates only to a decision as to whether subsection 12(1) was contravened (the provision that imposes the obligation to report). It necessarily follows that the references to "a

décisions distinctes. L'une a trait à la contravention, tandis que l'autre porte sur la pénalité et la confiscation. L'article 27 énonce que le ministre doit décider s'il y a eu contravention au paragraphe 12(1), c'est-à-dire à l'obligation de déclarer les espèces ou effets. Le libellé est non équivoque et ne laisse aucun doute quant à sa signification. L'article 29 prévoit que, dans le cas où le ministre détermine que la personne a négligé de faire la déclaration requise, le ministre doit décider si le montant de la pénalité imposée par l'agent des douanes en application du paragraphe 18(2) était approprié, à savoir la confiscation entière des espèces ou une pénalité allant de 250 à 5 000 \$. Le ministre peut confirmer la décision de l'agent des douanes eu égard à la pénalité ou ordonner la restitution d'une partie plus ou moins importante de celle-ci.

[...]

[37] Le libellé des dispositions est clair. La Loi permet d'interjeter appel de la décision du ministre fondée sur l'article 25. Cet article vise uniquement une décision sur la question de savoir s'il y a eu contravention au paragraphe 12(1), qui énonce l'obligation de faire une déclaration. Il s'ensuit que les termes « une

decision" and "the decision" in subsection 30(1) refer to the Minister's determination under section 27 of the Act. In my view, it cannot reasonably be construed in any other way. Consequently, the Federal Court's jurisdiction, pursuant to section 30 of the Act, is limited to reviewing the decision under section 27 of the Act. That decision is with respect to whether or not there was a contravention of the Act under subsection 12(1).

demande » et « la décision » employés à l'article 30 renvoient à la décision du ministre en application de l'article 27. À mon avis, il s'agit de la seule interprétation raisonnable. La compétence de la Cour fédérale en vertu de l'article 30 de la Loi est donc restreinte à la révision de la décision rendue en application de l'article 27 de la Loi. Cette décision vise à déterminer s'il y a eu contravention au paragraphe 12(1).

[17] I am of the same opinion. The distinction she made between a decision under section 27 (the contravention or report) and a decision under section 29 (the penalty and forfeiture) is, as she demonstrated, based on the case law of this Court dealing with the seizure review and appeal mechanism provided for in the *Customs Act*, R.S.C. 1985, c. 1 (2<sup>nd</sup> Supp.), a mechanism similar to what is found in the Act (see *Time Data Recorder International Ltd v. M.N.R.*, [1997] F.C.J. No. 475 (C.A.)(QL), affirming [1993] F.C.J. No. 768 (T.D.)(QL); *Nerguizian v. M.N.R.*, [1996] F.C.J. No. 866 (T.D.)(QL); *He v. Canada*, [2000] F.C.J. No. 93 (T.D.)(QL).

[18] Accordingly, any decision relating to a penalty and seizure cannot be challenged by way of an action under section 30 of the Act. The appropriate remedy is an application for judicial review under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[19] The respondent drew our attention to the *Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act*, S.C. 2006, c. 12, sections 14 and 16 of which, *inter alia*, came into force on February 10, 2007 (Order in Council P.C. 2007-0142 (Registration SI/20-07-18)). Those amendments are not effective retroactively and are not relevant for the purposes of this appeal. It is not for the Court, in the context of this case, to make pronouncements on the effect of the amendments for the future. This Court commented on them in *Minister of Public Safety and Emergency Preparedness v. Pham*, 2007 FCA 141, [2007] F.C.J. No. 496 (QL) (see paragraph 23).

#### **Subsection 12(1) of the Act**

[20] The appellant argues that he has not contravened subsection 12(1) of the Act. He says, and customs officer J.C. Prémont acknowledged at the hearing before the trial judge, that he had signed a declaration before leaving the airport in the early hours of July 6, 2003.

[21] The trial judge clearly took note of that statement. He nonetheless held that the form signed by Mr. Tourki did not constitute a report under subsection 12(1) of the Act. It was too late to do so, because he was sitting on a plane on the tarmac when he was intercepted.

[22] The trial judge did not err in deciding that the Minister was correct in determining that the appellant had contravened subsection 12(1) of the Act.

### **Connection between a Forfeiture and a Declaration**

[23] One of the objects of the Act is to require the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments (subparagraph 3(a)(ii)). As Layden-Stevenson J. explained at paragraph 26 of her reasons, the implementation of those objectives is achieved through Part 2 of the Act which requires that importers and exporters make a report to a customs official whenever they import or export large quantities of currency or monetary instruments into or out of Canada. The reporting requirement is the cornerstone of the system established for monitoring cross-border movements.

[24] It is therefore important to note that a review of the Minister's decision, regarding both the contravention and the penalty or forfeiture, is necessarily initiated by a request under section 25 of the Act. It is also important to note that subsection 26(2), which is related to the request under section 25, is the only section of the Act that gives the person whose property has been seized an opportunity to offer evidence regarding both the contravention and the forfeiture.

[25] Sections 18 to 20 of the Act are under the heading **Seizures**. The Act provides that 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 (subsection 18(1) of the Act). An officer who decides to exercise the powers provided for in subsection 18(1) is required to record in writing reasons for the decision (section 19.1 of the Act). An officer who seizes currency or monetary instruments under subsection 18(1) of the Act must give the person from whom they were seized written notice of the seizure and of the right to review and appeal set out in sections 25 and 30 of the

Act (subsection 18(3) of the Act). 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 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 (subsection 18(2) of the Act). If the currency or monetary instruments have been seized under section 18, the officer who seized them shall without delay report the circumstances of the seizure to the President of the Canada Border Services Agency and to the Financial Transactions and Reports Analysis Centre of Canada (section 20).

[26] Under the heading **Forfeiture**, section 23 of the Act provides that 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. No act or proceeding after the forfeiture is necessary to effect the forfeiture (section 23 of the Act).

[27] The Act then provides, under the heading **Review and Appeal**, that the forfeiture is final and is not subject to review except to the extent and in the manner provided for by sections 25 to 30 of the Act (section 24 of the Act).

[28] The Act then provides that a person from whom currency or monetary instruments were seized, or the lawful owner, 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 (section 25). If a decision of the Minister is requested under section 25, the President shall without delay serve on the person who requested it written notice of the circumstances of the seizure in respect of which the decision is requested (subsection 26(1)). 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 (subsection 26(2)). The Minister shall decide, within 90 days after the expiry of the period referred to in subsection 26(2), whether subsection 12(1) was contravened (subsection 27(1)). The Minister has more time if criminal charges are laid (subsection 27(2)). When the time allowed by the Act expires, 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 (subsection 27(3)).

[29] If the Minister decides that subsection 12(1) of the Act was contravened, the Minister shall (a) decide that the currency or monetary instruments be returned (paragraph 29(1)(a)); (b) decide that any penalty or portion of any penalty that was paid under subsection 18(2) be remitted (paragraph 29(1)(b)); or (c) confirm that the currency or monetary instruments are forfeited to Her Majesty in Right of Canada (paragraph 29(1)(c)). The Act does not require that the Minister give reasons for the decision, nor does it state the basis on which the Minister decides. No doubt, however, the Minister has before him the reasons recorded by the officer who exercised the powers provided for in subsection 18(1). The Minister also has the evidence offered by the person from whom currency or monetary instruments were seized under subsection 26(2).

[30] The Minister's decision to confirm the forfeiture makes the forfeiture final, subject to judicial review as noted earlier.

[31] In this case, the Minister's decision under section 27 and section 29 was as follows (A.B. vol. II, p. 273):

[TRANSLATION]

**Decision**

After examining all of the circumstances of the case, I conclude, under section 27 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, that the contravention was validly determined to have occurred and the seizure of the currency was justified.

Under section 29 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, the currency seized is retained as forfeit.

**Reasons**

Because the currency was not properly reported to Customs, it was seized as forfeit. Forfeiture of the currency without conditions for return is in accordance with the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.

**Forfeiture of Negotiable Instruments in this Case**

[32] The appellant argues that the trial judge found that the property seized did not constitute proceeds of crime.

[33] At paragraph 59 of his reasons, Harrington J. added, in *obiter*:

¶ 59 That being said, in the event that I am wrong and the Minister's decision to confirm the forfeiture is also the subject of this appeal, I am of the opinion, based on the evidence at trial, that there are no reasonable grounds to suspect that the \$102,642.33 or any part



thereof are the proceeds of crime within the meaning of Section 462.3(1) of the *Criminal Code*. In reaching that opinion, it was not necessary to consider the burden of proof and the threshold which must be reached before it can be said that suspicions are supported by reasonable grounds.

[34] Having regard to his ruling that any review of the Minister's decision to confirm the forfeiture had to be done by way of an application for judicial review, the trial judge did not need to consider the "reasonable grounds to suspect that...". That was not his role.

#### **Sections 7, 8 and 11(d) of the Charter**

[35] Before the trial judge, the appellant challenged the constitutional validity of sections 12, 15, 16, 18, 19 and 22 to 29 of the Act, and more specifically: (1) the duty imposed on an individual under section 12 of the Act to report money or currency that do not constitute proceeds of crime or are intended to be used to finance terrorist activities; (2) the right of an officer to seize as forfeit, on mere suspicion, currency that does not constitute proceeds of crime or that is not intended to be used to finance terrorist activities; and (3) the powers to order the seizure and forfeiture of currency solely because of a failure to report, based on mere suspicion, without further proof of its origin or illegal destination.

[36] In the appellant's submission, section 12 of the Act creates a presumption whereby unreported currency of a value greater than \$10,000 constitutes proceeds or crime or is intended to be used to finance terrorist activities, so that the currency may then be seized and forfeited. That presumption is unconstitutional, *ultra vires*, null and void, in the appellant's submission, as contrary

to sections 8 and 11(d) of the Charter. Its effect is a reverse onus of proof. As well, it is inconceivable that the right to declare forfeit should be based on a mere suspicion.

[37] Before the trial judge, the appellant also invoked section 7 of the Charter, referring to *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606. In that decision, the Supreme Court of Canada recognized the existence of a principle of fundamental justice whereby laws must not so lack in precision as not to give sufficient guidance for legal debate. In this Court, the appellant submits that the Act creates a presumption that is abusive, extreme and illogical by using the expressions "proceeds of crime" and "terrorist financing", which are [TRANSLATION] "too vague and too general".

[38] Section 8 of the Charter protects reasonable expectations of privacy: *Hunter v. Southam*, [1984] 2 S.C.R. 145. That provision is intended to protect individual privacy and is not a constitutional guarantee of property rights: *Quebec (Attorney General) v. Larocche*, [2002] 3 S.C.R. 708 at paragraph 52. See also *R. v. Plant*, [1993] 3 S.C.R. 281 at paragraph 16.

[39] In *R. v. Simmons*, [1988] 2 S.C.R. 495, the Supreme Court of Canada held that the search and seizure provisions in the *Customs Act*, which authorized the search of an individual if a customs officer had "reasonable grounds for supposing" that the person had prohibited goods secreted about his or her person, did not violate section 8 of the Charter. At paragraph 49 of its reasons, the Court explained:

I accept the proposition advanced by the Crown that the degree of personal privacy reasonably expected at customs is lower than in

most other situations. People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role. Without the ability to establish that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function. Consequently, travellers seeking to cross national boundaries fully expect to be subject to a screening process. This process will typically require the production of proper identification and travel documentation and involve a search process beginning with completion of a declaration of all goods being brought into the country. Physical searches of luggage and of the person are accepted aspects of the search process where there are grounds for suspecting that a person has made a false declaration and is transporting prohibited goods.

[Emphasis added.]

[40] The Supreme Court of Canada has further confirmed, in *R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 37, that the reasoning in *Simmons* applies notwithstanding the amendments to the *Customs Act* that authorizes a search on the basis of reasonable grounds to suspect.

[41] The provisions of the Act in question therefore do not violate section 8 of the Charter. The trial judge did not err in finding that "[p]hysical searches of luggage and of the person are accepted aspects of that process where they are grounds for suspecting that a person has made a false declaration or is transporting prohibited goods" and holding that the provisions in issue are not unreasonable.

[42] Moreover, the presumption of innocence guaranteed by section 11(d) of the Charter applies only to an accused, that is, an individual who is facing criminal, quasi-criminal or regulatory

charges: see, for example, *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 at page 554; *Schmidt v. R.*, [1987] 1 S.C.R. 500.

[43] The appellant is not an accused. He is not charged with any criminal, quasi-criminal or regulatory offence. The fact that his conduct may result in criminal prosecutions does not mean that the forfeiture procedure set out in the Act can be characterized as a penal proceeding. The appropriate test is the nature of the proceeding, and not the nature of the act: *Martineau v. Canada (Minister of National Revenue)*, [2004] 3 S.C.R. 737, at paragraph 31. The seizure and forfeiture process established by the Act is a civil collection mechanism that is not intended to punish the individual: see *Martineau* at paragraphs 22-23; *Wigglesworth* at page 560.

[44] Section 11(d) of the Charter therefore does not come into play. The trial judge did not err in describing the forfeiture provided for in the Act as civil proceedings against a thing, not proceedings against a person, and holding that this provision does not apply because no charge has been laid against Mr. Tourki.

[45] Section 7 is also not engaged. Even before addressing the issue of whether section 7 rights have been infringed in a manner not in accordance with the principles of fundamental justice, one must first establish that there has been an infringement of the right to life, liberty and security of the person: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paragraph 47.

[46] The duty to report imposed by the Act and the seizure and forfeiture mechanism it establishes do not engage the right to life, liberty and security of the person. The right to life, liberty and security of the person encompass a person's fundamental life choices, and not purely economic interests or property rights: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at paragraph 95; *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6 at paragraph 45.

[47] At paragraph 56 of his reasons, the trial judge concluded that "the law is crystal clear. If you do not declare, the Customs officer is entitled to forfeit that which should have been declared. It is as simple as that." It was not necessary to examine the appellant's argument based on the vagueness of the Act, because the appellant's situation does not engage section 7.

### **Conclusion**

[48] I would dismiss the appeal with costs.

"Alice Desjardins"

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J.A.

"I agree.  
Marc Noël J.A."

"I agree.  
J.D. Denis Pelletier J.A."

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-71-06

**(APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED JANUARY 19, 2006, FILE No. T-903-04).**

**STYLE OF CAUSE:** Skander Tourki v. The Minister of  
Public Safety and Emergency  
Preparedness

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** February 7, 2007

**REASONS FOR JUDGMENT BY:** Desjardins J.A.

**CONCURRED IN BY:** Noël J.A.  
Pelletier J.A.

**DATED:** May 11, 2007

**APPEARANCES:**

Jérôme Choquette and Jean-Stéphane Kourie  
Montréal, Quebec

FOR THE APPELLANT

Jacques Mimar  
Montréal, Quebec

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Choquette Beaupré Rhéaume  
Montréal, Quebec  
Justice Canada  
Montréal, Quebec

FOR THE APPELLANT

FOR THE RESPONDENT