Federal Court  Cour fédérale

Date: 20150216

Docket: T-69-14

Citation: 2015 FC 186

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 16, 2015

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

JEAN-MARC POULIN DE COURVAL IN HIS CAPACITY AS TRUSTEE IN BANKRUPTCY OF ERGÜN BOULOUD

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Jean-Marc Poulin de Courval (the trustee) is acting as trustee in the bankruptcy of Ergün Bouloud. In this application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, the trustee is challenging a decision dated December 10, 2013, by Jonathan Ledoux-Cloutier (the Minister's delegate), acting on behalf of

the Minister of Public Safety and Emergency Preparedness (the Minister or the respondent). In that decision, the Minister's delegate declined the return of the funds seized and forfeited by customs officers from Mr. Bouloud in accordance with the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 (the Act). For the following reasons, the application is dismissed.

I. **Background**

[2] The factual background in this case is important for understanding the change in actors in this matter and for grasping the nature of the dispute between the parties.

A. ***The seizure***

[3] On January 23, 2009, Mr. Bouloud made an assignment of his property to the trustee under the provisions of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA). In his statutory statement of affairs, he reported liabilities of $94,652, substantially all of which were debts to credit card companies, and assets of $145.

[4] In January 2009, the Royal Canadian Mounted Police (the RCMP) were informed that Mr. Bouloud was getting ready to declare bankruptcy and leave the country with more than $10,000 in his possession. After consulting Mr. Bouloud's credit file and noting a recent and significant increase in his debt load, the RCMP asked the Canada Border Services Agency (the CBSA) to issue a lookout notice in respect of Mr. Bouloud. The evidence shows that

between December 8 and 29, 2008, Mr. Bouloud took out a total of $84,207.50 in cash advances on credit cards.

[5] On February 1, 2009, Mr. Bouloud arrived at Pierre Trudeau Airport to take a flight to Turkey. He was stopped by CBSA customs officers who asked him if he was in possession of currency or monetary instruments worth $10,000 or more. After hesitating, Mr. Bouloud replied that he was leaving the country for two months and that he did not know exactly how much money he was carrying. He later reversed his position and stated that he was carrying exactly $10,000. A search of Mr. Bouloud and his checked luggage revealed that he had in his possession the equivalent of CAD 53,157.83, $37,060 of which was in Canadian currency, 10,000 of which was in euros, $100 of which was in American currency and 105 of which was in Turkish lira. When asked about the source of the funds, Mr. Bouloud explained to the customs officers that he had collected it from one of his brothers and from friends, and that it was intended to cover the cost of a surgery that one of his brothers who lives in Turkey was going to undergo. He also stated that a portion of the currency in his possession came from cash advances on his credit cards. Receipts in his luggage were evidence of cash advances amounting to $22,000.

[6] The customs officers decided to seize the currency that Mr. Bouloud had in his possession under subsection 18(1) of the Act because he did not report it as set out in subsection 12(1) of the Act. Section 12 of the Act imposes on persons who are arriving in or departing from Canada with currency of value equal to or greater than the prescribed amount the obligation to report that amount to a customs officer. Under subsection 2(1) of the *Cross-border*

Currency and Monetary Instruments Reporting Regulations, SOR/2002-412 (the Regulations), the prescribed amount that must be reported is $10,000.

[7] Subsection 18(1) of the Act sets out that a customs officer may seize the currency held by an individual if the officer believes on reasonable grounds that the individual contravened subsection 12(1) of the Act by failing to report that he or she was intending to depart from Canada with an amount equal to or greater than CAD 10,000. Section 18 of the Regulations sets out different penalties that may be imposed on the person from whom the currency was seized, which vary depending on the undisclosed and/or concealed amounts. Subsection 18(2) of the Act also states that customs officers shall return the seized currency on payment of a penalty set out in the Regulations, unless the officer has reasonable grounds to suspect that the currency is proceeds of crime within the meaning of subsection 462.3(1) of the *Criminal Code*, or funds for use in the financing of terrorist activities. In that case, customs officers may seize as forfeit the currency.

[8] In this case, the customs officer in charge upheld the forfeiture and declined to return the seized currency to Mr. Bouloud because he suspected that the seized currency was proceeds of crime. It should be pointed out that Mr. Bouloud did not inform the trustee about the incidents that occurred or about the seizure that he was the subject of.

B. ***Mr. Bouloud's request for decision***

[9] It is helpful in order to understand the chain of events, to provide an outline of the recourse available to individuals who have had currency seized as forfeit under the Act and who have had its return declined.

[10] Section 24 of the Act specifies that the forfeiture of seized currency 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 of the Act.

[11] Pursuant to section 25 of the Act, a person from whom currency was seized and forfeited may, within 90 days after the date of the seizure, request a decision of the Minister as to whether subsection 12(1) of the Act was contravened. Upon receiving such a request, the Minister renders a decision under section 27 and decides whether subsection 12(1) of the Act was contravened. If the Minister decides that subsection 12(1) was contravened, the Minister is then called upon to render a second decision under section 29 of the Act wherein he must decide whether to uphold the forfeiture of the currency to Her Majesty in Right of Canada or whether to return the seized currency to its owner.

[12] On April 29, 2009, Mr. Bouloud sent the CBSA, through his counsel, Brigitte Martin, and without informing the trustee, a letter of opposition to the seizure of his currency. The CBSA treated that letter as a request for review of the customs officer's decision under section 25 of the Act.

[13] In his request, and to try to establish the legitimate source of the seized currency, Mr. Bouloud contended that the seized funds belonged to him and that they had been collected from relatives and friends to cover the cost of a surgery that his brother was to undergo in Turkey. The request mentions the names of six individuals who apparently lent a total of $76,000 to the applicant. Signed statements by those six individuals were attached to the request.

[14] It was not in dispute that Mr. Bouloud contravened subsection 12(1) of the Act and as a result, the only decision in question was the one that the Minister had to render under section 29 of the Act. He had to decide whether to uphold the forfeiture.

[15] In a letter to Mr. Bouloud dated June 29, 2009, Adjudicator Martin Bélanger described the process of requesting the return of seized funds. In particular, he summarized the circumstances of the seizure, and he explained to Mr. Bouloud that the onus was on him to prove that the currency seized from him had come from legal sources. The adjudicator also mentioned that the explanations and documents provided to date appeared to be insufficient to [TRANSLATION] "dispel the seizing officer's reasonable grounds to suspect that the seized funds were proceeds of crime or to be used in the financing of terrorist activities".

[16] Between July and November 2009, there was some correspondence between Ms. Martin and the adjudicator, who had, in the meantime, been replaced by Adjudicator Sonya Brisson. Some of the pieces of correspondence sent by counsel for Mr. Bouloud were accompanied by documents intended to more specifically prove the source of the amounts lent to Mr. Bouloud.

C. ***The trustee's intervention in the matter and the proceeding instituted before the Superior Court of Québec***

[17] On December 1, 2009, the RCMP informed the trustee that it had seized $26,000 from Mr. Bouloud and that the CBSA had also seized currency from Mr. Bouloud on February 1, 2009, at Pierre-Elliot Trudeau Airport. The trustee then gave his lawyer, Jean-Philippe Gervais, the mandate to act on his behalf to recover the amounts seized by the RCMP and the CBSA.

[18] On January 28, 2010, Corporal Daniel Michaud of the RCMP sent a letter to the CBSA informing it of the status of an investigation into Mr. Bouloud's bankruptcy. In that letter, Corporal Michaud stated that in addition to the seizure by the CBSA, the RCMP had seized an amount of $26,000 from Mr. Bouloud's house. He noted that the total amount seized (by the RCMP and the CBSA) amounted to $79,157.93 and that that amount was close to the amount of cash advances taken out by Mr. Bouloud in November and December 2008. Corporal Michaud also stated that Mr. Bouloud was facing criminal charges, namely a charge of laundering proceeds of crime and 18 counts of fraud.

[19] A piece of correspondence dated December 16, 2009, from the adjudicator to Élisabeth Gruffy, a lawyer who works in Ms. Martin's office, shows that Ms. Martin had asked the adjudicator whether the trustee could recover the seized currency.

[20] Other exchanges between Ms. Gruffy and the adjudicator show that the adjudicator was never convinced that the explanations and documents submitted on behalf of Mr. Bouloud established the legitimate source of the currency seized by the customs officers.

[21] In a letter to the adjudicator dated February 9, 2010, Ms. Gruffy stated, for the first time, Mr. Bouloud's intention to submit the seized currency, if the Minister agreed to return it, to the trustee so that it could be paid to his creditors. She also stated in the letter that Mr. Bouloud intended to plead guilty to the fraud charges related to the cash advances on his credit cards and to the charge of failing to report $53,157.83 contrary to the Act.

[22] In a letter to Ms. Gruffy dated May 11, 2010, the adjudicator referred to, for the first time, Mr. Bouloud's assignment of property before the seizure and to the fact that he was still not discharged from his bankruptcy. The adjudicator asked Ms. Gruffy to confirm in writing the steps she had taken with the trustee in relation to Mr. Bouloud's request for decision.

[23] Ms. Gruffy replied with a letter also dated May 11, 2010, that she sent to counsel for the trustee, Mr. Gervais, in which she informed him of the steps taken to recover the amounts seized by the CBSA. Ms. Gruffy also informed Mr. Gervais that on April 14, 2010, Mr. Bouloud pleaded guilty to eight counts of fraud under paragraph 380(1)(*b*) of the *Criminal Code*, to ten other counts of fraud under paragraph 380(*a*) of the *Criminal Code* and to a charge of failing to report at the time of export that he had in his possession an amount greater than $10,000. Ms. Gruffy also confirmed to Mr. Gervais that Mr. Bouloud did not object to the currency that was seized by the CBSA being given to the trustee if the Minister agreed to return it.

[24] In a letter dated June 11, 2010, Mr. Gervais informed the adjudicator that the trustee intended to act as a substitute for Mr. Bouloud and continue the review process seeking to have the seized currency returned to him. At the same time, he informed the adjudicator that he had brought, on behalf of the trustee, a motion to recover seized funds before the Superior Court of Québec, to obtain an order against the RCMP and against the CBSA, forcing them to return to the trustee the amounts seized at the airport and at Mr. Bouloud's house. At the trustee's request, the request for ministerial review was stayed pending the outcome of his motion to recover before the Superior Court.

[25] In a judgment dated October 13, 2010 (*Bouloud (Syndic de)*, 2010 QCCS 4840, [2010] JQ no 10325 (*Bouloud QSC*)), the Superior Court granted the motion to recover in part and declared that the trustee was the owner entitled to possession of the amount of $26,000 seized at Mr. Bouloud's house by the RCMP.

[26] Regarding the currency seized by the CBSA that is the subject of the request for decision to the Minister, the trustee argued that the BIA should take precedence over the Act and that the amounts seized had to be returned to him notwithstanding the review process set out in section 25 of the Act and the authority of the Minister under section 29. The Superior Court did not accept the trustee's arguments and determined that the process Mr. Bouloud undertook with the Minister had to be completed. It also stated that if the Minister decided to return the seized amounts, he should thus return them to the trustee and not to Mr. Bouloud.

[27] The trustee appealed that decision. The Quebec Court of Appeal rendered its judgment on July 12, 2011 (*Bouloud (Syndic de)*, 2011 QCCA 1813, [2011] JQ 13822 (*Bouloud QCA*)), and essentially confirmed the position of the Superior Court.

D. ***The trustee's submissions as part of the request for decision***

[28] The process before the Minister was then reactivated and the trustee filed his submissions to the adjudicator. On August 23, 2012, the Minister rendered his first decision. The trustee disputed that decision before this Court on the ground that the rules of procedural fairness had not been respected (docket T-1800-12). The application for judicial review was allowed with consent from the Minister and an order to that effect was rendered on July 24, 2013. The matter was thus returned to the Minister for redetermination.

[29] On October 2, 2013, the request for decision was reactivated and the new adjudicator assigned to the case sent a letter to Mr. Gervais. In that letter, she emphasized that the trustee had to demonstrate in detail the source of all of the seized currency and that the documentary evidence had to establish an identifiable link between the seized money and its legal origin. She added that even though it could be inferred that some of the currency in Mr. Bouloud's possession could have come from cash advances on his credit cards, he was also in possession of foreign currency, the legal source of which had not been established.

[30] The trustee filed his submissions to the adjudicator on October 17, 2013. He rebutted Mr. Bouloud's claims about the origin of the seized currency. He adopted the position that the documentation in his possession clearly established that the currency seized by the CBSA

originated from Mr. Bouloud's cash advances on his credit cards and not from alleged loans from his friends and family.

[31] The trustee also submitted in this regard that the amounts allegedly loaned were not reported in Mr. Bouloud's debt and none of the supposed lenders had filed claims as creditors.

[32] The trustee submitted that the seized currency therefore came from, in all probability, cash advances taken out by Mr. Bouloud on his credit cards. The trustee produced a detailed statement of the amounts withdrawn by Mr. Bouloud on each of his credit cards between December 8, 2008, and December 29, 2008. They total $84,208. 00, and the total amount of funds seized was $79,157.83. Because Mr. Bouloud did not report any other source of income in his statutory statement of affairs for that same period, or any assets, the trustee stated that the only possible reasonable conclusion was that the seized currency came from the cash withdrawals that Mr. Bouloud had made. The trustee also based his position on the RCMP correspondence dated January 28, 2010, in which the RCMP itself was of the opinion that the amounts seized clearly came from the cash advances Mr. Bouloud took out on his credit cards.

[33] The trustee submitted that because Mr. Bouloud had obtained the amounts using his credit cards to the limits approved by the financial institutions, the seized currency originated from activities of a civil or commercial nature, and not of a criminal nature. At paragraph 60 of the affidavit sworn on October 17, 2013, the trustee stated that the fraud committed by Mr. Bouloud lies not in how he obtained the funds that were seized, but in the fact that he hid from the trustee that on the date of the seizure he still possessed the funds that were subsequently

seized by the RCMP and the CBSA. The trustee submitted that in light of that, Mr. Bouloud's creditors should not be deprived of assets that would allow them to recover a portion of their loss.

[34] It is apparent from the various exchanges between the trustee and the adjudicator that the adjudicator asked the trustee to prove the legitimate source of all of the seized currency and required that the documentary evidence prove an identifiable link between all of the currency seized and its legal origin. The adjudicator provided an example of the 10,000 euros seized, and stated that the documentary evidence had to show that Mr. Bouloud withdrew CAD 15,380 and then converted it to euros. The applicant told the adjudicator that the burden that was imposed on him was too high and impossible to meet.

[35] It is also apparent from the exchanges between the adjudicator and the trustee that the adjudicator considered Mr. Bouloud's guilty plea to a certain number of fraud charges and that she was of the view that the legitimate source of the funds was still in question. She also noted that the cash advances were made in December 2008, while the seizure occurred in February 2009, and that because of the period of four to eight weeks between the withdrawals and the enforcement action, it might be difficult to conclusively link the cash advances to the seized currency.

II. **Impugned decision**

[36] The impugned decision was rendered on December 10, 2013, by the Minister's delegate. That decision essentially reiterated the adjudicator's report on the reasons for decision dated December 5, 2013.

[37] First, the Minister's delegate decided, under section 27 of the Act, that the Act had been contravened because Mr. Bouloud had failed to report that he intended to leave Canada with an amount greater than $10,000 in his possession. He then discussed the decision that he had to make pursuant to section 29 of the Act, and he decided that the full forfeiture of the seized currency was justified because he was not convinced that the seized funds were not proceeds of crime.

[38] First, the Minister's delegate replied to the trustee's argument that the seized currency came from cash advances that Mr. Bouloud took out on his credit cards and he found that the legitimate source of the entirety of the funds was still in question. He also noted that the seized funds consisted in part of foreign currency and that the origin of that foreign currency had not been proven by any documentation. He also noted that four to eight weeks passed between the cash advances and the enforcement action and that he was therefore unable to conclusively link the cash advances to the seized currency.

[39] Second, the Minister's delegate found that the legitimate origin of the currency also remained in question. In this regard, he noted that Mr. Bouloud had taken out the cash advances

with the aim of defrauding the financial institutions that had issued the credit cards and then fleeing the country. He noted that [TRANSLATION] "it was understood that the seized currency was obtained fraudulently and that Mr. Bouloud faced fraud charges." He found that the currency in Mr. Bouloud's possession had been obtained by the commission of an offence, that is, fraud.

[40] The Minister's delegate stated that he found it unfortunate that the creditors had given Mr. Bouloud so much credit and that they had to suffer such loss, but that the Minister could not use his discretion because the currency was obtained illegally by the commission of an indictable offence. He concluded his decision with the following comments:

> [TRANSLATION]
> In conclusion, the Ministerial review considered the credibility of the person in possession of the funds at the time of the enforcement action and could not be convinced that the funds were not proceeds of crime. It is understood that Mr. Bouloud pleaded guilty to a certain number of fraud charges made against him. As a result, the original source of the seized funds is no longer in question because it is without a doubt an unlawful source, proceeds of crime.

III. **Issue and standard of review**

[41] The trustee maintains that two issues arise in his application for judicial review.

[42] He presents the first issue as follows: Does the BIA have precedence over the Act with respect to the trustee's seizin of the debtor's assets? In fact, because the Minister's delegate did not address this issue in his decision, the issue raised by the applicant should instead be whether the Minister's delegate erred by failing to consider and apply the provisions of the BIA in dealing with the request for decision.

[43] The applicant argues that this issue is a question of law that should be reviewed on the standard of correctness. The issue does indeed involve a question of law, that is, the interpretation of the BIA and its impact on the Minister's exercise of his discretion under section 29 of the Act. The Minister has no specific expertise in or familiarity with the BIA and I am of the opinion that its possible interpretation, to determine whether its provisions must be taken into consideration in the exercise of his discretion, could be reviewed on the standard of correctness. However, and as will be explained below, this issue is not determinative in this case because the Quebec courts have already ruled on this issue. Consequently, the Minister did not have to interpret the provisions of the BIA to render his decision.

[44] The second issue involves the reasonableness of the decision of the Minister's delegate with respect to the circumstances of the case.

[45] The parties agree, and I concur, that this issue must be reviewed against the reasonableness standard. The Federal Court of Appeal has stated several times that decisions rendered by the Minister under section 29 of the Act are discretionary and must be reviewed on the standard of reasonableness (*Dag v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 95 at para 4, [2008] FCJ No 424; *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255 at para 25, [2008] FCJ No 1267 (*Sellathurai*); *Yang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 281 at para 9, [2008] FCJ No 1321; *Canada (Minister of Public Safety and Emergency Preparedness) v Huang*, 2014 FCA 228 at para 36, [2014] FCJ No 1010 (*Huang*). In *Huang* at para 37, relying on *McLean v British Columbia (Securities Commission)*, 2013 SCC

67 at para 33, [2013] 3 SCR 895, the Court also stated that the Minister's interpretation of the extent of his discretion is presumptively entitled to deference.

[46] It is useful to bear in mind the principles on the concept of reasonableness that were stated by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

IV. **Positions of the parties**

A. ***The applicant's arguments***

[47] Regarding the first issue raised, the trustee submits arguments in support of his position that the BIA should take precedence over the Act. His arguments are essentially the same as those he raised before the Superior Court of Québec and the Quebec Court of Appeal to claim that the funds seized from Mr. Bouloud should be returned to him so that he can redistribute them to the creditors according to the order of priority in the BIA.

[48] The trustee relies on section 71 of the BIA which states that once there has been an assignment of property, all of the property belonging to the debtor is vested in him, and he argues that the definition of the term "property" in sections 2 and 67 of the BIA does not make any exception for property that might otherwise constitute proceeds of crime under subsection 462.3(1) of the *Criminal Code* and the Act. The applicant contends that the BIA must be interpreted based on its general purpose and that there cannot be any exception to his seizin unless Parliament has explicitly provided for it, either in the BIA or in another Act of Parliament that expressly references it. The applicant also bases his position on the powers conferred on him by the BIA to recover the property that belongs to the bankrupt.

[49] The trustee therefore contends that because the Act does not provide that funds seized by a customs officer may be forfeited notwithstanding the BIA, the BIA must have precedence and the currency that was seized by the CBSA must be returned to him.

[50] The trustee adds that section 86 of the BIA stipulates that except in certain specific cases, Crown claims are ranked as ordinary claims. The trustee argues that it would be illogical for the Crown to obtain the assets of the bankruptcy in priority to the mass of creditors, merely because the assets in question were seized by customs officers under the Act.

[51] Regarding his second argument, the trustee maintains that the burden of proof imposed on him by the Minister to show the legitimate origin of the currency is too high. More specifically, he criticizes the Minister for imposing on him the burden of proving through documentary evidence an identifiable link between all of the currency seized and its legitimate

origin. The applicant particularly referred to the adjudicator's correspondence dated October 2, 2013, in which she provided as an example, regarding the 10,000 euros, that he had to submit documentary evidence demonstrating that Mr. Bouloud had taken out or made a cash advance of about $15,380 and then converted his Canadian currency into euros.

[52] The trustee submits that such a requirement is unreasonable and impossible for a trustee to meet unless he had tracked Mr. Bouloud and had videotaped all of his actions continuously in the weeks preceding his bankruptcy and throughout his bankruptcy. The trustee argues that the Minister must consider his position and the inherent limitations on his capacity to prove all of the actions of the bankrupt.

[53] The trustee indicates that the evidence that he submitted to the Minister demonstrates that, in all probability, the currency seized by the customs officers came from cash advances that Mr. Bouloud took out on his credit cards. He adds that that is the only possible source of the funds and that the documentary evidence that he submitted to establish that, namely statements of account from financial institutions attesting to all of the withdrawals made by Mr. Bouloud, is solid and uncontradicted.

[54] The trustee also argues that the evidence demonstrates that the seized funds are not proceeds of crime because they come from cash advances on Mr. Bouloud's credit cards. According to the trustee, Mr. Bouloud used his credit facilities to the maximum authorized by the card issuing financial institutions, and in doing so, exercised activities that were civil or commercial in nature, and not criminal. He thus argues that in this context, the seized currency

could not be considered proceeds of crime because the seized funds were not obtained by the commission of a crime.

[55] The trustee claims, as he also submitted to the Minister, that the fraud committed by Mr. Bouloud did not lie in obtaining funds from his credit cards, but instead in his failure to inform him that he had those amounts in his possession at the time he made an assignment of his property.

[56] The trustee also argued that the object of the Act is to combat money laundering by preventing criminals and terrorists from moving significant amounts of cash into or out of Canada, and he submits that the context in this case is very different.

[57] As a third argument, the trustee contends that the Minister should have exercised his discretion taking into account the distinctive circumstances of the case and returned the seized and forfeited currency to him so that it could be redistributed to the mass of Mr. Bouloud's creditors, allowing them to recover a portion of their debts.

[58] In his opinion, the decision of the Minister's delegate is unreasonable and contrary to the spirit of the Act and to that of the BIA, especially since the amounts would not have been returned to Mr. Bouloud himself, but to the mass of his creditors.

[59] In the alternative, the trustee argues that if the Court finds that he did demonstrate the legitimate source of a portion of the funds, that is, all of the Canadian currency, the Court should

order that that portion of the amount be returned to him. The trustee relied on *Huang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 729, [2013] FCJ No 803, in which Justice Simpson found that section 29 of the Act does not expressly preclude the return of a portion of seized funds once their legitimate origins have been established. The Federal Court of Appeal confirmed that position in *Huang*, which was rendered a few days before the hearing, and which was submitted by counsel for the Minister at the hearing.

B. ***The respondent's arguments***

[60] The Minister maintains that the decision rendered by his delegate is reasonable and that there is no basis for the Court to intervene. The Minister contends that all of the trustee's arguments must be rejected.

[61] The Minister submits that the issue regarding the precedence of the BIA over the Act has already been settled by the Superior Court of Québec and the Quebec Court of Appeal. The Minister stressed that the trustee advanced exactly the same arguments as those he made before the Superior Court and that the Quebec Court of Appeal clearly recognized that the Act transcended the BIA. Therefore, according to the Minister, the trustee cannot avoid the application of the Act. The Minister emphasizes that the trustee acted in the continuance of the request that Mr. Bouloud made under section 25 of the Act as the owner of the seized currency.

[62] The Minister points out that a third party claims process is set out in sections 32 to 35 of the Act. The process is established by an application to the superior court of the province in which the seizure took place. The Minister stressed that, in this case, the trustee chose to

continue the request made by Mr. Bouloud under section 25 of the Act and that he did not file an application for a third party claim. Thus, as a trustee, he can have no more rights than the bankrupt himself.

[63] The Minister also argues that the forfeiture of the seized currency is separate from the seizure itself and that it is not an enforcement action, but the legal consequence chosen by Parliament that results from a contravention of the Act. Thus, the ownership of the forfeited currency is vested in the Crown pursuant to the Act.

[64] The Minister argues that it was completely reasonable for his delegate to have found in this case that he had reasonable grounds to suspect that the seized currency was proceeds of crime.

[65] He submits that the burden imposed on the trustee was not unduly onerous and that it was reasonable to require that he establish, by reliable and credible evidence, the legitimate source of the entire amount seized. The Minister relied on *Kang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 798, [2011] FCJ No 1006.

[66] First, the Minister stresses that Mr. Bouloud never claimed to be the owner of the seized funds. He instead maintained that those amounts had been collected from friends and third parties to cover the cost of his brother's surgery.

[67] Second, the Minister argues that the copies of the credit card statements showing cash advances taken out by Mr. Bouloud do not conclusively prove that the seized amounts indeed came from those advances or, if they did, that their origin was legitimate.

[68] First, the Minister contends that four to eight weeks passed between the cash advances and the seizure and that it was therefore impossible to conclusively link the cash advances to the seized amounts.

[69] Second, the Minister adds that the trustee was unable to establish the origin of all of the funds seized because no documentation demonstrated the origin of the foreign currency. Responding to the trustee's argument about the return of the seized currency, other than the foreign currency, the Minister, in his memorandum, adopted the position that section 29 of the Act did not allow for the partial return of seized amounts. However, he acknowledged at the hearing that the Federal Court of Appeal's judgment in *Huang* changed the state of the law in this regard.

[70] The Minister also argues that it was reasonable to believe that the seized currency was obtained through the commission of an offence, that is, fraud. The Minister stresses that Mr. Bouloud pleaded guilty to fraud offences under section 380 of the *Criminal Code* related to a fraudulent bankruptcy and to cash advance withdrawals on his credit cards. Contrary to the trustee, the Minister argues that the cash advance amounts were indeed obtained through the commission of a fraud by Mr. Bouloud. The Minister argues that the Superior Court recognized

that Mr. Bouloud's bankruptcy was fraudulent and that he had wanted to defraud his creditors, the financial institutions.

V. **Analysis**

[71] It is well established that when customs officers seize currency because they have reason to believe that there was contravention of subsection 12(1) of the Act and they do not return that currency because they suspect, on reasonable grounds, that it is proceeds of crime, the forfeiture is complete and the currency is vested in the Crown (*Huang*, at para 15).

[72] Upon receiving a request under section 25, the Minister must, first, decide whether subsection 12(1) of the Act was contravened (subsection 27(1)). In this case, it is not in dispute that Mr. Bouloud contravened subsection 12(1) of the Act because he was preparing to leave Canada with more than $10,000 and he failed to report that he had that amount in his possession. The Minister's delegate confirmed that contravention of the Act.

[73] The Minister's delegate therefore had to, secondly, decide whether to exercise his discretion under section 29 of the Act, and return the amounts to the trustee.

[74] Section 29 of the Act reads as follows:

If there is a contravention	**Cas de contravention**
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.

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).

Limit on amount paid

(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.

Limitation du montant versé

(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.

[75] Section 29 does not impose on the Minister any kind of test to apply in the exercise of his discretion. His discretion is broad and, under subsection 29(1) of the Act, he determines the terms and conditions that may give rise to the funds being returned. The Minister must also exercise his discretion in a manner that is consistent with the purpose and objectives of the Act. In this case, the Minister required Mr. Bouloud, and then the trustee, to establish that the seized currency had a legitimate origin. That criterion was recognized as a reasonable test.

[76] In *Sellathurai*, the Federal Court of Appeal clearly explained the nature of the decision that the Minister is called upon to make pursuant to section 29 of the Act. The Court recognized, in particular, that it was reasonable for the Minister to choose, in the exercise of his discretion, the legitimate source of the seized funds test. Writing for the Court, Justice Pelletier stated the following:

> 36 It seems to me to follow from this that the effect of the customs officer's conclusion that he or she had reasonable grounds to suspect that the seized currency was proceeds of crime is spent once the breach of section 12 is confirmed by the Minister. The forfeiture is complete and the currency is property of the Crown. The only question remaining for determination under section 29 is whether the Minister will exercise his discretion to grant relief from forfeiture, either by returning the funds themselves or by returning the statutory penalty paid to secure the release of the funds.
>
> . . .
>
> 53 The nature of the discretion to be exercised by the Minister under section 29 is whether to relieve an applicant, whose breach of section 12 he has just confirmed, from the consequences of that breach. The Minister's discretion must be exercised within the framework of the Act and the objectives which Parliament sought to achieve by that legislation. Within that framework, there may be various approaches to the exercise of the Minister's discretion but so long as the discretion is exercised reasonably, the courts will not interfere. In this case, the Minister proceeded by asking Mr. Sellathurai to demonstrate that the funds which were seized

> came from a legitimate source. The Minister concluded that the evidence provided by Mr. Sellathurai did not satisfy him that the funds came from a legitimate source. It was not unreasonable of the Minister, in those circumstances, to decline to exercise his discretion so as to grant relief from forfeiture.
>
> [Emphasis added.]

[77] In *Huang*, the Federal Court of Appeal had to determine whether section 29 of the Act allows the Minister to return a portion of the amounts seized. The Court confirmed that section 29 of the Act did not preclude partial relief when the legitimate source of only a portion of the seized currency has been established. The Court also provided a very useful summary of the applicable principles. Writing for the Court, Justice Dawson addressed the nature of the decision that the Minister must make under section 29 of the Act as follows:

> 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.
>
> [Emphasis added.]

[78] Thus, the decision of the Minister's delegate must be analyzed in light of the principles established by case law.

[79] First, I will address the argument raised by the trustee that the BIA should take precedence over the Act and that the seized currency should be returned to him in accordance with the provisions of the BIA without regard to the application of section 29 of the Act.

[80] It is clear that the Minister's delegate did not address the BIA in his decision or its possible impact on the exercise of his discretion under section 29 of the Act.

[81] In his memorandum, the applicant argues that the BIA must take precedence over the Act and he essentially repeats the proposition and arguments that he raised in the motion to recover before the Superior Court of Québec. However, the trustee does not expressly state that he criticizes the Minister's delegate for failing to consider the BIA in his application of section 29 of the Act.

[82] In any event, I find that the Minister's delegate was not required to determine whether the BIA applied and whether its provisions should take precedence over those of the Act because that issue was already definitively decided by the Quebec Court of Appeal in *Bouloud QCA*.

[83] The Superior Court is the appropriate forum for determining disputes arising from a bankruptcy that occurred in Quebec. The trustee commenced a proceeding to force the Minister to return to him the currency seized and forfeited under the Act. The issue of the priority of the BIA over the Act was at the heart of the debate because the trustee was seeking an order that would have forced the Minister to return the amounts to him notwithstanding the discretion conferred on the Minister by section 29 of the Act. That is why the trustee requested that the Minister stay the request for decision pending the outcome of the proceeding before the Superior Court.

[84] The Superior Court dismissed his motion in *Bouloud QSC*. In *Bouloud QCA*, the Quebec Court of Appeal confirmed that the Act supersedes the BIA and that the only way for the trustee to try to recover the amounts seized under the Act was through the recourse mechanisms set out in the Act. The essence of the Quebec Court of Appeal's reasoning is articulated in the following passages from the judgment:

> [TRANSLATION]
> 10 Attempting to argue that, under section 67 of the *Bankruptcy and Insolvency Act*, the amounts seized were part of the patrimony divisible among Bouloud's creditors, the trustee brought a motion before the Superior Court seeking to have both seized amounts returned to him.
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> . . .
>
> 13 The trustee suggests that the judge should have ruled in his favour and ordered the return of the amount of $53,157.83 to him.
>
> . . .
>
> 15 For the following reasons, I find that the trustee is wrong to argue that the judge should have declared that he was entitled to the amount of $53,157.83. In fact, the motion in this respect was inadmissible.

16 Subsection 18(1) of the PCA confers on an officer the power to "seize as forfeit" the currency that an individual is unlawfully attempting to export, regardless of whether this individual is the owner of the currency in question. This is apparent in subsections 18(2) and 32(1) and section 25 of the PCA.

17 If the PCA provides for the forfeiture of an asset belonging to someone other than the person attempting to export it, it also provides for the forfeiture of an asset of which the trustee has seizin because, even though the trustee has all the rights of the bankrupt and enjoys some creditor rights and special powers, all these rights and powers do not exceed those of the owner.

18 It is wrong to assert that the holder of a property right in an asset – the holder of an absolute right – is bound by the PCA, while the bankruptcy trustee, whose rights cannot exceed those of the owner of the asset in question, is not.

19 The PCA supersedes the *Bankruptcy and Insolvency Act*. The first law transcends the second. From the moment a violation of subsection 12(1) of the PCA is observed by an officer, a legal fiction is created: ownership of the asset is automatically forfeited to Her Majesty (section 23), as if it were an expropriation without compensation. But the owner affected by a seizure is not without recourse.

20 What remedies are available to the owner of a forfeited asset? They are limited to only those set out in the PCA (section 24) and are twofold.

21 First, pursuant to section 25, the owner – including the trustee – may, within 90 days of the seizure, apply to the Minister to decide whether there was indeed a breach of subsection 12(1) of the PCA. The Minister will then proceed in accordance with sections 28 and 29. Afterwards, there remains the possibility of an appeal to the Federal Court under subsection 30(1).

22 Second, pursuant to subsection 32(1), anyone claiming to be the holder of a property interest in the seized asset may apply to the Superior Court to have that right confirmed and, if the conditions of section 33 are met, to obtain a declaration that the right is not affected by the seizure.

23 The PCA is a special statute of public order. It includes its own code of procedure, which anyone wishing to dispute the seizure and reverse the forfeiture must follow.

[85] I therefore find that the Quebec Court of Appeal's judgment definitively established the precedence of the Act over the BIA and that the Minister did not need to address that issue in his decision. It is also apparent from the record that the exchanges between the adjudicator in charge of the file and the trustee dealt primarily with the evidence required to demonstrate the legitimate origin of the seized currency and not the provisions of the BIA.

[86] I therefore find that the only real issues involve having the Court determine whether the Minister's delegate exercised his discretion in an unreasonable manner by finding that the trustee did not convince him that the amounts seized were not proceeds of crime, or by failing to consider the specific context of the case.

[87] With respect, I find that the decision rendered by the Minister's delegate has all the qualities of a reasonable decision and that the intervention of the Court is not warranted.

[88] First, it is apparent from the decision that the Minister's delegate agreed to consider the trustee's claim about the origin of the seized currency (amounts from cash advances on credit cards) instead of that proposed initially by Mr. Bouloud (amounts from loans by friends and family members).

[89] The decision of the Minister's delegate has two separate components.

[90] Regarding the first component, the Minister's delegate stated that the trustee failed to convince him, despite the documentary evidence submitted, that the seized currency had come

from cash advances taken out by Mr. Bouloud on his credit cards for two reasons. First, he found that there was four to eight weeks between Mr. Bouloud's withdrawals and the seizure. Then, he found that no documentary evidence could establish the source of the foreign currency that was part of the seized currency.

[91] The trustee argues that the Minister's delegate imposed on him a burden of proof that was too great and impossible to meet.

[92] In *Sellathurai*, at paragraph 51, the Federal Court of Appeal found that it "is neither necessary nor useful to attempt to define in advance the nature and kind of proof which the applicant must put before the Minister". The Court must verify whether the decision is reasonable considering all of the evidence before the Minister.

[93] In the case at bar, I tend to think that the evidence submitted by the trustee suggests that the seized currency might indeed have come from cash advances taken out by Mr. Bouloud in December 2008, because in his bankruptcy proceedings, Mr. Bouloud did not declare any assets or income, and no "lender" other than the financial institutions has come forward to the trustee as a creditor.

[94] The Minister's delegate himself was not convinced of the source of the currency despite the evidence submitted by the trustee, but my view is that it is not necessary for me to determine whether his decision in this regard is unreasonable because, in my opinion, the second component of the decision was determinative.

[95] After concluding that the origin of the currency had not been established, the Minister's delegate found that even if the seized currency was deemed to have come from cash advances on Mr. Bouloud's credit cards, that currency was obtained through fraud and that the currency is therefore proceeds of crime.

[96] The trustee disagrees with the Minister's delegate and maintains that Mr. Bouloud did not obtain the seized amounts by committing an offence, that is, fraud. In his opinion, Mr. Bouloud obtained the funds using the credit authorized by the financial institutions and the fraud occurred later when he failed to inform the trustee that he had those amounts in his possession when he made an assignment of his property.

[97] With respect, I am of the view that that disagreement with the Minister's decision is not sufficient to warrant the intervention of the Court. The information before the Minister with regard to the fraud committed by Mr. Bouloud was sufficient to find that his decision constitutes a possible, acceptable outcome in respect of the facts and law.

[98] The details of the charges to which Mr. Bouloud pleaded guilty are not revealed in the record. However, we know that he pleaded guilty to 18 counts of fraud under section 380 of the *Criminal Code* and to one charge of contravening the Act. The Superior Court's judgment in *Bouloud QSC* nevertheless reveals a little more information on the charges against Mr. Bouloud. Here are the relevant excerpts of the judgment on this point:

> [TRANSLATION]
>
> 9 The facts are not in dispute. Ergun Bouloud (the bankrupt) made an assignment of his property on January 23, 2009.

> 10 According to his sworn statement of affairs, the estimated value of his realizable assets is $147. On the other hand, he owes more than $113,000 to creditors, the majority of whom are victims of fraud that was orchestrated by him.
>
> 11 The report on the examination by the official receiver confirms that the bankrupt declared that he obtained his most recent credit cards in the summer of 2008, that is, a few months before the assignment of his property. The bankrupt admits that he declared a fictitious income to obtain the credit cards while in reality, his gross annual income was approximately $15,000 or $20,000.
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> . . .
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> 16 On October 19, 2009, the bankrupt was charged with 18 counts of fraud totalling $115,661.82 to various financial institutions mentioned in the statutory statement of affairs. It is to those charges of fraud that the bankrupt pleaded guilty and for which he is awaiting sentencing.
>
> [Emphasis added.]

[99] The Minister's delegate had in his possession the judgments of the Superior Court and the Quebec Court of Appeal. I find that in light of the information in the judgment of the Superior Court and other elements in the record, it is far from clear that Mr. Bouloud did not obtain the cash advances by committing an offence and that his fraud only occurred later when he failed to report that he had funds in his possession when he made an assignment of his property. Mr. Bouloud declared a false income to obtain credit cards with high credit limits, he bought his plane tickets for Turkey with his Sears credit card before making an assignment of his property and he took out cash advances with no intention of reimbursing the financial institutions from which he obtained his credit cards. In such context, I am of the opinion that it was reasonable for the Minister to not have been convinced that the seized funds did not originate

from the commission of a criminal offence and therefore constituted proceeds of crime. I thus find that that conclusion had all the qualities of a reasonable decision.

[100] It is interesting to note the following comments by the Federal Court of Appeal in *Sellathurai*:

> 50 If, on the other hand, the Minister is not satisfied that the seized currency comes from a legitimate source, it does not mean that the funds are proceeds of crime. It simply means that the Minister has not been satisfied that they are not proceeds of crime. The distinction is important because it goes directly to the nature of the decision which the Minister is asked to make under section 29 which, as noted earlier in these reasons, is an application for relief from forfeiture. The issue is not whether the Minister can show reasonable grounds to suspect that the seized funds are proceeds of crime. The only issue is whether the applicant can persuade the Minister to exercise his discretion to grant relief from forfeiture by satisfying him that the seized funds are not proceeds of crime. Without precluding the possibility that the Minister can be satisfied on this issue in other ways, the obvious approach is to show that the funds come from a legitimate source. That is what the Minister requested in this case, and when Mr. Sellathurai was unable to satisfy him on the issue, the Minister was entitled to decline to exercise his discretion to grant relief from forfeiture.
>
> [Emphasis added.]

[101] This leaves the trustee' allegation that the Minister should have considered the specific context of the case and namely that the amounts would have been returned not to Mr. Bouloud, but to the financial institutions that he defrauded.

[102] The Minister's delegate was called upon to exercise a discretionary authority. In this case, he chose a test that has been recognized as reasonable, that is, that of requiring that the legitimate source of the seized funds be established.

[103] The Minister could have decided to consider the specific context raised by the trustee, but, in my view, he was not obligated to do so.

[104] It must be remembered that the process that the trustee undertook was to continue the request for decision made by Mr. Bouloud to the Minister and to act as a substitute for Mr. Bouloud. I need not determine whether the trustee would have had a better chance of success trying to commence a proceeding as a third party owner under section 32 of the Act, but in the case at bar, he continued the request filed by Mr. Bouloud pursuant to section 25. As rightly noted by the Quebec Court of Appeal in *Bouloud QCA*, at paras 17-18, the trustee's rights cannot exceed those of Mr. Bouloud.

[105] The Minister nonetheless agreed to consider the specific context of the case by dealing with the request for return of funds from the perspective of the position advanced by the trustee regarding the origin of the seized currency instead of from the perspective of the completely different position submitted by Mr. Bouloud. However, that change in actors did not impose on the Minister the obligation to decline to exercise his discretion on the basis of the legitimate origin of the seized currency test.

[106] In my opinion, he therefore was not required to return the seized currency even if he was not convinced of its legitimate origin only because the amounts would have been given to the creditors that were the victims of Mr. Bouloud's fraud, rather than to Mr. Bouloud himself. The trustee acted as a substitute for Mr. Bouloud and the Minister had no obligation to adapt his test for intervention as a result.

[107] I therefore find that in light of all of the evidence in the record and of the information before him, the Minister's delegate reasonably exercised his power. The trustee's disagreement with the findings of the Minister's delegate is not a sufficient basis on which to conclude that the Minister's delegate exercised his discretion in an unreasonable manner that would warrant the intervention of the Court, despite the effective representations of counsel for the trustee.

[108] In light of the foregoing, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed with costs to the Minister.

"Marie-Josée Bédard"

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-69-14
STYLE OF CAUSE:	JEAN-MARC POULIN DE COURVAL IN HIS CAPACITY AS TRUSTEE IN BANKRUPTCY OF ERGÜN BOULOUD v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	OCTOBER 15, 2014
JUDGMENT AND REASONS:	BÉDARD J.
DATED:	FEBRUARY 16, 2015

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