

Federal Court



Cour fédérale

Date: 20161122

Docket: T-1911-15

Citation: 2016 FC 1286

Ottawa, Ontario, November 22, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

CAROL FRANCES BRITZ

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Carol Frances Britz [the Applicant] under II.45 of the *Transportation Security Clearance Program Policy* [the *Policy*], challenging a decision of the Director General of Aviation Security [Director General], made on October 13, 2015, on behalf of the Minister of Transport [the Minister] and acting on the advice of the Transportation Security Clearance Advisory Body [Advisory Body], in which the Applicant's

security clearance was cancelled [the Decision], pursuant to paragraph I.4(4) of the *Policy*, s. 4.8 of the *Aeronautics Act*, RSC, 1985, c A-2 [the *Act*] and the *Canadian Aviation Security Regulations*, 2012, SOR/2011-318 [the *Regulations*].

[2] Judicial review is granted and redetermination ordered. The decision is unreasonable because it is not justified on either the facts or the law as it must be to comply with governing jurisprudence. The Minister made an unreasonable ‘either/or’ decision, which is unintelligible in that it does not permit the Applicant or this reviewing Court to determine the basis for the cancellation of the Applicant’s Security Clearance. Even if the Minister’s Decision was not based on this unreasonable ‘either/or’ finding, it is still unreasonable because there is no basis in the evidence to justify a finding the Applicant may be prone to commit the relevant unlawful acts. In addition, the Court is not satisfied that the Applicant’s submissions were considered by the Minister.

II. Facts

[3] The Applicant is a 49-year-old flight attendant working with Air Canada at the Calgary International Airport. She was initially granted a Security Clearance in 2004, which was valid until September 12, 2018. It required renewal every 5 years. She does not have any criminal convictions. She had a spotless record with Air Canada.

[4] On September 4, 2014, the Applicant applied to renew her Security Clearance.

[5] On February 5, 2015, a Law Enforcement Record Check [LERC] report was prepared by the RCMP. This report was sent to the Director of Security Screening Programs. The report noted that the Applicant had no criminal convictions. The report also noted that the Applicant interacted on a daily basis with an associate, referred to by the RCMP only as "Subject A," who associates with the Hells Angels in Calgary.

[6] Both parties agree "Subject A" is the Applicant's husband, Gerald MacMullin [Husband or MacMullin].

[7] The Applicant has lived with her Husband since 1989; they were married in May 2011.

[8] The RCMP's LERC report stated:

1. The Applicant has no known criminal convictions; however she interacts on a daily basis with a very close associate whom [*sic*] associates with members of the Hells Angels of Calgary, Alberta.

- a. The Hells Angels is identified as a one percent outlaw motorcycle gang. "One percenters" are considered to be any group of motorcycle enthusiasts who voluntarily made a commitment to band together and to abide by their organization's rules which are enforced by violence, who engage in activities that bring them and their club into repeated and serious conflict with society and the law.

2. [The Applicant's Husband]

- a. Is a very close associate of the Applicant with whom she interacts on a daily basis.

- b. Between 2009 and 2012:

i. a vehicle registered to [Husband] was observed by the RCMP at the funeral of a Hell's [sic] Angels "Hangaround" (individuals associating closely with the Hell's [sic] Angels)

ii. a vehicle registered to [Husband] was observed by the RCMP at the Hell's [sic] Angels Southland clubhouse in Calgary, Alberta during the 1st anniversary festivities of the Southland Chapter.

iii. [Husband] was observed by the RCMP driving to and entering the residence of a well-known cocaine and firearm trafficker.

iv. [Husband] was observed by the RCMP getting into a vehicle with a well-known cocaine and firearm trafficker.

v. [Husband] was observed by the RCMP leaving a location with a member of the Hell's [sic] Angels.

vi. a member of the RCMP observed a "Nomads' support" hat and a memorial picture of a deceased Hell's Angel [sic] member hanging in [Husband's] garage.

vii. a vehicle registered to [Husband] was observed by the RCMP amongst other vehicles owned by members of several motorcycle gangs including Hell's [sic] Angels at a gathering at a local bar in Calgary, Alberta.

viii. [Husband] was observed by the RCMP wearing 81 Nomads Support gear in Red Deer, Alberta.

- Note: Since July 1997, a Hells Angels Nomads chapter exists within the Province of Alberta. Members of Nomads Chapters are generally older and seasoned members and they are not bound by any geographic

borders. They can travel and do business anywhere, whereas a member of one chapter entering another's must report in and abide by their wishes.

[9] On February 17, 2015, Transport Canada Security Screening Programs sent the Applicant a Procedural Fairness Letter [PFL] advising that her Security Clearance would be reviewed by the Advisory Body. The PFL repeated the contents of the LERC report (the contents of which can be found above at paragraph 8 of these Reasons).

[10] The PFL encouraged the Applicant to provide "additional information, outlining the circumstances surrounding the above noted association, as well as to provide any other relevant information or explanation, including any extenuating circumstances [...]". It also provided the name and number of a contact person with whom the Applicant could speak should she wish to discuss the matter further.

[11] In bold typeface, the PFL stated:

Please consult the *Transportation Security Clearance Program Policy* which is available on our website at <http://www.tc.gc.ca/eng/aviationsecurity/tscp-menu.htm>.

[emphasis in original]

[12] The PFL also stated:

The various grounds, on which the Advisory Body may make a recommendation, can be found in section 1.4 of the Policy.

[13] On March 10, 2015, the Applicant sent a response letter to the PFL through her counsel [Response Letter]. In her Response Letter, she explained the following:

Mr. MacMullin is not now, nor has he ever been, a member or associate of the Hells Angels. He is a service manager for Gasoline Alley Harley Davidson (“GAHD”), a motorcycle business, which has been in operation for over 25 years. GAHD has been rated the number one Harley Davidson dealership in Canada with Mr. MacMullin being the number one service manager in Canada.

Mr. MacMullin’s customers are varied and include doctors, lawyers, RCMP officers and members of the Hells Angels. The extent of his relationship with the Hells Angels is that of agent for GAHD. It is trite to say that the Hells Angels are renowned motorcycle enthusiasts and it’s clear that Mr. MacMullin, as agent for GAHD, would be in close proximity to Hells Angels members.

That being said, Mrs. Britz and Mr. MacMullin intend to cooperate fully with your inquiry and can provide the following answers to your specific concerns:

1. A vehicle registered to Subject “A” was observed by the RCMP at the funeral of Hells Angels “Hangaround” (individual associating closely with the Hells Angels).

Mr. MacMullin is often invited to the funerals of long-term customers. On one or more occasions, a long-term customer who was a member of the Hells Angels passed away. On those occasions, Mr. MacMullin was invited to that customer’s funerals [*sic*] attended the same to offer his condolences to the friends and family of the deceased.

2. A vehicle registered to Subject “A” was observed by the RCMP at the Hells Angels Southland clubhouse in Calgary, Alberta during the 1st anniversary festivities of the Southland Chapter.

GAHD often lends out equipment such as barbecues to customers for social events. If Mr. MacMullin was at a Hells Angels clubhouse, it was for the sole purpose of providing GAHD services to customers for a social event.

3. Subject "A" was observed by the RCMP driving to and entering the residence of a well-known cocaine and firearm trafficker.

Mr. MacMullin is unaware of which of his customers is the aforesaid cocaine and firearm trafficker. As an agent of GAHD, Mr. MacMullin visits many homes without the ability to know whether the home owner is engaged in criminal activities.

4. Subject "A" was observed getting into a vehicle with a well-known cocaine and firearm trafficker.

As above, Mr. MacMullin is unaware of which of his customer [sic] is the cocaine and firearm trafficker referred to. Mr. MacMullin has interacted with many of his customers in their vehicles without the ability to know whether said customers are engaged in criminal activities.

5. Subject "A" was observed by the RCMP leaving a location with a member of the Hells Angels.

As Hells Angels members are customers of GAHD, it's clear that, on occasion, Mr. MacMullin will be leaving locations with them.

6. A member of the RCMP observed a "Nomads support" hat and a memorial picture of a deceased Hells Angels member hanging in Subject "A's" garage.

Mr. MacMullin has many memorial pictures in his garage of customers, family, staff members, and friends. The "Nomads support" hat was given to Mr. MacMullin as a gift from his customer.

7. A vehicle registered to Subject "A" was observed by the RCMP amongst other vehicles owned by members of several motorcycle gangs including Hells Angels at a gathering at a local bar in Calgary, Alberta.

Mr. MacMullin advises that when a Hells Angels customer of his dies, wakes are often held at bars.

In those instances, Mr. MacMullin will make appearance at the wake to offer his condolences to family and friends of the deceased.

8. Subject "A" was observed by the RCMP wearing 81 Nomads Support gear in Red Deer, Alberta.

The gear was given to Mr. MacMullin as a gift from his customer.

In reference to the relevant subsections of section 1.4 of the Transportation Security Clearance Program Policy, the information provided above as well as further inquiry should relieve the Transportation Security Clearance Advisory Body of its suspicions that Mr. MacMullin is involved in activities directed toward or in support of the threat or use of acts of serious violence against persons or property as well as suspicions that Mr. MacMullin is a member of the Hell's [*sic*] Angels.

Both Mrs. Britz and Mr. MacMullin are hardworking professional [*sic*] who have enjoyed long lasting and fruitful careers. A quick glance at Mrs. Britz's file will reveal a spotless record. In an effort to demonstrate Mr. MacMullin's character, we have attached reference letters from the RCMP and GAHD.

[14] In addition, the Applicant attached two reference letters for her Husband. The first reference letter was from an RCMP Sergeant who wrote in regards to the Husband's professionalism and general character. The RCMP Sergeant confirmed the Applicant's Husband had overseen the servicing of most of the Harley Davidsons used by the RCMP in the K Division Integrated Traffic Services since 2008.

[15] The second reference letter was from the General Manager of the Husband's employer, Gasoline Alley Harley Davidson [GAHD], who confirmed that the dealership also services Harley Davidson motorcycles belonging to the RCMP and the Alberta Sheriff's Department. The General Manager's reference letter stated that Mr. MacMullin had formed long-standing

relationships with many long-term customers and, like other GAHD employees, he attends at funerals of customers “from all walks of life.”

[16] Aside from this Response Letter, neither the Applicant nor the Minister shared any additional information and neither contacted the other.

[17] The Advisory Body met and recommended cancellation of the Applicant’s security clearance on July 21, 2015. The Advisory Body’s Summary of Discussion states:

SUMMARY OF DISCUSSION: BRITZ, Carol Frances

1808-0194897

- The issue is whether to allow Ms. Britz, a Flight Attendant with Air Canada at Calgary International Airport, to retain her transportation security clearance (TSC), or to cancel it in light of new information received by Transport Canada.
- Transport Canada, Security Screening Programs, initially granted the applicant a security clearance in 2004, renewed every 5 years and is currently valid until September 12, 2018.
- Criminal record checks indicate that the applicant has no criminal convictions.
- Security Screening Programs received a report from the RCMP SIBS, dated February 5, 2015, detailing the applicant’s association to an individual (her husband) who associates with the Hells Angels and a known cocaine and firearms trafficker.
- The Advisory Body noted the applicant’s lawyer mentioned that the applicant’s husband is a service manager for Gasoline Alley Harley Davidson (GAHD), a motorcycle business, and that his customers are varied and include members of the Hells Angels. The lawyer also

mentioned that the relationship with the Hells Angels is that of agent for GAHD.

- The Advisory Body noted that the applicant's husband has taken the relationship to the next level by attending a funeral of a Hells Angels "Hangaround", leaving a location with a member of the Hells Angels and also a vehicle registered to him, was observed at the Hells Angels Southland clubhouse in Calgary during the 1st anniversary festivities of the Southland Chapter.
- The Advisory Body noted the applicant's husband was observed by RCMP and a "Nomads' support" hat and a memorial picture of a deceased Hells Angels member was seen displayed in his garage.
- The Advisory Body was of the opinion that an individual would not get invited to a funeral or club house or even be given support wear unless there would be a high level of trust, which led them to question the applicant [*sic*] husband's level of involvement with the Hells Angels.
- The Advisory Body noted the applicant's husband was also observed by RCMP on different occasions, either entering the residence of a well-known cocaine and firearms trafficker or getting into a vehicle with a well-known cocaine and firearms trafficker.
- The Advisory Body noted the vulnerability to airport security that is created by security clearance holders having spouses associated to individuals who have links with organized crime or persons with serious criminal records.
- A review of the file led the Advisory Body to have reason to believe, on a balance of probabilities, that she may be prone or induced to commit an act, or assist or abet an individual to commit an act that may unlawfully interfere with civil aviation.
- The Advisory Body considered the written submission provided by the applicant's counsel; however, the submission did not provide sufficient information to dispel the Advisory Body's concerns.

[18] All five voting members of the Advisory Board, which included two members from Transport Canada's Security Screening Programs, one member from Transportation Security and one member each from Transport Canada's Aviation Security Operations and Marine Security Operation, signed the following recommendation:

JUSTIFICATION/JUSTIFICATION/COMMENTS/

COMMENTAIRES:

The Advisory Body recommends cancelling the applicant's transportation security clearance based on the applicant's very close association to an individual (her husband) who associates with the Hells Angels and a known cocaine and firearms trafficker. A review of the information on file led the Advisory Body to believe, on a balance of probabilities, that the applicant may be prone or induced to commit an act or assist or abet any person to commit an act that may unlawfully interfere with civil aviation. Furthermore, the applicant's submission did not provide sufficient information to dispel the Advisory Body's concerns.

[19] On October 13, 2015, the Minister (through his delegate) rendered a Decision cancelling the Applicant's Security Clearance. The Decision largely - though not entirely - adopted the Summary of Discussion and Recommendation of the Advisory Body as set out above at paragraph 17, as its reasons:

The information regarding your very close association to an individual (your husband) who associates with the Hells Angels and a known cocaine and firearms trafficker raised concerns regarding your judgment, trustworthiness and reliability. I note your husband works as a manager for Gasoline Alley Harley Davidson and his customers include members of the Hells Angels. I also note that your husband attended a funeral of a Hells Angels "Hangaround", went to a Hells Angels club house, and was observed by police leaving a location with a member of the Hells Angels indicating a relationship closer than mere business ties. I also note a "Nomad's support" hat and a memorial picture of a deceased Hells Angels were observed in your husband's garage. I further note your husband was observed by police entering a

residence of a well-known cocaine and firearms trafficker and also getting into a vehicle with him. The ongoing and frequent interactions between your husband and the Hells Angels, led me to believe that there would be a high level of trust between him and the Hells Angels. I note the vulnerability to airport security that is created by security clearance holders having spouses associated to individuals who have links with organized crime or persons with serious criminal records. A review of the information on file led me to believe, on a balance of probabilities, that you may be prone or induced to commit an act or assist or abet any person to commit an act that may unlawfully interfere with civil aviation. I considered the statement provided by your counsel; however, the information presented was not sufficient to address my concerns. For these reasons, on behalf of the Minister of Transport, I have cancelled your security clearance.

[emphasis added]

[20] This is an application for judicial review of the Minister's decision. The Applicant filed an affidavit in support of this application which contains both argument and evidence not before the Minister. The Minister asks that large portions be struck as inadmissible.

III. Issues

[21] In my view, the following issues arise:

1. Whether all or some part of the Applicant's affidavit is inadmissible, and
2. Whether the Minister's decision to revoke the Applicant's Security Clearance is reasonable.

IV. Admissibility of the Applicant's Affidavit

[22] New evidence is not generally admissible on judicial review. While there are limited exceptions, judicial review generally proceeds on the basis of the record that was before the decision-maker, with some exceptions. As the Federal Court of Appeal stated in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22:

[18] Now before the Court is an application for judicial review from this decision on the merits. In such proceedings, this Court has only limited powers under the *Federal Courts Act* to review the Copyright Board's decision. This Court can only review the overall legality of what the Board has done, not delve into or re-decide the merits of what the Board has done.

[19] Because of this demarcation of roles between this Court and the Copyright Board, this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitksan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.), "[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court." See also *Kallies v. Canada*, 2001 FCA 376 at paragraph 3; *Bekker v. Canada*, 2004 FCA 186 at paragraph 11.

[20] There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker (described in paragraphs 17-18, above). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:

- (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it

in understanding the issues relevant to the judicial review: see, *e.g.*, *Estate of Corinne Kelley v. Canada*, 2011 FC 1335 at paragraphs 26-27; *Armstrong v. Canada (Attorney General)*, 2005 FC 1013 at paragraphs 39-40; *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 at paragraph 9. Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider. In this case, the applicants invoke this exception for much of the Juliano affidavit.

(b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness: *e.g.*, *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980) 29 O.R. (2d) 513 (C.A.). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.

(c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite, supra.*

[23] The Respondent takes exception to several parts of the Affidavit, setting out the objected to evidence. The Minister's objections are italicized, and my comments on each follow the Minister's objection:

- A. *The Applicant's assertion of her belief that she has never been suspected of a crime.* In my view, this is a fact which could have been put into the Response Letter. Though it is of little probative value, it does not qualify under the background exception.

- B. *The Applicant's assertion that cancellation of her Security Clearance effectively ends her career as a flight attendant.* In my view, this also could have been put into the Response Letter. Additionally, this evidence is not necessary as that consequence would be obvious to the Minister as it is to the Court.
- C. *The Applicant's assertion that some of the locations where her Husband was observed were unclear to her, thereby failing to give her a meaningful opportunity to present her response [Kaczor v. Canada (Transport), 2015 FC 698] and depriving her of procedural fairness.* I note that in many cases, responses were given in the Response Letter to similarly undetailed allegations and the Applicant did, in fact, provide a response to this RCMP observation. Her concern as to specificity could have been raised in the Response Letter and, furthermore, the Applicant did not request further particulars despite the invitation contained in the PFL to contact and discuss her concerns with Transport Canada staff.
- D. *The Applicant's assertion that certain Nomads gear and hats, etc., were available on the internet.* In my view, this is a matter that could easily have been added to the Response Letter but for whatever reason was not. In any event, the Applicant had advised that the gear was given to her Husband as "a gift from his customer." If that was not from a Hells Angels member, the time to say so was in the Response Letter.
- E. *The Applicant's assertion that she had no reason to think that her Husband had any connection with the Hells Angels, or any other criminals, that went beyond his business connection with GAHD customers.* In my view, this could readily have been added to the Response Letter, but was not.
- F. *The Applicant's addition of another reference letter, from a different RCMP officer, concerning the Husband's professionalism and general character.* In my view, this letter could have been added to the two reference letters which she did file with her Response and which were to the same effect.

[24] In a word, therefore, I find the objections valid.

[25] Much of the Affidavit contains complaints concerning alleged lack of notice leading to breach of procedural fairness and errors related to various conclusions set out in the Decision. In my view, these are all arguments relating to errors in the Minister's decision, which belong in the Applicant's memorandum.

[26] I wish to add that the Affidavit, even if admitted, would add little, if anything, to the Applicant's case. The only possible exceptions are paragraphs 74 and 75, which deal with the fact the Minister did not seek additional information after receiving the Response Letter. With respect, this is not a valid issue of procedural fairness; it is the Applicant who had the onus to establish her claim for the renewal of her Security Clearance.

[27] The Affidavit is therefore inadmissible and as a consequence, I may not consider it.

V. Relevant Provisions

[28] The granting or cancellation of Security Clearance is governed by the *Act* and the *Regulations: Henri v Canada (Attorney General)*, 2016 FCA 38, leave to appeal refused, 36944 (15 September 2016) [*Henri*].

[29] The applicable provisions from the *Act* and *Regulations* are set out in the Appendix to these reasons. In summary, the *Act* gives the Minister the authority to, among other things, cancel a Security Clearance for the purposes of the *Act*. Pursuant to the *Regulations*, only those

with a valid Security Clearance may be issued a Restricted Area Identity Card [RAIC]. The RAIC grants access to restricted areas of the airport.

[30] It is a given that the Applicant, a flight attendant with Air Canada, requires a RAIC to do her job.

[31] Ministerial discretion to grant or cancel a RAIC under s. 4.8 of the *Act* is exercised pursuant to the *Policy*. The most relevant sections of the *Policy*, namely sections I.4 (and in particular I.4(4)) and I.8, are set out below; other relevant sections are included in the Appendix.

**Transportation Security Clearance Program Policy – Aviation (excerpt) /
Programme d'habilitation de sécurité en matière de transport aérien (excerpt)**

Objective

I.4 The objective of this Program is to prevent the uncontrolled entry into a restricted area of a listed airport by any individual who

1. is known or suspected to be involved in activities directed toward or in support of the threat or use of acts of serious violence against persons or property;

2. is known or suspected to be a member of an organization which is known or suspected to be involved in activities directed toward or in support of the threat or use of acts of serious violence against people or property;

Objectif

I.4 L'objectif de ce programme est de prévenir l'entrée non contrôlée dans les zones réglementées d'un aéroport énuméré dans le cas de toute personne:

1. connue ou soupçonnée d'être mêlée à des activités relatives à une menace ou à des actes de violence commis contre les personnes ou les biens;

2. connue ou soupçonnée d'être membre d'un organisme connu ou soupçonné d'être relié à des activités de menace ou à des actes de violence commis contre les personnes ou les biens;

3. is suspected of being closely associated with an individual who is known or suspected of

- being involved in activities referred to in paragraph (1);
- being a member of an organization referred to in paragraph (2); or
- being a member of an organization referred to in subsection (5) hereunder.

4. the Minister reasonably believes, on a balance of probabilities, may be prone or induced to

- commit an act that may unlawfully interfere with civil aviation; or
- assist or abet any person to commit an act that may unlawfully interfere with civil aviation.

[emphasis added]

5. is known or suspected to be or to have been a member of or a participant in activities of criminal organizations as defined in Sections 467.1 and 467.11 (1) of the Criminal Code of Canada;

6. is a member of a terrorist group as defined in Section

3. soupçonnée d'être étroitement associée à une personne connue ou soupçonnée

- de participer aux activités mentionnées à l'alinéa (1);
- d'être membre d'un organisme cité à l'alinéa (2); ou
- être membre d'un organisme cité à l'alinéa (5).

4. qui, selon le ministre et les probabilités, est sujette ou peut être incitée à:

- commettre un acte d'intervention illicite pour l'aviation civile; ou
- aider ou à inciter toute autre personne à commettre un acte d'intervention illicite pour l'aviation civile.

[soulignements ajoutés]

5. est connu ou soupçonné d'être ou d'avoir été membre d'une organisation criminelle ou d'avoir pris part à des activités d'organisations criminelles, tel que défini aux articles 467.1 et 467.11 (1) du Code criminel du Canada;

6. est membre d'un groupe terroriste, tel que défini à

83.01 (1)(a) of the Criminal Code of Canada.

l'alinéa 83.01(1)(a) du Code criminel du Canada.

The Advisory Body

L'organisme consultatif

I.8 An Advisory Body shall review applicant's information and make recommendations to the Minister concerning the granting, refusal, cancellation or suspension of clearances.

I.8 Un Organisme consultatif sera tenu d'étudier les renseignements des demandeurs et de formuler des recommandations au ministre concernant l'octroi, le refus, l'annulation ou la suspension d'une habilitation.

Cancellation or Refusal

Annulation ou refus

II.35

II.35

1. The Advisory Body may recommend to the Minister the cancellation or refusal of a security clearance to any individual if the Advisory Body has determined that the individual's presence in the restricted area of a listed airport would be inconsistent with the aim and objective of this Program.

1. L'Organisme consultatif peut recommander au ministre de refuser ou d'annuler l'habilitation d'une personne s'il est déterminé que la présence de ladite personne dans la zone réglementée d'un aéroport énuméré est contraire aux buts et objectifs du présent programme.

2. In making the determination referred to in subsection (1), the Advisory Body may consider any factor that is relevant, including whether the individual:

2. Au moment de faire la détermination citée au sous-alinéa (1), l'Organisme consultatif peut considérer tout facteur pertinent, y compris:

1. has been convicted or otherwise found guilty in Canada or elsewhere of an offence including, but not limited to:

1. si la personne a été condamnée ou autrement trouvé coupable au Canada ou à l'étranger pour les infractions suivantes:

1. any indictable offence punishable by imprisonment for more than 10 years,

1. tout acte criminel sujet à une peine d'emprisonnement de 10 ans ou plus;

- | | |
|---|--|
| 2. trafficking, possession for the purpose of trafficking or exporting or importing under the Controlled Drugs and Substances Act, | 2. le trafic, la possession dans le but d'en faire le trafic, ou l'exportation ou l'importation dans le cadre de la Loi sur les drogues et substances contrôlées; |
| 3. any offences contained in Part VII of the Criminal Code - Disorderly Houses, Gaming and Betting, | 3. tout acte criminel cité dans la partie VII du Code criminel intitulée « Maison de désordre, jeux et paris »; |
| 4. any contravention of a provision set out in section 160 of the Customs Act, | 4. tout acte contrevenant à une disposition de l'article 160 de la Loi sur les douanes; |
| 5. any offences under the Security Of Information Act; or | 5. tout acte stipulé dans la Loi sur les secrets officiels; ou |
| 6. any offences under Part III of the Immigration and Refugee Protection Act; | 6. tout acte stipulé dans la partie III de la Lois sur l'immigration et la protection des réfugiés. |
| 3. [sic] is likely to become involved in activities directed toward or in support of the threat or use of acts of serious violence against property or persons. | 3. si elle possède une mauvaise réputation en matière de crédit et qu'elle occupe un poste de confiance; ou |
| | 4. qu'il est probable qu'elle participe à des activités directes ou en appui à une menace ou qu'elle se livre à des actes de violence sérieuse contre la propriété ou des personnes. |

VI. Standard of Review

[32] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where “the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question.” The standard of review for assessing an administrative decision to cancel or withhold an airport Security Clearance has been determined to be reasonableness: *Clue v Canada (Attorney General)*, 2011 FC 323 at para 14 [*Clue*]; *Henri*, above at para 16; *Mitchell v Canada (Attorney General)*, 2016 FCA 241 at para 5.

[33] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

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.

VII. Jurisprudence on cancellation of such security clearances

[34] It is established that the Advisory Body and the Minister have specialized expertise and that the Minister’s decisions are entitled to a high degree of deference: *Lavoie v Canada (Attorney General)*, 2007 FC 435 at para 17; *Fontaine v Transport Canada Safety and Security*, 2007 FC 1160 [*Fontaine*]. The Minister is entitled to err on the side of public safety: *Brown v*

Canada (Attorney General), 2014 FC 1081 at para 71; *Yee Tam v Canada (Transport)*, 2016 FC 105 at para 16. Further, access to restricted areas in Canadian airports is a privilege, not a right: *Fontaine*, above at para 78; *Clue*, above at para 20. As noted already, the Applicant has the onus of establishing his or her entitlement to a Security Clearance.

[35] I agree with and accept my colleague Justice LeBlanc's recent summary of the Court's jurisprudence generally, as set out in *Sargeant v Canada (Attorney General)*, 2016 FC 893

[*Sargeant*]:

26 In security clearance cases, this Court has stated three important principles.

27 First, section 4.8 of the Act confers on the Minister a broad discretion to grant, suspend or cancel a security clearance, which empowers him to take into account any relevant factor (*Thep-Outhainthany v Canada (Attorney General)*, 2013 FC 59, at para 19, 425 FTR 247 [*Thep-Outhainthany*]; *Brown v Canada (Attorney General)*, 2014 FC 1081, at para 62 [Brown]).

28 Second, aviation safety being an issue of substantial importance and access to restricted areas being a privilege, not a right, the Minister, in exercising his discretion under section 4.8, is entitled to err on the side of public safety which means that in balancing the interests of the individual affected and public safety, the interests of the public take precedence (*Thep-Outhainthany v Canada*, at para 17; *Fontaine v Canada (Transport)*, 2007 FC 1160, at paras 53, 59, 313 FTR 309 [*Fontaine*]; *Clue v Canada (Attorney General)*, 2011 FC 323, at paragraph 14). *Rivet v Canada (Attorney General)*, 2007 FC 1175, at para 15, 325 FTR 178).

29 Third, in such matters the focus is on the propensity of airport employees to engage in conduct that could affect aviation safety which requires a broad and forward-looking perspective. In other words, the Minister "is not required to believe on a balance of probabilities that an individual "will" commit an act that "will" lawfully interfere with civil aviation or "will" assist or abet any person to commit an act that "would" unlawfully interfere with civil aviation, only that he or she "may"'" (*MacDonnell v Canada (Attorney General)*, 2013 FC 719, at para 29, 435 FTR 202

[*MacDonnell*]; *Brown*, at para 70). As such, the denial or cancellation of a security clearance "requires only a reasonable belief, on a balance of probabilities, that a person may be prone to or induced to commit an act that may interfere with civil aviation" (*Thep-Outhainthany*, above at para 20). Any conduct which causes to question a person's judgment, reliability and trustworthiness is therefore sufficient ground to refuse or cancel a security clearance (*Brown*, at para 78; *Mitchell v Canada (Attorney General)*, 2015 FC 1117, at paras 35, 38 [Mitchell]).

VIII. Discussion and Analysis

[36] This Decision must be set aside because it is unreasonable. It is unreasonable for several reasons considered as a whole.

The finding that the Applicant "may be prone or induced"

Discussion of "prone" and "induced"

[37] To begin this discussion it is necessary to consider the meaning of "prone" and "induced". The Minister cancelled the Applicant's Security Clearance stating:

A review of the information on file led me to believe, on a balance of probabilities, that you may be prone or induced to commit an act or assist or abet any person to commit an act that may unlawfully interfere with civil aviation.

[emphasis added]

[38] In making this finding, the Minister repeated word for word the language found in paragraph I.4(4) of the *Policy*, which states:

Objective

I.4 The objective of this Program is to prevent the uncontrolled entry into a restricted area of a listed airport by any individual who

[...]

4. the Minister reasonably believes, on a balance of probabilities, may be prone or induced to

- commit an act that may unlawfully interfere with civil aviation; or
- assist or abet any person to commit an act that may unlawfully interfere with civil aviation.

[emphasis added]

[39] The underlined words in paragraph I.4(4) of the *Policy* are worded disjunctively; one may be either “prone” to do certain unlawful acts, or one may be “induced” to do certain unlawful act, or both.

[40] Accordingly, as I read it, the *Policy’s* wording describes three different findings which the Minister may make. First, an individual may be found to be an individual *who may be prone* to commit or assist or abet an unlawful act. Secondly, an individual may be found to be an individual *who may be induced* to commit or assist or abet an unlawful act. Third, an individual may be found to be an individual who both *may be prone* and *induced* to commit or assist or abet an unlawful act.

[41] These three alternative findings are separate. A fourth option for the Minister, of course, would be to renew the licence but as he did not, I will not consider that option further.

[42] Therefore, to cancel a Security Clearance, the Minister, acting reasonably i.e., in a manner which is defensible in accordance with the law per *Dunsmuir*, is required to decide this case on one of these three possible bases.

[43] It is important to determine the meaning of prone and induced. The first step in this analysis is to consider if the words “prone” and “induced” have the same meaning. In my view, they do not.

[44] As a matter of interpretative first principles, I am unable to find that ‘prone’ and ‘induced’ have the same meaning; to do so would offend the presumption of consistent expression. As stated by the Supreme Court of Canada in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*]:

81 First, according to the presumption of consistent expression, when different terms are used in a single piece of legislation, they must be understood to have different meanings. If Parliament has chosen to use different terms, it must have done so intentionally in order to indicate different meanings.

[emphasis added]

[45] And see *Saporsantos Leobrerá v Canada (Citizenship and Immigration)*, 2010 FC 587:

(b) The presumption of consistent expression

[...]

51 Although it has already been established that "dependent child" does not apply to the IRPA, the Court also finds that the use of the "dependent child" to interpret "child" is contrary to the presumption of consistent expression. In Sullivan on the Construction of Statutes (5th edition, Markham, Ont.: LexisNexis Canada, 2008), Ruth Sullivan explains this presumption in the following terms (at pages 214-215):

It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to [page312] avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it makes sense to infer that where a different form of expression is used, a different meaning is intended.

[emphasis added]

[46] The distinction between one who may be prone and one who may be induced to commit unlawful acts is also supported by their differing dictionary definitions:

Prone

- Having an inclination to do something: *Collins Dictionary*, 2016, *sub verbo* “prone” <http://www.collinsdictionary.com/dictionary/english/prone_1>;
- Likely to do, have or suffer from something: *Mirriam –Webster Online Dictionary*, 2015, *sub verbo* “prone” <<http://www.merriam-webster.com/dictionary/prone>>;
- (prone to/to do something) Likely or liable to suffer from, do, or experience something unpleasant or regrettable: *Oxford Dictionaries*, 2016, *sub verbo* “prone” <<http://www.oxforddictionaries.com/definition/english/prone>>.

Induced

- (*transitive verb*) 1. (often foll. By an infinitive) to persuade or use influence on; 2. To cause or bring about: *Collins Dictionary*. 2016, *sub verbo* “induce”
<<http://www.collinsdictionary.com/dictionary/english/induce>>;
- (*simple definition*) 1. to cause (someone or something) *to do* something; 2. to cause (something) to happen or exist; (*full definition, transitive verb*) 1(a). to move by persuasion or influence; 1(b). to call forth or bring about by influence or stimulation; 2(a). effect, cause; 2(b). to cause the formation of; 3. To determine by induction; *specifically*: to infer from particulars: *Mirriam –Webster Online Dictionary*, 2015, *sub verbo* “induce” <<http://www.merriam-webster.com/dictionary/induce>>;
- (*verb with object*) 1. Succeed in persuading or leading (someone) to do something; 2. Bring about or give rise to: *Oxford Dictionaries*, 2016, *sub verbo* “induce”
<<https://en.oxforddictionaries.com/definition/induce>>.

[47] In my view, on a proper analysis, an individual's personal inclinations, their likely conduct and individual characteristics are the primary focus in considering the issue of whether one is prone to commit unlawful acts. However, determining whether one may be *induced* to commit unlawful acts involves an assessment of additional factors in addition to one's personal inclinations and likely conduct. Whether one may be induced will generally involve consideration of a third party, i.e., someone else who is inducing or leading the individual to wrongful conduct. Therefore, an individual's associations, along with other considerations including personal inclinations and likely conduct, are relevant in assessing whether one may be

induced to commit unlawful acts. In short, whether one may be prone focusses on the individual applying for the Security Clearance; whether one may be induced looks at the individual as well as the impact of a third party on that individual. The two are qualitatively different.

[48] This interpretation of the *Policy* accords with *Sargeant*, although the distinction between being prone and induced was not at issue in that case. In *Sargeant* the problem for the applicant was his *personal* involvement in smuggling a large quantity of marijuana and US currency into the United States. In *Sargeant*, the applicant was arrested, along with another, in possession of 26 pounds of marijuana and \$353,430 in United States currency. The applicant in *Sargeant* stated to US police that he knew he was smuggling marijuana and was to be paid \$200 by someone else to complete the job. During the interview, the other individual also admitted to smuggling the marijuana and currency and stated that he hired the applicant for \$200 to assist him with the smuggling.

[49] The Minister in *Sargeant* made the same disjunctive finding as made in the case at bar. However, unlike the case at bar, the Minister in *Sargeant* not only had grounds to find the applicant may personally be *prone* i.e., inclined to unlawful activity (he admitted to have acted unlawfully before), but in addition, the Minister also had grounds to conclude that the applicant might be *induced* into unlawful activity (as in fact the applicant had been before). Therefore, the Minister's finding was reasonable.

No evidence the Applicant may be prone to commit unlawful activities

[50] In my view, the proper analysis of whether the Applicant “may be prone” asks whether this individual Applicant has an inclination to, or is likely or inclined to commit the unlawful acts the Policy aims to prevent. The Minister’s finding that the Applicant “may be prone” is not supported by the facts. It is not defensible in terms of the facts because there is no evidence to support that finding.

[51] Contrary to the finding of the Minister, not only is there no evidence to support a finding that the Applicant is prone to such illegal acts, the evidence is to the contrary: the Applicant has no such inclination. The Applicant has a spotless personnel file, having served Air Canada many years – at least a decade – as a flight attendant. She has no criminal record. In my view, there is no evidence of any inclination or weakness or susceptibility or likelihood on her part to commit, assist or abet the unlawful activity aimed at by the *Policy*.

[52] The Minister could not reasonably find that the Applicant may be prone to commit or assist or abet such activities on this record. That being the case, such a finding is unreasonable per *Dunsmuir*.

The Minister acted unreasonably in making an ‘either/or’ finding

[53] The *Policy* is written in a disjunctive form in paragraph I. 4(4). In my respectful view, in order to cancel a Security Clearance, a Minister acting reasonably may only make one of three possible findings. As stated earlier, these three possible findings are: 1) that the Applicant may

be prone to commit or assist or abet unlawful activities; 2) that the Applicant may be induced to commit or assist or abet unlawful activities; or, 3) that the Applicant may be both prone and induced to commit or assist or abet unlawful activities. Clearly, a finding made under either or both branches of I.4(4), would supply a reasonable basis for the Minister to cancel a Security Clearance.

[54] What the Minister acting reasonably may not do is to find disjunctively, as the Minister did here, that the Applicant may *either* be prone to *or* induced to commit unlawful activities without actually deciding the basis for his Decision to cancel.

[55] Here, the Minister did not decide one way i.e., prone, or the other i.e., induced. In addition, the Minister did not find that the Applicant may be both prone *and* induced. In my respectful view, in failing to decide on one of the three possible bases for cancellation allowed by the *Policy* in this respect, the Minister failed his duty to decide in accordance with law. The Minister had no authority to cancel the Applicant's clearance without deciding the basis for that cancellation.

[56] Essentially, the Minister's disjunctive finding is an equivocation, not a decision. No reasons for this equivocal finding are provided. In my respectful view, the Minister was obliged to do more than make equivocal 'maybe this or maybe that' findings as done here.

[57] The unintelligibility of the Minister's equivocal finding may be demonstrated in the following manner. Consider section I.4 of the *Policy*, which includes 6 paragraphs, each

identifying a different class of persons whose security certificates may be cancelled. The Minister could no more cancel a security certificate on the basis of a finding that ‘this individual falls into either ‘class 1, or class 2, or class 3, or classes 4, or 5, or 6’ without coming to ground on any of them, than the Minister could cancel a certificate based on finding the Applicant fell under either one of three possible categories in para I.4(4) without identifying which is the basis for the Decision.

[58] Moreover, the finding that the Applicant may be *prone* to commit, *or* in the alternative, that she may be *induced* to commit such unlawful acts is also objectionable and unreasonable because neither the Applicant nor this Court are able to ascertain which of the three alternative findings formed the basis of the Minister’s decision to cancel her Security Clearance. This puts the Applicant and reviewing Court in an almost, if not completely, impossible position of attempting to determine what is being reviewed on judicial review: is the review on one ground, on the second ground, or on both? Should the Applicant deal with all three possibilities, or with only two, or with just one and, if only one, which one should she choose? This lack of clarity leads me to conclude that the Minister must act with greater precision particularly given the potential consequences for an applicant, namely, the termination of what might be very lengthy and loyal service.

[59] If the Decision was based on a finding that the Applicant may be prone, the Decision must be set aside as made without evidence, as explained above. Similarly, the Decision could not be reasonably based on a finding that the Applicant may be both prone and induced, because a finding the Applicant may be prone is not supported by the evidence. However, if the Decision

was based on a finding that the Applicant may be induced, then other issues are engaged; while the Minister might have hypothetically acted reasonably had the finding been one of ‘may be induced,’ the difficulty is that no such finding was actually made.

[60] Therefore, in my view, the Minister’s finding was unreasonable.

Lack of Intelligibility and Transparency

[61] In addition, I am not persuaded that the Minister appreciated and duly considered the Applicant’s submissions in arriving at a conclusion in this case. Thus, even if the Minister may make a decisions on an ‘either/or’ basis without actually deciding one way or the other (which I do not accept), I would still grant judicial review.

[62] A failure to duly consider the submissions of the parties is a matter going to the reasonableness of the decision: *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*]; *Ho v Canada (Attorney General)*, 2013 FC 865 [*Ho*]; *Doan v Canada (Attorney General)*, 2016 FC 138. In *Ho*, as my colleague Justice Harrington at para 28, states: “*Dunsmuir*, above, teaches us that a reasonable decision is one which is transparent. To say that Mr. Ho’s explanations did not contain sufficient information to address concerns is in and of itself insufficient and opaque. From *Newfoundland Nurses* we learn that a decision may be justified by an analysis of the record. However, in this case there is no indication that Mr. Ho’s explanations were actually considered. In these circumstances, it is not up to the Court to substitute its own opinion. The matter must be referred back for reconsideration.” That said, a failure of this aspect of a decision-maker’s duty also

implicates the procedural fairness of the decision: *O'Grady v Bell Canada*, 2015 FC 1135; *Brosnan v Bank of Montreal*, 2015 FC 925 [*Brosnan*]. In this case, it does not matter which because both directions lead to judicial review.

[63] Reasons are sufficient if they allow a reviewing court to understand why the tribunal made its decision and determine if it is within the range of acceptable outcomes set out in *Dunsmuir: Newfoundland Nurses*, above at para 16.

[64] In the case at bar, the material parts of the Decision are taken almost word for word from the Summary of Discussion and Recommendation of the Advisory Body. I agree the Minister may adopt the finding of this specialized body. However, the Minister must hear and consider both the Applicant's case and the Advisory Body's case. It is a core duty of administrative decision-makers to hear both sides.

[65] It is trite that not every issue raised by the Applicant needs to be separately or specifically assessed by a decision-maker: *Newfoundland Nurses* at para 16; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3. The issue here is that the Minister failed to adequately hear and consider the Applicant's submissions. This is best assessed by reference to what was said by both the Minister and the Advisory Body and by the Applicant.

[66] The Minister gave notice of 8 observations reported by the RCMP in the PFL. The Applicant responded to each with varying degrees of detail; these responses can be seen in the excerpt provided above at paragraph 13. While all 8 RCMP observations are carefully and

specifically addressed in the Decision, the only reference to the substance of the Applicant's Response is as follows:

I note your husband works as a manager for Gasoline Alley Harley Davidson and his customers include members of the Hells Angels.

[67] I am not persuaded that the Minister considered the Applicant's submissions. This lack of consideration is evident in light of the almost total absence of any mention of the Applicant's submissions in the Minister's reasons:

- There is no mention of the Applicant's categorical and uncontested denial of the Husband's current or prior membership in the Hells Angels;
- There is no mention of GAHD's ranking as the number one Harley Davidson dealership in the country;
- There is no reference made to the submission that the Husband is the number one service manager in Canada, which speaks to the importance of his job;
- There is no reference to the various clientele with which the Husband interacts, including not only local police but the RCMP itself; the Minister only refers to the fact that the Husband's customers are members of Hells Angels;
- The submission that the extent of the Husband's interactions with Hells Angels is as agent for GAHD is not referred to by the Minister, although mentioned in the Advisory Body material.

[68] This almost complete omission of the Applicant's submissions in the Minister's reasons gives rise to both transparency and intelligibility issues and implicates procedural fairness concerns.

[69] I am further concerned by the Minister's failure to refer to either of the two reference letters concerning her Husband, which are substantively summarized above at paragraphs 14 and 15 of these Reasons. I reiterate there is no need to refer to every piece of evidence. However, in my view, these letters are material. Despite their materiality, the Minister says nothing about either.

[70] In essence, the Minister and Advisory Body material evinces inadequate awareness or appreciation of the Applicant's submissions, namely that her Husband had an important *business relationship* with Hells Angels customers as agent for his employer, GAHD, in his capacity as number one service agent in Canada working for the largest Harley Davidson dealership in the country and that, in fact, his dealership also supplied Harley Davidson motorcycles to both the RCMP and to the Alberta Sheriff's Department. Instead, on this the Minister (in addition to a relatively meaningless boilerplate¹) says only:

I note your husband works as a manager for Gasoline Alley Harley Davidson and his customers include members of the Hells Angels.

[71] In my view, that summary of the Applicant's Response is inadequate and is also inaccurate. The Minister's implication that the Hells Angels are the only type of customers serviced by GAHD suggests a failure to engage with the explanations and substantive

¹ This "boilerplate sentence" states "I considered the statement provided by your counsel; however, the information presented was not sufficient to address my concerns"

submissions put forward, submissions that go to the "heart of the complaint under adjudication," as per *Brosnan*, above at para 28.

[72] In my respectful view, the Minister's reasons are impermissibly one-sided and fail to identify or address the critical relationship advanced by the Applicant. In this sense, the Decision in the case at bar is analogous to *Ho*, where the Court found the Minister's decision did not meet the transparency standard outlined by *Dunsmuir*, thereby requiring judicial review.

[73] The Court appreciates it has a duty to review the Decision in the context of the record and that, in some cases, the Court may supply matters found in the record that are not explicit in the decision.: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54 ("The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error"); *Driver Iron*, above at para 3 ("The Board did not have to explicitly address all possible shades of meaning of these provisions").

[74] The only reasonable basis on which the Minister might have made a Decision to cancel on the facts of this case would be if the Minister had concluded that the Husband's dealing with the Hells Angels put the Applicant's employment in such jeopardy that the Applicant fell into the "may be ... induced" category. I stress this option could only arise if, contrary to my finding above, a disjunctive 'either/or' finding is reasonably permitted. The Court is presented with three difficulties in allowing the decision to stand on this basis. First, that is not what the Minister decided. The Decision did not conclude that the Applicant may be induced. Instead, the Minister

made a disjunctive ‘either/or’ finding that the Applicant may be either prone *or* induced. Second, a disjunctive finding is *per se* unreasonable for the reasons set out above. And finally, to reach the result that the Applicant may be induced by her Husband, the Minister must, of necessity, have rejected each of the eight responses plus the two reference letters provided. While I may, in some circumstances, supply reasons and ‘connect the dots,’ that would entail writing reasons for why the Minister rejected virtually all the Applicant’s responses while knowing only the end result. I am unable to write the reasons the Minister did not write for that conclusion.

[75] I should add that there was no argument that the Applicant’s *Charter* rights were violated by the *Policy*, although references were made in argument to *Neale v Canada (Attorney General)*, 2016 FC 655 and to *Reference re Marine Transportation Security Regulations*, 2009 FCA 234.

IX. Conclusion

[76] I conclude that the Decision fails to meet the test of reasonableness established by the Supreme Court of Canada in *Dunsmuir*. It is unreasonable because it does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The Decision must therefore be set aside and re-determined.

X. Costs

[77] Costs should follow the event and therefore the Applicant is entitled to costs of this application. The parties shall have 15 days to make submissions on an appropriate lump sum cost award if they are unable to agree.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The Decision of the Minister dated October 13, 2015, is set aside.
3. The Applicant's application is remanded to a different decision-maker for redetermination.
4. The Applicant shall have her costs.
5. The parties shall have 15 days to make submissions on an appropriate lump sum cost award if they are unable to agree.

"Henry S. Brown"

Judge

APPENDIX

Aeronautics Act – relevant sections

Responsibilities of Minister

Attributions du ministre

Minister's responsibilities respecting aeronautics

Note marginale: Mission

4.2 (1) The Minister is responsible for the development and regulation of aeronautics and the supervision of all matters connected with aeronautics and, in the discharge of those responsibilities, the Minister may

4.2 (1) Le ministre est chargé du développement et de la réglementation de l'aéronautique, ainsi que du contrôle de tous les secteurs liés à ce domaine. À ce titre, il peut:

[...]

[...]

(n) subject to subsection (2), investigate matters relating to aviation safety; and

n) sous réserve du paragraphe (2), procéder à des enquêtes sur tout aspect intéressant la sécurité aéronautique;

(o) undertake such other activities in relation to aeronautics as the Minister considers appropriate or as the Governor in Council may direct.

o) entreprendre, à son initiative ou sur les instructions du gouverneur en conseil, toute autre activité liée à l'aéronautique.

Security Clearances

Habilitations de sécurité

Granting, suspending, etc.

Note marginale: Délivrance, refus, etc.

4.8 The Minister may, for the purposes of this Act, grant or refuse to grant a security clearance to any person or suspend or cancel a security clearance.

4.8 Le ministre peut, pour l'application de la présente loi, accorder, refuser, suspendre ou annuler une habilitation de sécurité.

Canadian Aviation Security Regulations – relevant sections

Issuance of Restricted Area Identity Cards

Délivrance des cartes d'identité de zone réglementée

Issuance criteria

Note marginale: Critères de délivrance

146 (1) The operator of an aerodrome must not issue a restricted area identity card to a person unless the person

146 (1) Il est interdit à l'exploitant d'un aérodrome de délivrer une carte d'identité de zone réglementée à une personne à moins qu'elle ne réponde aux conditions suivantes :

- | | |
|---|---|
| (a) applies in writing; | a) elle présente une demande par écrit; |
| (b) is sponsored in writing by their employer; | b) elle est parrainée par écrit par son employeur; |
| (c) has a security clearance; | c) elle possède une habilitation de sécurité; |
| (d) consents in writing to the collection, use, retention, disclosure and destruction of information for the purposes of this Division; and | d) elle consent par écrit à la collecte, à l'utilisation, à la conservation, à la communication et à la destruction des renseignements pour l'application de la présente section; |
| (e) confirms that the information displayed on the card is correct. | e) elle confirme l'exactitude des renseignements qui figurent sur la carte. |

Transportation Security Clearance Program- relevant sections

Refusal/Cancellation/Suspension

I.5 Any person who is denied a clearance, or any person whose clearance is suspended or cancelled, shall be advised in writing of

1. the refusal, cancellation or suspension; and
2. the reason or reasons for the refusal, cancellation or suspension unless the information is exempted under the Privacy Act; and
3. the right to redress.

Cancellation of Security Clearance

II.23

1. The Supervisor of the enrolment site shall notify the Director, Security Screening Programs in writing when a security clearance is no longer required by its holder.

Refus/Annulation/Suspension

I.5 Toute personne à qui l'on refuse une habilitation ou dont ladite habilitation est suspendue ou annulée, sera avisée par écrit:

1. du refus, de l'annulation ou de la suspension; et
2. de la raison ou des raisons justifiant le refus, l'annulation ou la suspension à moins que les renseignements ne soient exemptés en vertu de la Loi sur la protection des renseignements personnels; et
3. du droit à un redressement.
4. [...]

Annulation de l'habilitation

II.23

1. Le Superviseur du Bureau de contrôle des laissez-passer avisera par écrit le Directeur, programmes de filtrage de sécurité à l'effet qu'un détenteur n'a plus besoin de son habilitation.

2. A security clearance will be cancelled upon receipt of notification in accordance with subsection (1).

[...]

Subsequent Applications

II.36 If the Minister refuses to grant or cancel a security clearance, an applicant may submit a new application only if:

- (a) a period of five (5) years has elapsed after the day of the refusal or cancellation; or
- (b) a change has occurred in the circumstances that led to the refusal or cancellation

Notification of a Refusal or Cancellation

II.41

1. Where the Minister has refused or cancelled a security clearance, a notice shall be given to the individual and to the Airport Security Manager.
2. The notification to the applicant that a security clearance is refused or cancelled shall refer to the redress described in section II.45 and shall be sent by registered mail to the last known address.

Redress.

II.45 When a security clearance is cancelled or an application for a security clearance is refused an application for review may be directed to the Federal Court of Canada - Trial Division within thirty (30) days of the receipt of the notice of cancellation or refusal

2. Une habilitation sera annulée sur réception d'un avis à cette fin, conformément au sous-alinéa (1).

[...]

Demandes Ultérieures

II.36 Si le Ministre refuse ou révoque une autorisation, le demandeur peut soumettre une nouvelle demande seulement si:

- (a) une période de cinq (5) années s'est écoulée suivant la date du refus ou de l'annulation; ou
- (b) un changement à eu lieu dans les circonstances qui ont menées au refus ou à l'annulation.

Avis d'un refus ou d'une annulation

II.41

1. Lorsque le ministre refuse ou annule une habilitation, un avis sera donné à cet effet au candidat et au gestionnaire de la sécurité aéroportuaire.
2. L'avis du refus ou de l'annulation de l'habilitation contiendra une référence au processus de redressement décrit à l'article II.45 et sera adressé par courrier recommandé à la dernière adresse connue du candidat.

Redressement

II.45 Lorsqu'une habilitation est révoquée ou qu'une demande d'habilitation est refusée une demande d'examen peut être adressée à la Cour fédérale du Canada, Division de première instance, dans les trente (30) jours suivant la réception de l'avis de révocation ou de refus en supposant que la personne visée ne soit pas décrite dans l'alinéa (a).

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1911-15

STYLE OF CAUSE: CAROL FRANCES BRITZ v CANADA (ATTORNEY GENERAL)

PLACE OF HEARING: CALGARY, ALBERTA

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DATED: NOVEMBER 22, 2016

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