Federal Court  Cour fédérale

Date: 20180622

Docket: T-1352-16

Citation: 2018 FC 651

Toronto, Ontario, June 22, 2018

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

HUSSAIN-UL-HAQUE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] In February 2015 the applicant, who was employed by Air Canada Cargo at Lester B. Pearson International Airport, applied to the Minister of Transport for a Transportation Security Clearance [TSC]. The applicant requires a TSC before he can have access to restricted areas of the airport. On July 19, 2016, the Director General, Aviation Security, who was exercising

delegated authority on behalf of the Minister, denied the application. She found that information about the applicant contained in a Law Enforcement Records Check Report led her "to reasonably 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." This was the sole reason for denying the application for a TSC.

[2] The applicant now applies for judicial review of this decision pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[3] Two principal issues arise in this application: first, whether the requirements of procedural fairness were respected; and second, whether the decision of the Director General is reasonable.

[4] I have concluded that this application should be allowed. I am satisfied that the requirements of procedural fairness were respected. However, in several key respects the decision depends on findings that are not reasonably supported by the information before the Director General. The result is a decision that is not justified, transparent or intelligible. Accordingly, for the reasons developed further below, the application for judicial review is allowed and the Director General's decision is set aside.

II. BACKGROUND

A. *The TSC Application Process*

[5] The respondent filed a background affidavit which describes generally how applications for TSCs are processed.

[6] The need for and the authority to grant or refuse to grant transportation security clearances at designated airports are set out in the *Aeronautics Act*, RSC 1985, c A-2 [the Act] and the *Canadian Aviation Security Regulations, 2012* [the Regulations].

[7] As a matter of aviation safety and security, certain areas of airports are accessible only to authorized persons. Generally speaking, persons whose employment requires them to be in restricted areas of designated airports must first obtain a security clearance from the Minister.

[8] Section 4.8 of the Act provides:

Aeronautics Act, RSC, 1985, c A-2	*Loi sur l'aéronautique*, LRC (1985), ch A-2
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.

[9] Under s 3(1) of the Act, "security clearance" is defined as "a security clearance granted under section 4.8 to a person who is considered to be fit from a transportation security

perspective" (*habilitation de sécurité* - Habilitation accordée au titre de l'article 4.8 à toute personne jugée acceptable sur le plan de la sûreté des transports).

[10] Once granted a security clearance, an individual may apply to the operator of a designated airport for a Restricted Area Identity Card. This card authorizes the individual to enter restricted areas of the airport.

[11] Section 4.3 of the Act provides that the Minister may delegate a number of his powers, duties or functions under the Act. The authority to grant or refuse a TSC is typically exercised by a senior official with Transport Canada pursuant to the Transportation Security Clearance Program [the Program].

[12] An applicant for an aviation TSC must complete and submit an application form. Among other things, an applicant must provide biographical information including current and past addresses, education and employment history, immigration and travel history, and marital status (and spousal biographical details if applicable).

[13] An applicant must also agree to submit to comprehensive background checks. To this end, an applicant must provide written consent to the release of various types of information to the RCMP or Transport Canada. This includes information from "any and all" Canadian or foreign law enforcement agencies pertaining to the applicant's "criminal history, charges, court orders and any other information concerning [the applicant] contained in any accessible records and databases under their control." The consent also explicitly contemplates the release of

"information enabling investigation of [the applicant's] associates and thus enabling determination of whether [the applicant] is of good character." (The foregoing is drawn from the consent signed by the present applicant in 2015.) The results of these inquiries are compiled by the RCMP in a Law Enforcement Records Check Report [LERC Report] and communicated to the Security Screening Program.

[14] If information contained in the LERC Report (or other background checks) raises concerns on the part of the Director of Security Screening Programs about the suitability of an applicant for a TSC, the Director must refer the file to an Advisory Body established under the Transportation Security Clearance Program Policy [the Policy]. The Advisory Body is chaired by the Director and consists of members who are familiar with the aims and objectives of the security clearance program.

[15] Before the Advisory Body considers the matter, an applicant is advised by letter of the specific information received that has raised concerns regarding his or her suitability for a TSC. The applicant is encouraged to provide any information that is relevant to his or her suitability for a TSC, including the circumstances surrounding the events that have raised the concerns and any extenuating circumstances or explanation. The applicant is also informed of the role of the Advisory Body and directed to the various grounds on which it may make a recommendation to the Minister, as set out in section I.4 of the Policy.

[16] If the Advisory Body determines that an applicant's presence in a restricted area of a listed airport would be inconsistent with the aim and objectives of the Transportation Security

Clearance Program, section II.35 of the Policy provides that it may recommend to the Minister or his delegate that a TSC be cancelled or refused.

[17] Upon receipt of the Advisory Body's recommendation, the Minister or his delegate will determine whether to grant or refuse the application. If the security clearance is refused, written notice is sent to the applicant and to the Airport Security Manager.

B. *The Applicant's TSC Application*

(1) The LERC Report

[18] As a result of the background checks conducted following receipt of the applicant's TSC application by Transport Canada, a LERC Report was prepared. The LERC Report was not shared with Transport Canada. Instead, its contents were summarized in a letter to Guy Morgan, Director, Security Screening Programs, Transport Canada dated August 27, 2015 from Inspector Stephen Verrette, the Officer in Charge of the Security Intelligence Background Section [SIBS] of the RCMP's Technical Operations Directorate.

[19] Based on what is set out in Insp. Verrette's the letter, in summary the LERC Report contained the following information:

a) In October 2005 the applicant was charged with possession of property obtained by crime. He and another individual were discovered attempting to withdraw money from a TD/Canada Trust ATM using blank cards with magnetic strips containing TD/Canada Trust debit card information. This information had been stolen from a gas station "skim

site". The applicant was found with twelve cards and $1,000 in cash. The charge against the applicant was withdrawn in February 2007 "for reasons unknown to SIBS."

b) In June 2008 the applicant and some friends were involved in an altercation with three other males at a parking lot where the applicant was working. The police were called and met with the applicant, who is identified in the report as the complainant. The applicant and his friends did not want to lay charges; they only wanted the other individuals to leave the property. Insp. Verrette's letter states: "The report does not state if there was any further police action in this incident." The letter also notes that one of the applicant's "friends", mentioned below, was involved in this incident.

c) In November 2010 the applicant was a passenger in a vehicle with three other individuals on which Peel Regional Police performed a "street check". The letter is silent concerning why this check occurred. The letter does indicate: "The report does not state if there was any further police action during this occurrence." Finally, the letter notes that one of the applicant's "friends", mentioned below, was involved in this incident.

d) In September 2011 the applicant was identified as a passenger in a vehicle with one other occupant that was stopped by Peel Regional Police for an unspecified *Highway Traffic Act* offence. The report states that prior to the vehicle coming to a full stop the applicant "took off on foot." The applicant was described as having been drinking and as "uncooperative with police." No further details are provided. The letter states: "The police report does not state if there was any further police action during this occurrence."

e) In August 2012 an individual identified as the applicant attempted to enter Woodbine Slots using someone else's identification. He was prevented from doing so by Woodbine

security. The Ontario Provincial Police responded to this occurrence. The applicant explained to police that he did not have any identification on him and he had borrowed a friend's. This friend was not present but was visiting family nearby. The applicant was informed that he would no longer be permitted to attend any casino in Ontario and was issued an indefinite trespass notice by Woodbine security. No criminal charges were laid.

f) Two of the individuals who were involved in incidents described above have criminal records. Specifically,

   i. Subject "A", who was involved with the applicant in four of these incidents, had been convicted in 2013 for unauthorized use of credit card data and mischief under $5000; and

   ii. Subject "B", who was involved with the applicant in one of these incidents, had between 2006 and 2008 been convicted of possession of a Schedule I substance, obstruction, robbery and possession of property obtained by crime.

[20] The contents of the letter from Insp. Verrette were communicated to the applicant essentially verbatim in a letter dated December 15, 2015 from Christopher McQuarrie, Chief, Security Screening Programs with Transport Canada. This letter also stated the following:

> Transport Canada would encourage you to provide additional information, outlining the circumstances surrounding the above noted criminal charge, incidents and associations, as well as to provide any other relevant information or explanation, including any extenuating circumstances.

(2) The Applicant's Response to the LERC Report

[21] The applicant provided a written response to the information contained in the LERC Report by email dated January 4, 2016.

[22] The applicant stated the following with respect to the 2005 TD/Canada Trust incident:

> In 2005 I had just started going to Humber College. Osap [*sic*] didn't get approved. I had to take a personal loan from Td [*sic*] bank to pay for college and had to make payments towards it while going to school full-time. I was also working full time at McDonalds making minimum wage to try to pay for my education. I was young, dumb and in need of money. Somebody came to me with an opportunity to make a hefty amount of money in 1 night and I took it thinking it would resolve my financial issues and i [*sic*] would be able to focus solely on my education.

[23] With respect to the 2008 parking lot incident, the applicant stated:

> In 2008 I was working at direct flight parking where some drunk guys wanted to get to their hotel through the parking lot. I told them the parking lot was fenced off and that there wasn't a way through it and get to their hotel so they would have to go around the parking lot. They didn't seem to like that and started to cause a fight. Cops came and took them away.

[24] With respect to the vehicle stop in November 2010, the applicant stated:

> I don't know what to say for Nov 2010 incident as there is nothing in the report to make me recall of when that was or what happened at that time.

[25] Finally, the applicant stated the following with respect to the September 2011 vehicle stop and the August 2012 incident at Woodbine Slots:

> As for what happened September 2011 and August 2012 I have no idea of what this report states. None of these incidents ever happened to me in my life. I have never ran [*sic*] from cops. I don't drink. I have never had any incident taking place at Woodbine slots. Either you have me mistaken for someone else or someone else was using my name in those cases.

(3) Further Inquiries by Transport Canada

[26] As a result of the correspondence from the applicant, on January 4, 2016 Lesley Mott, Superintendent, Security Screen Program at Transport Canada, wrote to Pascal Poutot, her contact at RCMP SIBS, to seek "clarification" regarding the September 2011 and August 2012 incidents. After setting out the substance of the applicant's response concerning those incidents, Ms. Mott asked whether it would be possible "to confirm the applicant's identity regarding these two incidents."

[27] Mr. Poutot responded to Ms. Mott by email on January 5, 2016 as follows:

> The investigator carefully checked again both reports. For the incident in para #4 [the September 2011 incident], Peel police details are limited. However, the last and first name of the applicant are noted in the report, as well as his old address [...], his DOB, his telephone number as well as his driver's licence which **suggests** (not confirmed) that police identified him with picture ID.
>
> In regards of para #5 [the August 2012 incident] from OPP Central the male was identified **verbally** with the last and first name of the applicant, his old address [...], his DOB and telephone number.
>
> That's all I have for you. I hope that helps.

The emphasis by bolding was in the original email. I have omitted the details of the applicant's previous address but note that the same address in Hamilton was recorded with respect to both incidents.

[28] No further inquiries were made regarding the September 2011 or August 2012 incidents.

(4) The Advisory Body's Recommendation

[29] The Advisory Body reviewed the applicant's file on April 12, 2016. It made the following recommendation on the same date:

> The Advisory Body recommends refusing the applicant's transportation security clearance based on a police report detailing the applicant's involvement in criminal activities related to theft and disrespect for authority. The Advisory Body noted the applicant's association to two (2) individuals with criminal records. An in-depth review of the information on file led the Advisory Body to reasonably 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.

(5) The Final Decision on the Application

[30] On July 19, 2016, Brenda Hensler-Hobbs, Director General, Aviation Security, made the final decision as the Minister's delegate to refuse to grant the applicant a TSC.

[31] The Record of Decision states the following reasons for the decision, which I set out in full:

The issue is whether to grant or refuse a transportation security clearance (TSC) to Mr. Haque, a Station Attendant with Air Canada at Lester B. Pearson International Airport. My decision is set out below and is based on a review of the file including the concerns drawn to the applicant's attention in our letter to him dated December 15, 2015, his written submission, the recommendation of the Transportation Security Clearance Advisory Body, as well as the *Transportation Security Clearance Program (TSCP) Policy*.

The information regarding the applicant's withdrawn charge for Possession of Property Obtained by Crime and his involvement in criminal activities related to theft and disrespect for authority, along with his association to two (2) individuals with criminal records raised concerns regarding his judgment, trustworthiness and reliability. I note the applicant's involvement in several incidents between 2005 and 2012, demonstrating a pattern of involvement in criminal activities. I also note the incident in 2005, in which the applicant was conducting illegal credit card transactions and was found to be in possession of $1000 in cash. This incident required a level of sophistication, as it was deliberate and premeditated. I further note that the applicant indicated that this was an opportunity to resolve his financial issues and I wonder what else the applicant would do for money if he was in financial distress in the future. Furthermore, I note the two (2) incidents in 2011 and 2012, in which the applicant was uncooperative with police, demonstrating disrespect for authority. Additionally, I note that although the charges are dated, I found them to be serious in nature. I note the discrepancies between the Law Enforcement Record Check and the applicant's submission, where the applicant stated he was the victim of mistaken identity. I note that police verified the applicant's identity at that time, which leads me to question his credibility. An in-depth review of the information on file led me to reasonably 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. I considered the statement provided by the applicant; however, the information presented was not sufficient to address my concerns.

I therefore concur with the Advisory Body's recommendation and refuse to grant Mr. Haque's transportation security clearance.

[32] The decision and the reasons were communicated to the applicant in essentially identical terms in a letter from Ms. Hensler-Hobbs dated July 19, 2016.

III. LEGAL AND POLICY FRAMEWORKS

A. *Introduction*

[33] Before addressing the merits of this application, it is necessary to consider the legal and policy frameworks governing applications for security clearances for designated airports.

[34] While the authority to grant or refuse a TSC is rooted in legislation, the Transportation Security Clearance Program Policy plays an important role in the exercise of that authority. Unfortunately, the Policy suffers from a lack of clarity concerning the key determination that had to be made in the applicant's case. Specifically, it is ambiguous with respect to the applicable standard of proof. I must try to resolve this ambiguity before I can explain why I have found that the Director General's decision is unreasonable.

[35] I have also found that there is some uncertainty in this Court's jurisprudence concerning the requirements of procedural fairness for an initial application for a TSC. I will attempt to resolve this as well so that I can then explain why I have found that the requirements of procedural fairness were met in this case.

B. *The Transportation Security Clearance Program Policy*

[36] It is well-established that in discharging their responsibilities for aviation security, the Minister and his delegate enjoy a broad discretion. Maintaining the security of airports and preventing any interference with civil aviation are obviously matters of great public interest and importance. Given the potential for grave consequences if the wrong person is granted an airport security clearance, it has been said that it is appropriate for the Minister to err on the side of caution and public safety when deciding whether or not someone should have a TSC (*Sargeant v Canada (Attorney General)*, 2016 FC 893 at para 28 [*Sargeant*]; *Dhesi v Canada (Attorney General)*, 2018 FC 283 at para 18). At the same time, it is also recognized that the decision on whether or not to grant a security clearance is a significant matter for applicants, since it can affect the nature of their work, their prospects for advancement, and their financial security (*Farwaha v Canada (Minister of Transport, Infrastructure and Communities)*, 2014 FCA 56 at para 92 [*Farwaha*]). Indeed, where one's employment is dependent on having a security clearance, decisions respecting that clearance are of "enormous personal importance" (*Henri v Canada (Attorney General)*, 2016 FCA 38 at para 23 [*Henri*]). Still, this is just one of the factors to be considered (*ibid.*).

[37] The Act does not expressly limit the Minister's authority over who is entitled to a TSC but his discretion in this area is not completely unstructured. Its exercise with respect to designated airports is guided by the Policy. The Policy also sets out some (but not all) of the procedures that are followed in assessing TSC applications, suspensions or cancellations relating to airports.

[38] The aim and the objective of the Program are central to the Policy and to the determination of applications for TSCs.

[39] According to section I.1 of the Policy, the aim of the Program is to prevent unlawful interference with civil aviation by granting a TSC only to those persons who meet the standards set out in the Policy.

[40] Under section I.4 of the Policy, the objective of the 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;

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.

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 83.01 (1)(a) of the *Criminal code of Canada*.

[41] As noted, the applicant's application for a TSC was refused under Paragraph 4.

C. *Section I.4, Paragraph 4 of the Policy*

[42] To repeat for ease of reference, Paragraph 4 states that among the objectives of the Policy is to prevent the uncontrolled entry into a restricted area of a listed airport by any individual who "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). If this conclusion is drawn with respect to an applicant, it is grounds for denying a TSC.

[43] The problem with Paragraph 4 is that the part I have emphasized appears to combine two distinct standards of proof: reasonable grounds to believe and belief on a balance of probabilities. This has created some uncertainty about what the standard of proof is under Paragraph 4. Is it sufficient to deny a TSC for the Minister to have reasonable grounds to believe that a person "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"? Or is it necessary for the Minister to believe it is more likely than not that a person "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"? The applicable standard of proof must be one or the other of these; it cannot coherently be both. While the latter encompasses the former, the converse is not the case.

[44] The wording of Paragraph 4 has from time to time given rise to the suggestion that the standard of proof it expresses is less than a balance of probabilities because all that is required is a reasonable belief on the part of the decision-maker (see, for example, *Ho v Canada (Attorney General)*, 2013 FC 865 at para 7; *Salmon v Canada (Attorney General)*, 2014 FC 1098 at para 75 [*Salmon*]; *Kaczor v Canada (Minister of Transport)*, 2015 FC 698 at para 32; *Wu v Canada (Attorney General)*, 2016 FC 722 at para 51; and *Ng v Canada (Attorney General)*, 2017 FC 376 at para 50). With respect to those who hold a contrary view, I cannot agree.

[45] In my view, standards of proof lower than on a balance of probabilities are well-known and are expressed easily using familiar language (for example, see the discussion of 'reasonable grounds to believe' in *Mugesera v Canada (Minister of Citizenship and Immigration)*,

[2005] 2 SCR 100, 2005 SCC 40 at para 114, and the discussion of 'reasonable grounds to suspect' in *Farwaha* at paras 75 and 95-97). When a standard of proof lower than on a balance of probabilities is intended, this familiar language is used. This is demonstrated by other parts of s I.4 itself, which repeatedly use the disjunctive test "is known or suspected to be."

[46] The phrase used in Paragraph 4 (which appears to be *sui generis*) therefore must have been intended to convey something else. While the words "on a balance of probabilities" suggest that this is the intended standard, the waters are muddied by the words "reasonably believes." Fortunately, while the English version of Paragraph 4 is ambiguous in this way, the French version is not (at least, not in this respect). The pertinent part of the provision in French is "*qui, selon le ministre et les probabilités est sujette ou peut être incitée à* [...]." Reasonable belief is not mentioned. Instead, the only standard identified is one of "the probabilities." While this does not expressly suggest the test of whether something is more likely than not (in theory, "the probabilities" could range from 0% to 100%), reading "*les probabilités*" in that way finds a common meaning in both versions of the paragraph. I should note that the decisions of this Court that have adopted the "reasonable belief" standard of proof do not address the differences between the English and French versions of Paragraph 4.

[47] Applying the shared meaning rule, it is thus safe to assume that the common element of proof on a balance of probabilities found in both the English and French versions of Paragraph 4 is what was intended to be the standard of proof here (see, for example, the discussion of this rule in the context of statutory interpretation in *Alexander College Corp v Canada*, 2016 FCA

269 at para 18). This resolves the ambiguity in the English version (and the vagueness of the French version).

[48] While I thus find that the adjective "reasonably" in the English version of Paragraph 4 does not add anything to the test, this is not to suggest that the reasonableness of the decision-maker's belief is not important. On the contrary. Any decision rendered by the Minister or his delegate must be reasonable, and this includes the drawing of reasonable conclusions from the available information. However, in my view this is a general requirement of the law as opposed to an element of the specific test the Minister applies under Paragraph 4 of the Policy.

[49] In addition to the awkward wording of the English version of Paragraph 4, another possible source of confusion about the standard of proof here is the fact in issue – namely, whether an applicant is a person who 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. The question the Minister must answer is not whether an applicant will so act but only whether he or she might so act. This is a matter of possibilities, not probabilities (*Clue v Canada (Attorney General)*, 2011 FC 323 at para 20; *MacDonnell v Canada (Attorney General)*, 2013 FC 719 at para 29; *Sargeant* at para 29). The idea of a possibility being established on a balance of probabilities is counterintuitive, to say the least. Still, this does not change the standard upon which that fact must be established. How someone might act in the future could well be easily established in a given case. If that is so, it is because of the nature of the fact in issue (a possibility), and not because of any lowering of the standard of proof from on a balance of probabilities.

[50] In its written submissions, the respondent suggested that a "relatively low standard of proof" was applicable under Paragraph 4. However, when pressed, the respondent was prepared to accept that the standard of proof is on a balance of probabilities.

[51] This standard of proof is discernible in judgments from this Court. For example, in *MacDonnell*, Justice Sean Harrington stated: "The Policy does not require the Minister to believe on a balance of probabilities that an individual 'will' commit an act that 'will' unlawfully 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" (at para 29). Similarly, in *Mohamed v Canada (Attorney General)*, 2017 FC 271, Justice Susan Elliott observed that the Minister "determines, on a balance of probabilities, whether the applicant for a TSC or renewal of one 'may be prone or induced' to commit an act that may unlawfully interfere with civil aviation" (at para 35). As well, in *Chambers v Canada (Attorney General)*, 2017 FC 698 [*Chambers*], Justice Glennys McVeigh stated that the Policy "is forward looking as the decision maker must predict on a balance of probabilities whether an applicant may be prone to or be induced to commit an act that may unlawfully interfere with civil aviation" (at para 18).

[52] In my respectful view, these *dicta* reflect the correct interpretation of Paragraph 4.

[53] In conclusion on this point, what Paragraph 4 of section I.4 of the Policy calls upon the Minister or his delegate to determine is whether it is more likely than not that an applicant for a TSC is someone who might be prone or induced to commit an act that might unlawfully interfere with civil aviation, or assist or abet any person to commit an act that might unlawfully interfere

with civil aviation. This resolves the ambiguity concerning the standard of proof in the English version and makes the applicable test consistent in both the English and French versions.

[54] In the present matter, the Advisory Body and the Director General simply repeat the English wording of Paragraph 4 verbatim in rendering, respectively, the recommendation and the decision. Neither offers any analysis of the meaning of the provision that could lead me to conclude that they had a different understanding of it. As a result, I will presume that the test I have set out above is the one they applied in assessing the applicant's file.

IV. STANDARD OF REVIEW

[55] It is well-established that decisions to deny a TSC generally are reviewed on a reasonableness standard (*Henri* at para 16). Under this standard, the reviewing Court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). On judicial review under the reasonableness standard, it is not the role of the Court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]).

[56] It is also well-established that questions of procedural fairness in this context are reviewed on a correctness standard (*Henri* at para 16).

[57] In this case, as discussed below, the question of procedural fairness is whether the applicant was entitled to more disclosure than he received. There is no indication in the record that anyone turned his or her mind to whether additional information should be disclosed to the applicant. This is not meant as a criticism. Rather, I am simply pointing to the artificiality of speaking of a standard of review being applied to a decision about procedure in this case.

[58] Where an issue of procedural fairness arises, this Court's task is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances (*Khosa* at para. 43). There is some question as to whether it is helpful at all to speak of a standard of review being applied to questions of procedural fairness (see *Canadian Pacific Railway Company v Canada (Attorney General)* 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]). To the extent that it is, what is meant by the correctness standard is that this Court will not show deference to the procedure adopted by the Minister; instead, it will undertake its own analysis (*Rossi v Canada (Attorney General)*, 2015 FC 961 at para 20).

V. ANALYSIS

A. *Procedural Fairness*

(1) What is required?

[59] The requirements of procedural fairness when it comes to transportation security clearances are often described as "minimal". This is said to follow from the fact that having a TSC is a privilege, not a right, and thus one can have no legitimate expectation that a TSC will be issued (*Agosti v Canada (Transport)*, 2016 FC 1410 at para 32 [*Agosti*]).

[60] There is some uncertainty in the jurisprudence about what these "minimal" requirements are when someone is applying for a TSC for the first time. It has been suggested that the only level of fairness owed to a first-time applicant is that the Minister must render a decision that is not based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before him. It appears that this suggestion was first made in *Motta v Canada (Attorney General)*, [2000] FCJ No 27 (QL), 180 FTR 292, at para 13. It has been repeated from time to time since then (see, for example, *Varn v Canada (Attorney General)*, 2017 FC 1132 at para 45; *Laframboise v Canada (Attorney General)*, 2017 FC 832 at para 19; *Chambers v Canada (Transport)*, 2017 FC 698 at para 32; *Pouliot v Canada (Transport)*, 2012 FC 347 at para 9 [*Pouliot*]; *Kahin v Canada (Transport, Infrastructure and Communities)*, 2010 FC 247 at paras 13-16; *Irani v Canada (Attorney General)*, 2006 FC 816 at paras 21-22).

[61] As I understand it, in effect *Motta* is suggesting that the only procedural right a first-time applicant has is to receive a decision that is not substantively flawed. In my respectful view, this conflates procedural review and substantive review. These are, of course, distinct issues. As the Federal Court of Appeal recently observed: "Procedural review and substantive review serve different objectives in administrative law. While there is overlap, the former focuses on the nature of the rights involved and the consequences for affected parties, while the latter focuses on the relationship between the court and the administrative decision maker" (*Canadian Pacific Railway* at para 55). Further, as L'Heureux-Dubé J held in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22 [*Baker*], "the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker." The dicta in *Motta* do not engage with this understanding of procedural fairness at all.

[62] It is possible that this peculiar situation emerged as a result of efforts to distinguish individuals who had had a TSC and were now facing its suspension, cancellation or a denial of a renewal from first-time applicants. It has been said that the loss of a job because of the loss of a security clearance is more significant than merely losing the opportunity to take on a new job because of a denial of a security clearance. The requirements of procedural fairness were thus thought to be slightly higher in that case compared to a first-time applicant (although they were still on the "lower end of the spectrum" (*Pouliot* at para 10)). It has been accepted that someone

facing the loss of a security clearance is entitled to know the facts alleged against him or her and has the right to make written representations about those facts (*Farwaha* at para 118; *Henri* at para 28). To maintain the distinction between this person and a first-time applicant, who was deemed to be entitled to something less than this, it must have been inferred (at least implicitly) that the first-time applicant was therefore not entitled to know the facts alleged against him or her or to make representations about them.

[63] In my view, this line of reasoning nullifies even "minimal" procedural rights for first-time applicants. While I believe that *Motta* should no longer be followed in this respect, it is not necessary to state this definitively because it has been overtaken by the current practice of the Minister, which treats both new applicants and individuals who already hold a security clearance in the same way. As *Baker* instructs, the actual practices of the decision-maker are an important consideration in determining the requirements of procedural fairness (*Baker* at para 27).

[64] Under current practice, the following participatory rights are extended to both prospective and existing TSC holders:

- Both are informed to the extent that the law permits of the information that has raised concerns about their suitability to hold a TSC;
- Both are informed of the criteria for determining one's suitability for a TSC;
- Both are given the opportunity to make written representations and provide information addressing the areas of concern;

- In both cases, any written representations or information provided by the individual are considered by the Advisory Body before it makes a recommendation to the Minister or his delegate; and
- In both cases, the written representations or information provided by the individual are considered by the Minister or his delegate before a final decision is made.

[65] These procedures sit comfortably with the other four *Baker* factors, including the importance of the decision to the person affected and the value their submissions can add to the decision-making process (cf. *Baker* at paras 23-26; *Henri* at paras 18-28). Some decisions of this Court have recognized that, despite what was suggested in *Motta*, even a first-time applicant is entitled to know the facts alleged against him or her and must be given an opportunity to make written representations about those facts and his or her suitability to receive a security clearance (*Quan v Canada (Attorney General)*, 2016 FC 1181 at para 33; *Agosti* at para 33). I agree.

[66] Since the applicant was seeking his first TSC, it is not necessary for me to consider whether there could still be cases where someone facing the loss of a security clearance is entitled to a higher standard of procedural fairness than a first-time applicant. For present purposes it suffices to conclude the applicant was entitled to the protections set out above.

(2) Were the requirements of procedural fairness respected?

[67] Setting aside for the moment the January 5, 2016 email, I have no hesitation in concluding that the requirements of procedural fairness were met here.

[68] First, the applicant was notified of the areas of concern and offered an opportunity to address them in writing. It must be said that the substance of the LERC Report (at least as it was summarized by Insp. Verrette) leaves much to be desired, an issue I will return to below. Nevertheless, the information the Security Screening Program received from the RCMP was communicated to the applicant accurately and completely. Further, the letter the applicant received setting out the areas of concern would have assisted him in understanding the criteria that would be applied in determining his eligibility, enabling him to provide pertinent information and submissions if he chose to do so. As well, the letter provided Ms. Mott's name and contact information if the applicant wished to discuss his application. Although the applicant did not take up this offer, it is apparent from the Certified Tribunal Record [CTR] that Ms. Mott was personally familiar with his application.

[69] The applicant provided a written response addressing the areas of concern that had been identified to him. While his response was relatively brief, this was a matter of the applicant's own choosing. The applicant submitted in oral argument that he believed that he would have an opportunity to make further submissions. While this may very well be so, nothing in the communications from Transport Canada would have led him to think this and, conversely, the applicant gave Transport Canada no reason to think he had more to say at that time.

[70] Finally, as is reflected in the written summary of the Advisory Body's discussion of the applicant's case, it considered all of the information on file, including the applicant's submissions. In her reasons, the Director General also confirms that she considered all of the

information on file, including the applicant's submissions. There is nothing in the reasons or the CTR that causes me to doubt that this was the case.

[71] The only remaining question is whether the contents of the January 5, 2016 email should have been disclosed to the applicant before a decision was made on his application. The applicant submits that this information would have assisted him in responding to the concerns raised by the LERC Report. While I do not doubt the sincerity of the applicant's submission, I find that the information in the email would not have been of assistance to him. I reach this conclusion for three reasons.

[72] First, the email did not include any new factual allegations. The applicant had been put on notice by the December 15, 2015 letter that he had been identified as having been involved in the 2011 and 2012 incidents. While the email contained some additional details about the information recorded in relation to these identifications, in essence it simply repeated the critical allegation: the applicant had been identified as a party to both incidents. Moreover, the email did not include information pertaining to other incidents of which the applicant would have been unaware. The basis of the security concern (such as it was) was "readily apparent" to the applicant from the December 15, 2015 letter (cf. *Meyler v Canada (Attorney General)*, 2015 FC 357 at para 33 [*Meyler*]; *Sargeant* at para 51). The email added nothing to this.

[73] The second consideration is the applicant's position with respect to the 2011 and 2012 incidents: he categorically denied being involved in either of them. He was confident about this because he knew he had never done the things described – he had never run away from the police

and he had never attempted to use someone else's identification to enter Woodbine Slots. This may be contrasted with his position concerning the 2010 vehicle stop, where he stated that with the sparse details provided he simply could not recall it and, as a result, could not offer anything in response. Additional details about that incident could well have assisted the applicant by refreshing his memory. The additional details in the email concerning the 2011 and 2012 incidents could not have assisted him in this way.

[74] Third, despite now having seen the email in the CTR, the applicant was unable to show how the information it contained could have assisted him in any other way. The applicant had been told that he had been identified as having been involved in the 2011 and 2012 incidents. His position was that he was not involved in either. This led him to venture two explanations to Transport Canada: either he had been mistaken for someone else in the background checks, or someone was impersonating him. While the letter of December 15, 2015 did not provide him with many details concerning the incidents, it did give him something with which he could start making inquiries if he chose to do so (e.g. the approximate dates of the incidents, the location of one of them and the police agencies involved). The information in the email added nothing to what he already had that could have assisted his efforts to find evidence supporting his position regarding the two incidents.

[75] The circumstances of this case may thus be contrasted with the sort of material non-disclosure considered in *DiMartino v Canada (Minister of Transport)*, 2005 FC 635 at paras 36-43; *Xavier v Canada (Attorney General)*, 2010 FC 147 at paras 8-14; *Meyler* at paras 29-40; and *Farah v Canada (Attorney General)*, 2016 FC 935 at paras 55-66 [*Farah*]. Of course, this is not

to say that the sort of information contained in the email might not be important in a different set of circumstances. As Justice Elliott observed in *Farah*, the nature and amount of information that must be disclosed to ensure procedural fairness "will always vary with the context" (at para 62).

[76] As I see it, the real problem with the information in the January 5, 2016 email is how it was interpreted by the Director General. That, however, goes to the reasonableness of the decision, not procedural fairness. I address this below.

[77] Accordingly, I am satisfied that the requirements of procedural fairness were satisfied in this case.

B. *Is the Director General's decision reasonable?*

[78] The respondent acknowledges that the decision suffers from several flaws but contends that the denial of a TSC can reasonably be supported by a single consideration – the applicant's admitted involvement in an unsuccessful attempt in 2005 to steal cash from a TD/Canada Trust ATM using doctored bank cards. The difficulty for the respondent is that the Director General relied on several other considerations in addition to this one in refusing the application. Indeed, she expressly linked the 2005 incident to several of these other considerations, finding that there was "a pattern of involvement in criminal activities" on the part of the applicant. In any event, even standing on its own the Director General's assessment of the 2005 incident is not reasonably supported by the information before her. In all the circumstances, I cannot be satisfied that the decision she made is reasonable.

[79] As I understand the Director General's reasons, she relied on the following five considerations in refusing to grant a TSC to the applicant:

A. the 2005 TD/Canada Trust incident;

B. "several incidents" between 2005 and 2012 "demonstrating a pattern of involvement in criminal activities" on the part of the applicant;

C. the applicant's involvement in two incidents in which he was "uncooperative with police, demonstrating disrespect for authority;"

D. discrepancies between the LERC Report and the applicant's submissions, which led the Director General to question the applicant's credibility; and

E. the applicant's "association" with two individuals with criminal records.

[80] In my respectful view, the Director General's assessment of these factors, considered both individually and cumulatively, was unreasonable.

(1) The 2005 TD/Canada Trust Incident

[81] The circumstances of the 2005 incident are summarized above.

[82] The Director General made three express or implied findings in relation to this incident. First, the incident "required a level of sophistication, as it was deliberate and premeditated." Second, given that the applicant acknowledged that he saw this as an opportunity to resolve his financial difficulties, the Director General was left wondering "what else [the applicant] would do if [he] were in financial distress in the future." Third, while the charge was dated, it was serious in nature.

[83] I should note that I have extracted the third factor from a charitable reading of the Director General's reasons. In fact what she states is that the charges (plural) were dated but serious. The applicant has only ever faced a single charge. Moreover, read in context, the Director General's comment about charges appears to be in reference to the 2011 and 2012 incidents, even though neither incident gave rise to charges. Giving the Director General the benefit of the doubt, I am prepared to read her comment as referring to the 2005 incident. So understood, a finding that the charge was dated but serious was reasonably open to her on the information before her. However, the same cannot be said about her other findings concerning the 2005 incident.

[84] First, in my view the finding that the incident "required a level of sophistication, as it was deliberate and premeditated" is unreasonable. It must be recalled that the charge of possession of property obtained by crime was withdrawn. There were no findings against the applicant in relation to that matter. In cases where a criminal charge has resulted in a finding of guilt, either admissions or conclusive findings of fact will have been made. Generally speaking, these can be relied upon in later proceedings. However, when a criminal charge has been withdrawn, it can be much more difficult for a decision-maker in a later proceeding to determine what happened that gave rise to the charge. The underlying facts and surrounding circumstances can be very much in dispute. A decision maker in a position like that of the Director General must therefore proceed with caution when considering withdrawn charges. The police synopsis that finds its way into a LERC Report might or might not be a complete and accurate account of what happened.

[85] In this case, the applicant did not dispute the accuracy of the synopsis of the 2005 incident in the LERC Report. The difficulty with the Director General's findings is that they go well beyond what the information before her reasonably could support. While the applicant's conduct may have been "deliberate" as opposed to accidental, and while it may have been "premeditated" in the sense that he likely agreed to take part in the scheme sometime before he went to the bank, the information before the Director General does not reasonably support a finding that the incident "required a level of sophistication" (whatever that means). The scheme as a whole was arguably sophisticated but the applicant stated that his only involvement was attempting to use the cards at the bank machine once at someone else's invitation. One could view that involvement as quite unsophisticated, especially considering how easily the applicant was caught. There was no other information before the Director General apart from the synopsis and the applicant's comments about the incident. The Director General was not required to accept the applicant's account of the incident; however, in the absence of any information to support it, a more significant role than the one the applicant admitted to cannot reasonably be attributed to him.

[86] Second, simply "wondering" what else the applicant might do for money if he found himself in financial difficulty again fails the tests of transparency, intelligibility and justification. Even if a definitive finding that this incident showed that the applicant posed an unacceptable risk of abusing a security clearance can be read into this indirect conclusion, the information before the Director General does not reasonably support it. The incident is dated (now nearly 15 years in the past). The applicant was a young man at the time. And there has been no suggestion that he has misconducted himself in any way since then in response to financial pressures.

[87] Third, in her reasons the Director General cites both the withdrawn charge for possession of property obtained by crime (i.e. the 2005 incident) and the applicant's "involvement in criminal activities related to theft and disrespect for authority" as raising concerns regarding the his "judgment, trustworthiness and reliability." I address the applicant's alleged "disrespect for authority" below. As for his involvement in criminal activities "related to theft," the only such incident was the one from 2005. Either the Director General has misapprehended the information before her, or she has doubled the weight she gave to a single incident. While the 2005 incident could count against the applicant's suitability for a TSC, it cannot reasonably be counted twice.

(2) A Pattern of Involvement in Criminal Activities between 2005 and 2012

[88] Perhaps recognizing that the 2005 incident alone might not justify refusing to grant the applicant a TSC, the Director General expressly linked it to a "pattern" of criminal activities spanning some eight years. In my view, this finding is also unreasonable.

[89] The information before the Director General indicated that the applicant had been involved in a single matter where a criminal charge was laid: the 2005 incident. While it is possible to see the 2011 and 2012 incidents as also involving criminality (perhaps, respectively, obstruct police and personation), the police do not appear to have seen them that way at the time. (Whether the Director General reasonably concluded that the applicant was actually involved in either of these incidents is a separate question I address below.) Some further explanation from the Director General is required to justify not only her findings of criminal activity over and above the 2005 incident but also how three disparate incidents taken together formed a "pattern". As for the applicant's other contacts with police, in 2008 he was the complainant and in 2010 he

was simply a passenger in a vehicle containing at least one racialized young man (the applicant) that was stopped by Peel Regional Police for an unknown reason.

[90] In short, the information does not reasonably support the conclusion that between 2005 and 2012 the applicant had been involved in "several incidents [...] demonstrating a pattern of involvement in criminal activities."

(3) Uncooperativeness with Police and Disrespect for Authority

[91] The Director General noted that the applicant had been involved in two incidents (in 2011 and 2012) where he had been "uncooperative with police, demonstrating disrespect for authority." In fact, it was only in the 2011 incident that the applicant was described as "uncooperative with police." The Director General appears to have misread the Advisory Body's assessment of these incidents, which was: "The Advisory Body noted two (2) incidents in 2011 and 2012, in which the applicant was uncooperative: in 2011 with police and in 2012 with Woodbine Casino, demonstrating disrespect for authority." Even if this is what the Director General meant to say, this finding is not reasonably supported by the information. The bald assertion in a police report that someone was "uncooperative with police," without at least some indication of why the police thought this, is worthless. As for the 2012 incident, the information suggests that once caught using someone else's identification, the applicant was entirely cooperative with Woodbine Casino security and the police. There is no suggestion that he acted disrespectfully towards persons in authority during that incident. On the other hand, if the individual in question was not the applicant, that person could fairly be described as having been "uncooperative" and "disrespectful" towards both Woodbine Casino security and the police

because he misrepresented his identity to them. Of course, if that is what happened, it is irrelevant to the applicant's suitability to have a TSC.

(4) The 2011 and 2012 Incidents

[92] The Director General's reasoning concerning the 2011 and 2012 incidents appears to have been as follows. The police had verified the applicant's identity during both incidents. The applicant denied being involved in either. This gave rise to discrepancies between the LERC Report and the applicant's submissions. Those discrepancies in turn led the Director General to question the applicant's credibility.

[93] If sound, this line of reasoning could provide grounds for denying the application for a TSC. However, in my view the Director General's reasoning depends on a material misapprehension of the information concerning these incidents.

[94] As set out above, as a result of the applicant's submissions, Transport Canada made further inquiries of the RCMP about the two incidents. Specifically, Ms. Mott asked Mr. Poutot whether it would be possible "to confirm the applicant's identity regarding these two incidents." Mr. Poutot appears to have understood Ms. Mott to be asking whether the police had confirmed the applicant's identity at the time of the incidents. His response was a qualified "yes". With respect to the 2011 incident, he stated that the file information "suggested" (but did not confirm) that the police had identified the applicant with photo identification. With respect to the 2012 incident, the file information indicated that the applicant was identified "verbally".

[95] The 2011 and 2012 incidents were important. If the applicant was involved in one or both, that could reflect poorly on his character and judgment. The question of whether the police had confirmed the applicant's identity was therefore an important one given the applicant's clear denial that he was involved in either. If they had, this would contradict the applicant's denial and support concerns about whether he should be given a TSC. The Director General found that the police had "verified" the applicant's identity. On this basis, she drew an adverse conclusion regarding the applicant's credibility as well as his suitability for a TSC.

[96] Having reviewed the information in the CTR, in my view the Director General misapprehended the information before her when she states that the police "verified" the applicant's identity at the time of the incidents. The only information directly on point is Mr. Poutot's email and it does not actually say this.

[97] With respect to the 2011 incident, it appears that the LERC Report is silent about whether the police had confirmed the individual's identity at the time. Instead of stating this, Mr. Poutot indicates that someone (apparently an unnamed RCMP investigator) had reviewed the police report and concluded from the fact that several specific details were recorded there that the individual had identified himself with photo identification. While this is one possible explanation for the presence of the details in the police report, it is not the only one. Another that comes to mind is that the individual identified himself verbally with, say, only a name and street address and the rest of the information in the report was drawn from a police database once the police believed they knew who they were dealing with. Mr. Poutot does not address this possibility or explain why the information is not equally consistent with that explanation. In any event, the

Director General appears not to have appreciated that what Mr. Poutot indicated was that the information only "suggested" that the person had identified himself with photo identification but this had not been confirmed. (It is interesting to note that the postal code recorded has an obvious error in it – LBS 2M8 – which could suggest that it was not taken from government issued photo identification.)

[98] With respect to the 2012 incident, Mr. Poutot's email appears to indicate that the original police report stated that the individual had identified himself "verbally" – in other words, without presenting any identification. This would be consistent with the background circumstances of that incident, where the individual had attempted to use someone else's identification because he did not have his own. But someone identifying him or herself "verbally" is a far cry from "confirming" or "verifying" that person's identity. If, for example, the person had independently provided a name, date of birth, complete address and telephone number and these details were consistent with information in a police database, this would be some evidence that the person is who he or she claims to be. But if only a few details were provided independently, and the rest were filled in by police from a database, a "verbal" identification would have much less probative value. Without knowing what information was provided independently and what the police took from somewhere else, there is simply no way to know what probative value to give to the "verbal" identification in this case. (In fact, the same error in the postal code was recorded with respect to this incident as well, suggesting that the two originated from a common source – perhaps a police database into which erroneous information was entered in error.)

[99] In light of the applicant's submissions, Ms. Mott was rightly interested in whether the police had confirmed his identity during either incident. While Mr. Poutot attempted to qualify his answers to Ms. Mott's question, in my view his email ended up obscuring a critical fact: there was no information indicating directly that the applicant's identity had been "confirmed" by police at the time. The Director General may also have been misled by the Advisory Body on this point. The Advisory Body states in the record of its discussion of this matter that the RCMP had "confirmed" that the applicant's name, date of birth and old address "were confirmed in the police reports." The RCMP had indeed confirmed that the applicant's name and other details were present in the police reports. The available information, however, falls well short of demonstrating that these things were "confirmed" at the time of the incidents.

[100] It bears noting that with respect to both incidents that the RCMP were attempting to interpret records prepared by other police forces regarding incidents in which they had had no involvement. There is no indication that the RCMP SIBS office contacted anyone with first-hand knowledge of either incident to see if they could shed any further light on what had happened.

[101] I feel obliged to observe that this is an unsatisfactory state of affairs. The Director General had an important decision to make when considering an application for a TSC. The decision is important to the applicant personally. The decision is also important for the security of civil aviation and to the public at large. Precise and accurate information is critical to the integrity of the process. Depending on what it is, information in police records can be highly probative of an individual's suitability to hold a TSC. But by the time the information about an incident in police records reaches the decision-maker, it is many steps removed from the original

incident. As the present case illustrates, the risk of errors and misunderstandings increases at every step.

[102] To sum up, the Director General's reasoning concerning the 2011 and 2012 incidents proceeds from a false premise. Contrary to what she believed, the available information does not state that the police "verified" the applicant's identity either time. At best, there is no way to tell whether this happened or not. The Director General's findings that there were "discrepancies" between the applicant's statement and the LERC Report and, as a result, the applicant's credibility was called into question are therefore unreasonable.

(5) Associates with Criminal Records

[103] Another factor the Director General relied on in finding that concerns were raised regarding the applicant's "judgment, trustworthiness and reliability" is the applicant's association with two individuals with criminal records.

[104] No doubt someone's association with an individual with a criminal record can be probative of that person's suitability for holding a TSC. However, the significance of any such association will depend on the individual circumstances of the case, including: the nature of the offences in the record; the nature of the relationship between the two individuals; whether the associate had the record at the time the applicant was associating with him or her; whether the applicant knew about the record at the time; and whether the association continued after the applicant learned of the criminal record and, if so, why. Care must therefore be taken to examine all the circumstances before drawing any conclusions.

[105] The Director General's simple statement that, among other things, the applicant's association with two individuals with criminal records raised concerns about his "judgment, trustworthiness and reliability" is lacking in transparency as it gives no indication as to whether she considered the particular circumstances of this case. Looking behind her reasons to the information in the CTR only increases the opacity of the decision.

[106] First, one of these individuals, Subject "A", only acquired a criminal record in 2013. The LERC Report apparently indicated that Subject "A" was "involved with the applicant" in four of the incidents described in the report but neither Insp. Verrette's letter nor the summary of the report provided to the applicant state which ones. Given that five incidents in total were described, and given that one of them (the 2012 incident at Woodbine Slots) apparently involved only the applicant, it would appear to follow that Subject "A" was involved all of the other incidents mentioned in the LERC Report. The significance of this will become apparent shortly.

[107] The applicant did not raise any concerns about the state of the disclosure in relation to Subject "A" and I have no reason to think that he was hampered in dealing with this aspect of the case. The important point is that all of the incidents when the applicant was "involved" with Subject "A" happened before 2013. There is no information suggesting that the applicant has continued to associate with Subject "A" after the latter acquired a criminal record. These potentially salient facts are not addressed by either the Director General or the Advisory Body.

[108] Second, matters are even less satisfactory with respect to the other alleged associate, Subject "B". The summary of the LERC Report provided to Transport Canada by Insp. Verrette

(and disclosed to the applicant) simply states that Subject "B" was "involved" with the applicant in one of the incidents described in the report. It does not say which one (presumably to protect third-party privacy interests). However, it is necessary to try to determine which of the five incidents is the pertinent one because each incident is distinct and the nature of the association bears on the reasonableness of the Director General's reliance on this factor.

[109] Without the original LERC Report, the best I can do is resort to a process of elimination using the information available to me (and presumably to the Director General) to see if I can determine which of the five incidents it was:

- It cannot have been the 2005 TD/Canada Trust incident because the record indicates that there were only two individuals involved, the applicant and Subject "A".

- It cannot have been the 2008 parking lot incident because Subject "A" must have been there and the letter from Insp. Verrette states: "One of the applicant's friends in this incident is listed in paragraph 6 below" (emphasis added – paragraph 6 being where the criminal records of Subjects "A" and "B" are set out).

- It cannot have been the 2010 vehicle stop because Subject "A" must have been there and the letter from Insp. Verrette states: "One of the applicant's friends in this incident is listed in paragraph 6 below" (emphasis added).

- It cannot have been the 2011 vehicle stop because the record indicates that there were only two individuals in the vehicle and one of them must have been Subject "A" (the other individual allegedly being the applicant).

- It cannot have been the 2012 incident because the person alleged to have been the applicant appears to have been at Woodbine Slots alone that night.

[110] In short, the process of elimination actually eliminates all the possibilities, leaving the nature of the applicant's association with Subject "B" a complete mystery. This serious problem with the information concerning Subject "B" is not addressed by either the Director General or the Advisory Body.

[111] Having regard to these deficiencies in both the Director General's reasons and the underlying record, the Director General's reliance on the applicant's association with Subjects "A" and "B" is unreasonable.

(6) Conclusion

[112] In summary, with a single exception, the Director General's assessment of the factors she relied upon in denying the application for a TSC is tainted by reviewable errors. That exception is the applicant's admitted involvement in the attempted theft from the TD/Canada Trust ATM in 2005. As the Director General noted, this was a serious matter. As an act of dishonesty motivated by financial need, this incident, while dated, is potentially probative of the applicant's suitability to hold a TSC. Significantly, however, the Director General did not find that that incident alone led her to believe, on a balance of probabilities, that the applicant was someone who might be prone or induced to commit an act that might unlawfully interfere with civil aviation, or assist or abet any person to commit an act that might unlawfully interfere with civil aviation. Instead, she expressly linked it to other considerations in her decision. She also relied on several other

unrelated factors in refusing the application. My task is to review the decision the Director General made having regard to the reasons she gave and the record before her. Those reasons and that record are wanting in the ways I have discussed above. That being said, if I were to consider the 2005 incident in isolation and as the sole basis for the decision, I would find the conclusion that it established, on a balance of probabilities, that the applicant was someone who might be prone or induced to commit an act that might unlawfully interfere with civil aviation, or assist or abet any person to commit an act that might unlawfully interfere with civil aviation, to be unreasonable. The Director General's failure to consider whether this dated incident, standing alone, is a true measure of the applicant's character today would leave the decision lacking justification, transparency and intelligibility. As a result, I would be unable to understand why the Director General made the decision she did and would not be able to determine whether the conclusion is within the range of acceptable outcomes.

C. *Costs*

[113] The applicant has represented himself from the outset of his application for a TSC through to the hearing of this application for judicial review.

[114] The applicant did not request costs in his Notice of Application for Judicial Review. At the hearing of the application, he confirmed that he is not seeking costs. His only concern is with respect to the denial of the TSC.

[115] I should also note that the respondent very fairly sought at most a token award of costs in the event that the application were dismissed and indeed did not press the issue of costs strongly at all.

[116] In the circumstances, I do not consider this to be a case for costs.

VI. CONCLUSION

[117] For these reasons, the application for judicial review is allowed. The decision of the Director General, Aviation Security, dated July 19, 2016 is set aside.

[118] In view of the fact that the original application was submitted over three years ago, and considering that the decision-making process would likely benefit from more detailed information and submissions from the applicant, I am not ordering that that application be reconsidered. Instead, with the denial of the TSC having been set aside, the applicant is free to submit a new application for a TSC should he wish to do so. If the applicant makes a new application, it can be supported by whatever information and submissions he wishes to present. I also note that the applicant expressed genuine surprise that information concerning a withdrawn charge from nearly 15 years ago had found its way into this matter. If he makes a new application, the applicant will be free to raise any objections he sees fit to raise to the information that may be put before the Minister or his delegate when the matter is considered afresh. Finally, given the length of time this matter has been outstanding, I trust that the Minister will deal with any new application as expeditiously as circumstances and considerations of fairness permit.

JUDGMENT in T-1352-16

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed and the decision of the Director General, Aviation Security, dated July 19, 2016 is set aside; and

2. There will be no order as to costs.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 22, 2018
JUDGMENT AND REASONS:	NORRIS J.
DATED:	JUNE 22, 2018

APPEARANCES:

Hussain-Ul-Haque	FOR THE APPLICANT (ON HIS OWN BEHALF)
Mr. Stewart Phillips	FOR THE RESPONDENT

SOLICITOR OF RECORD:

Attorney General of Canada	FOR THE RESPONDENT