Federal Court Cour fédérale

Date: 20200728

Docket: T-1533-19

Citation: 2020 FC 797

Vancouver, British Columbia, July 28, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

KAN PAUL LUM AND GRUN LABS, INC.

Applicants

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of the decision of the Director General, Controlled Substances and Cannabis Branch, Health Canada [Director General or Director] on behalf of the Minister of Health [Minister], refusing to grant security clearance to the individual Applicant, Mr. Kan Paul Lum, pursuant s 53(1) of the *Cannabis Regulations*, SOR/2018-144.

Background

[2] On November 10, 2016, Mr. Lum submitted a "Security Clearance Application Form" to Health Canada. This was done in connection with a subsequent "Application to Become a Licensed Producer under the *Access to Cannabis for Medical Purposes Regulations* (ACMPR)" filed with Health Canada on April 19, 2017 [Producer License Application]. That application was filed by Mr. Lum as the director and named responsible person in charge of the corporate cannabis producer applicant, Grun Labs, Inc. [Grun Labs].

[3] At the time of Mr. Lum's application for security clearance, the production and sale of cannabis in Canada was governed by the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230 [ACMPR], made pursuant to the *Controlled Drugs and Substances Act*, SC 1996, c 19. In October 2018, the ACMPR was repealed and replaced with the *Cannabis Regulations* made pursuant to the *Cannabis Act*, SC 2018, c 16. Applications for a security clearance made under the ACMPR, for which no final determination had been made, were deemed to be continued under the *Cannabis Regulations*, pursuant to the transitional provisions of the *Cannabis Act* (s 158(10)).

[4] The *Cannabis Regulations* require security clearance for identified persons, including the directors and officers of a corporation holding a license for cultivation, processing or sale of cannabis (*Cannabis Regulations*, s 50(b)(i)). Before granting a security clearance, the Minister must determine that the applicant does not pose an unacceptable risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity (*Cannabis Act*, s 53(1)).

[5] On November 14, 2018, the Security Intelligence Background Section of the Royal Canadian Mounted Police [RCMP] prepared a Law Enforcement Record Check, or LERC report, which it provided to the Cannabis Legalization and Regulation Branch [CLRB] of Health Canada in support of the CLRB's security screening requirements. The LERC report states that:

> The applicant [Mr. Lum] has no criminal record, however is listed in the following occurrence(s):
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> 1. On April 21, 2015 RCMP Federal Serious and Organized Crime British Colombia [sic] entered into an investigation regarding money laundering and drug trafficking. During this investigation, it was determined from open source verifications, that the applicant is a director of 1045158 BC LTD and provided a residential address of … Vancouver. This is the same address as provided to Health Canada in his application under the ACMPR.
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> 2. The applicant's co-director in this company, Subject "A" provided the registry office with a residential address that is actually a UPS Store business.
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> 3. Subject "A" is the spouse of a known Asian Organized crime figure in the Lower Mainland of BC, Subject "B", who has been linked to organized crime for the last 20 years. Subject "B" has been criminally convicted of Trafficking in a Narcotic, Possession for the Purpose of Trafficking, Possession of an Unregistered Restricted Weapon and Personation with Intent.

[6] On December 14, 2018, the Manager for Security Operations at Health Canada issued a Security Clearance Recommendation to the Director General recommending that Mr. Lum's application for security clearance be denied. This recommendation referenced ss 53(2)(c) and 53(2)(b)(vii)(B) of the *Cannabis Regulations* and, on the basis that Mr. Lum is associated to an individual who is a member of a criminal organization convicted of drug trafficking offences,

concluded that it is more likely than not that he poses an unacceptable risk to public health and public safety, including the risk of cannabis being diverted to an illicit market or activity.

[7] By letter of December 31, 2018, the Director General advised Mr. Lum of the Director's intention to refuse Mr. Lum's application for security clearance [notice of intention]. The notice of intention sent to Mr. Lum reiterated the three occurrences communicated to Health Canada in the LERC report. The Director General stated it was his opinion that it is more likely than not that Mr. Lum poses an unacceptable risk to public health and public safety, including the risk of cannabis being diverted to an illicit market or activity. Further, that the factors most relevant to and which were considered in making the Director General's decision are those found in ss 53(2)(c), 53(2)(b)(vii)(A) and 53(2)(b)(vii)(B) of the *Cannabis Regulations*. The Director General stated that Mr. Lum is in a situation contemplated by those provisions. The Director General advised that, pursuant to s 55(1) of the *Cannabis Regulations*, Mr. Lum was entitled to submit written representations in response to the notice of intention to refuse to grant him a security clearance.

[8] Mr. Lum responded by email on January 29, 2019. He stated that until receiving the notice of intention he was unaware that Subject A's spouse is/was connected to organized crime or that her spouse had been convicted of drug-related offences. Mr. Lum stated that he had always known Subject A, and by extension her spouse, to be law abiding citizens and parents of three young children. However, the information about Subject A's spouse was very disturbing and of great concern. As a result, Mr. Lum stated he would ask Subject A to resign as a director of the company in respect of which they were co-directors. Mr. Lum stated that neither Subject A

nor her spouse are in any way connected to Grun Labs, the company in respect of which he was seeking a license under the *Cannabis Act*, and that his only connection to them was by virtue of the co-directorship in an unrelated entity. Mr. Lum also stated that he is a graduate of the Sauder School of Business at the University of British Columbia, he has been an upstanding entrepreneur for 25 years, he is the recipient of numerous awards for business excellence, and has appeared in numerous business articles over the years. Further, that he had no intention of jeopardizing his business career or reputation by engaging in any activities which may pose a risk to public health and safety, including by diverting cannabis to an illicit market. Finally, Mr. Lum stated that he would be open to considering any additional steps that Heath Canada would suggest to further support his security clearance application.

[9] By reply email of the same date CLRB confirmed receipt of Mr. Lum's representation and stated it would let him know should anything else be required.

[10] By a Security Clearance Recommendation to the Director General dated February 14, 2019, the manager of Security Operations recommended that, pursuant to s 20(3) of the *Cannabis Regulations*, Mr. Lum should be requested to provide proof that Subject A had been removed as co-director of his company. By letter of February 28, 2019, the Director General duly asked Mr. Lum to provide proof of Subject A's resignation. In response, on or about March 25, 2019, Mr. Lum provided Subject A's letter of resignation, the related Unanimous Shareholders' Resolution of 1045158 B.C. LTD [numbered company], and a Notice of Articles from the BC Registry Services showing Mr. Lum as the only director of that company.

[11] On April 26, 2019, the Interdepartmental Security Advisory Forum [ISAF] for Health Canada prepared a final Security Clearance Recommendation to the Director General. ISAF was of the view that, despite Subject A being removed as co-director, there were still reasonable grounds to suspect that Mr. Lum has been associated with Subjects A and B, as acknowledged in his representation, and to suspect that Subject B is a member of a criminal organization and has been convicted of drug related offences. As a result, it was more likely than not that Mr. Lum poses an unacceptable risk to public health or public safety, including the risk of cannabis being diverted to an illegal market or activity.

[12] On May 21, 2019, Mr. Lum sent a follow-up email to his written representation to ask if the CLRB needed any further information from him. By reply email on May 22, 2019, CLRB advised that it had not yet completed the review of his file and that it would let him know once a decision had been made.

[13] By letter dated August 15, 2019, the Director General informed Mr. Lum of the Director's final decision to refuse the application for security clearance. That refusal is the decision under judicial review.

Relevant legislative and regulatory provisions

[14] The relevant provisions of the *Cannabis Act* and the *Cannabis Regulations* are reproduced in Annex A of this decision.

Decision under review

[15] In his decision letter the Director General summarized the findings of the LERC report, as had previously been set out in the notice of intention to refuse the security clearance, Mr. Lum's response to the notice of intention, the Director's request for further information, and Mr. Lum's response to that request.

[16] The Director General advised that Mr. Lum's security clearance application had been reviewed by the ISAF, for the purposes of providing a recommendation as to whether Mr. Lum posed an unacceptable risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity. The ISAF had recommend that the security clearance application be refused.

[17] The Director General stated that pursuant to s 53(1) of the *Cannabis Regulations*, before granting a security clearance it must be determined that the applicant does not pose an unacceptable risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity. The Director General stated that he had considered the ISAF recommendation and reviewed the information in Mr. Lum's file, including his representation and the results of the checks conducted. Based on all of the relevant information, it was the Director General's opinion that Mr. Lum poses an unacceptable risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity. Further, that the factors most relevant to the Director's decision were those set out in ss 53(2)(c), 53(2)(b)(vii)(A) and 53(2)(b)(vii)(B) of the *Cannabis Regulations*, which the Director General summarized:

- Section 53(2)(c): whether there are reasonable grounds to suspect that Mr. Lum could be induced to commit an act —

> or to aid or abet any person to commit an act — that might constitute a risk to public health or public safety;
>
> - Section 53(2)(b)(vii)(A): whether it is known, or there are reasonable grounds to suspect, that Mr. Lum is or has been associated with an individual who is known to be involved in or to contribute to — or in respect of whom there are reasonable grounds to suspect their involvement in or contribution to — activities referred to in s 53(2)(b)(i) to (iii) of the *Cannabis Regulations*; and,
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> - Section 53(2)(b)(vii)(B): whether it is known, or there are reasonable grounds to suspect, that Mr. Lum is or has been associated with an individual who is a member of an organization referred to in s 53(2)(b)(v) or (vi) of the *Cannabis Regulations*.

[18] The Director General stated that regardless of the fact that Subject A had resigned as co-director in Mr. Lum's numbered company and of Mr. Lum's representations about his limited knowledge of Subject A and Subject B, the fact remained that Mr. Lum has had an association to them. Further, given that Subject B has been linked to organized crime for the last 20 years, Mr. Lum had not alleviated the Director General's concern that Mr. Lum is or has been associated with an individual who is a member of a criminal organization or an individual who is a member of an organization that is known to be involved in activities directed toward, or in support of acts of violence or the threat of violence. Additionally, as Subject B had been convicted of Trafficking in a Narcotic and Possession for the Purpose of Trafficking, Mr. Lum had not alleviated the Director General's concern that Mr. Lum is or has been associated with an individual known to be involved in or to have contributed to activities relating to s 53(2)(b)(ii) of the *Cannabis Regulations*.

[19] Given this, it was the Director General's view that Mr. Lum is in a situation contemplated by s 53(2)(c), s 53(2)(b)(vii)(A) and s 52(2)(b)(vii)(B) of the *Cannabis Regulations*.

[20] The Director General therefore refused Mr. Lum's application for security clearance.

Issues

[21] The Applicants raise two issues in this judicial review. These can be framed as follows:

i. Was the decision procedurally fair?

ii. Was the decision reasonable?

Standard of review

[22] The Applicants submit that while historically the correctness standard has been applied to issues of procedural fairness, such questions are not actually decided according to any particular standard of review. Rather, a reviewing Court must ask whether the procedure was fair having regard to all of the circumstances and must be satisfied that an applicant on judicial review knew the case to meet and was heard (*Canadian Pacific Railway Company v Canada (Attorney General*), 2018 FCA 69 at paras 34-56 [CPR]; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14).

[23] The Respondent submits that the standard of review of correctness applies to questions of procedural fairness (*Del Vecchio v Canada (Attorney General)*, 2018 FCA 168 at para 4 [*Del Vecchio* FCA]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]).

[24] In my view, the standard of review for questions of procedural fairness is correctness (*Khosa* at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79). As stated by the Federal Court of Appeal in *Oleynic v Canada (Attorney General)*, 2020 FCA 5 at para 39, referencing its decision in *CPR* at para 54, judicial review for procedural fairness is "best reflected in the correctness standard". No deference is afforded to the underlying decision maker on questions of procedural fairness (*Del Vecchio* FCA at para 4).

[25] The parties submit, and I agree, that the standard of review otherwise applicable in this matter is the presumptive standard of reasonableness (*CPR* at para 8; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 [*Vavilov*]).

[26] A review for reasonableness means that:

> 99 A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.
>
> (*Vavilov* at para 99)

Issue 1: Was the decision procedurally fair?

[27] The Applicants submit that the decision was procedurally unfair for three reasons:

i. The Director General pre-determined the outcome of Mr. Lum's application;

ii. The Director General failed to provide a meaningful opportunity for Mr. Lum to respond, contrary to Mr. Lum's legitimate expectations; and,

iii. The Director General failed to adequately test the reliability of the RCMP's LERC report.

Analysis

i. Content of the duty of fairness

[28] The starting point for this analysis is to determine the content of the duty of procedural fairness that was owed to Mr. Lum.

[29] As the Applicants submit, the concept of procedural fairness is variable and its content will be determined in the specific context of each case (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC) at paras 21-22 [*Baker*]; *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 18 [*Henri* FCA]). *Baker* identified factors that may be considered when determining the content of procedural fairness in a particular circumstance. These factors are: the nature of the decision being made and the process followed in making it; the nature of the statutory scheme and the terms of the statute pursuant to which the administrative decision maker operates; the importance of the decision to the individual(s) affected; the legitimate expectations of the person challenging the decision; and, the choices of procedure made by the agency itself (*Baker* at paras 23-27).

[30] The Applicants submit that Mr. Lum was owed a high degree of procedural fairness as the applicable statutory scheme lacks an appeal mechanism; the decision was important to Mr. Lum who is the sole shareholder, director and officer of Grun Labs, and without a security clearance certificate, that company cannot obtain a licence to produce cannabis despite having

made a significant financial investment in the project. Further, the Applicants submit that Mr. Lum had a legitimate expectation that he would be given a fair opportunity to respond to any remaining concerns that the Director General may have had after Mr. Lum provided proof that Subject A was no longer his co-director in the numbered company as well as a legitimate expectation that the Director General would test the content of the LERC report.

[31] I note that this would appear to be the first decision to consider the content of the duty of procedural fairness owed with respect to the issuance of security clearance in connection with the *Cannabis Act* and the *Cannabis Regulations.* However, there is jurisprudence in other areas, such as in the civil aviation and marine transportation fields, that has previously considered the content of the duty of procedural fairness owed in the context of refusals to issue, renew or the cancelling of security clearance.

[32] In *Henri v Canada (Attorney General)*, 2014 FC 1141 [*Henri*], the applicant was an aeronautics engineer who worked in restricted areas of an international airport. Access to restricted areas was limited to individuals who held security clearances issued under the *Aeronautics Act*. The applicant argued that the cancelling of his security clearance had a significant impact on him and his family as it involved his ability to retain his employment and, therefore, he was owed a high level of procedural fairness. Justice LeBlanc summarized the principles emerging from the jurisprudence of this Court in the context of the cancellation of security clearances in relation to air safety. This included that the content of procedural fairness is slightly higher when an existing clearance is cancelled than when someone is refused clearance for the first time. Nevertheless, it is on the lower end of the spectrum (*Henri* at para

27(e), citing *Pouliot v Canada (Transport)*, 2012 FC 347 at para 10 [*Pouliot*]). Further, in practical terms, this means that the procedural safeguards related to the process that may lead to the cancellation of a security clearance are limited to the right to know the alleged facts and the right to make representations about those facts (*Pouliot* at para 10; *Rivet v Canada (Attorney General)*, 2007 FC 1175 at para 25 [*Rivet*]; *DiMartino v Canada (Minister of Transport)*, 2005 FC 635 at para 36 [*DiMartino*]; *Peles v Canada (Attorney General)*, 2013 FC 294 at para 15 [*Peles*]; *Clue v Canada (Attorney General)*, 2011 FC 323 at para 17 [*Clue*]).

[33] On appeal, in *Henri* FCA the Federal Court of Appeal found that the Federal Court had not erred in determining the level and content of procedural fairness that the applicant was owed. And, while it must be recognized that where a person's employment is dependant on maintaining a security clearance the decision is of enormous personal importance, this is just one of the factors to be considered (*Henri* FCA at paras 22-23). The statutory scheme also afforded the Minister a great deal of discretion and entrusted the Minister with the duty of granting or refusing or revoking security clearances to individuals. The Federal Court of Appeal held that the nature of the decision and the statutory scheme militated towards reduced levels of procedural fairness. Further:

> [27] Although I frame the analysis somewhat differently, I find that the level of procedural fairness set out by the Federal Court is reflective of these factors in the context of this case. The decision is of great importance both to the individuals affected and to the public interest in safety and security. Parliament has entrusted the decision not to a court or a quasi-judicial tribunal but to the Minister's discretion. The Minister has elected to exercise this discretion with the assistance of an Advisory Body under a policy that ensures individuals are informed of claims made against them and that they have the opportunity to respond before a recommendation to the Minister, and then the Minister's decision, are rendered.

> [28] Specifically, the Federal Court's determination that procedural fairness requires that an individual who may have his security clearance under the Act revoked is informed of the facts alleged and is afforded with the opportunity to respond, is consistent with the *Baker* factors and with the goal of ensuring a fair and open procedure.

(See also *Canada (Minister of Transport, Infrastructure and Communities) v Jagjit Singh Farwaha*, 2014 FCA 56 at para 118.)

[34] The cannabis regulation scheme is also concerned with public safety. The purpose of the *Cannabis Act* includes the protection of public health and public safety and, in particular, to provide for the licit production of cannabis to reduce illicit activities in relation to cannabis and to deter illicit activities in relation to cannabis through appropriate sanctions and enforcement measures (*Cannabis Act*, ss 7(c) and (d)).

[35] The *Cannabis Act* also provides that, subject to the regulations, the Minister may grant or refuse to grant a security clearance or suspend or cancel a security clearance. That is, the Act affords the Minister significant discretion in determining whether to issue a security clearance (*Cannabis Act*, s 67(1)).

[36] The *Cannabis Regulations* permit the Minister to, at any time, conduct checks that are necessary to determine whether an applicant for, or the holder of, a security clearance poses a risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity. Such checks include a check of the applicant’s or holder’s criminal record and a check of the relevant files of law enforcement agencies that relate to the applicant or holder,

including intelligence gathered for law enforcement purposes (*Cannabis Regulations*, s 52). The regulations also require that the Minister must, before granting a security clearance, determine that the applicant does not pose an unacceptable risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity (*Cannabis Regulations*, s 53(1)). The regulations also set out a long list of factors that the Minister may consider when determining the level of risk posed by an applicant before granting security clearance (s 53(2)).

[37] Moreover, the *Cannabis Regulations* set out the process to be followed when the Minister intends to refuse to grant a security clearance. The Minister must provide the applicant with a notice that sets out the reasons for the proposed refusal and specify the time within which the applicant can submit written representations in response (*Cannabis Regulations*, s 55(1)).

[38] In my view, this matter is analogous to *Henri*. The discretionary nature of the decision, the process to be followed, and the statutory scheme all militate towards a lower level of procedural fairness (*Henri* FCA at para 24).

[39] Further, case law in other statutory contexts confirms that security clearance is a privilege, not a right (*Henri* at para 27(a); *Thep-Outhainthany v Canada (Attorney General)*, 2013 FC 59 at para 17 [*Thep-Outhainthany*]; *Sylvester v Canada (Attorney General)*, 2013 FC 904 at para 18; *Quan v Canada (Attorney General)*, 2016 FC 1181 at para 32 [*Quan*]; *Dorélas v Canada (Transport)*, 2019 FC 257 at para 35). This too suggests a low level of procedural fairness.

[40] As to the importance of the decision to the individual(s) involved, in this matter Mr. Lum has filed an affidavit sworn on September 17, 2019 in support of this application for judicial review [Lum Affidavit #1]. In that affidavit, he states that he incorporated Grun Labs in November 2016 and that he is the sole director and shareholder of that entity. In December 2016, Grun Labs purchased a property for the purpose of carrying out cannabis production at a purchase cost of approximately $2.9 million. On April 3, 2017, Mr. Lum submitted the Producer Licence Application on behalf of Grun Labs. Subsequently, Grun Labs invested an additional approximate $1.1 million in the project.

[41] I note that the Producer License Application names Mr. Lum under "Proposed Senior Person In Charge" as director and responsible person in charge. Under "Proposed Responsible Person in Charge" he is similarly named as director and senior person in charge. The *Cannabis Regulations* require that the directors of corporations holding a license for cultivation, processing or sale of cannabis must hold a security clearance (s 50(b)(i)). Security clearance must similarly be held by any individual who exercises, or is in a position to exercise, direct control over the corporation (s 50(b)(ii)). This latter provision presumably would include the sole shareholder and officer of a company, such as Mr. Lum with respect to Grun Labs. Section 62(7)(f) of the *Cannabis Act* precludes the issuance or renewal of cannabis producer license if the required security clearances are not in place.

[42] Thus, the decision under review affects Mr. Lum's capacity to act as the director and controlling interest of Grun Labs. By association, this potentially impacts Grun Labs' ability to become a licensed producer (*Cannabis Regulations*, s 50(b)(i); *Cannabis Act*, s 62(7)(f)). In that

sense, the decision could perhaps be seen to affect an employment opportunity for Mr. Lum, one in which Grun Labs has invested significantly. That said, affecting an employment opportunity, as opposed to one's current employment, may not be as significant in the context of the content of the duty of procedural fairness (see *Makavitch v Canada (Attorney General)*, 2019 FC 940 at para 29; *Haque v Canada (Attorney General)*, 2018 FC 651 at paras 62-63 [*Haque*]). Regardless, in my view, this factor weighs in the Applicants' favour in terms of greater procedural fairness. As does the fact that there is no statutory appeal mechanism found in the *Cannabis Act* or associated *Cannabis Regulations* related to security clearance (*Baker* at para 24).

[43] The Applicants also submit that Mr. Lum had a legitimate expectation that the Minister would test the information found in the LERC report provided by the RCMP and that this expectation supports a higher level of procedural fairness.

[44] The doctrine of legitimate expectations is described by the Supreme Court of Canada in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*]:

> [94] The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong foundation in Canadian administrative law in *Baker*, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.
>
> [95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized

> succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:
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> > The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [Emphasis added.]
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> (D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at §7:1710; see also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68.)
>
> [96] In *Mavi*, Binnie J. recently explained what is meant by "clear, unambiguous and unqualified" representations by drawing an analogy with the law of contract (at para. 69):
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> > Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

(See also *Drabinsky v Canada (Advisory Council of the Order)*, 2015 FCA 5 at para 8 [Drabinsky].)

[45] In my view, Mr. Lum could not have had a legitimate expectation that the Minister would investigate the accuracy or "test" the information found in the RCMP's LERC report. This is

because there is simply no evidence that the Minister made a representation that the Minister would test the LERC report. Nor do the Applicants assert this. Rather, they suggest that the Minister should have looked behind the LERC report to ensure that in its preparation the RCMP did not exaggerate or provide unreliable evidence about Subject B's alleged criminal activities. Further, that this should have included conducting legal research into the allegations against Subject B to uncover any relevant judicial decisions. Finally, they suggest that this legitimate expectation was heightened because Mr. Lum was not provided with the LERC report and therefore could not test its reliability himself.

[46] This submission simply does not address the requirement, necessary to found a legitimate expectation, that the Minister must have made a clear, unambiguous and unqualified representation that he would test the LERC report. Nor does the fact that the Certified Tribunal Record [CTR or record] contains a copy of the LERC report, with three affixed "sticky notes" that suggest the Director General or someone from his office had further discussions with the RCMP about the content of the LERC report, amount to any form of representation made to Mr. Lum. On this basis, the Applicants' claim of a legitimate expectation cannot succeed, and therefore, that factor cannot support a finding that the duty of procedural fairness owed to Mr. Lum is heightened.

[47] The Applicants also assert that Mr. Lum had a legitimate expectation that he would be given a fair opportunity to respond to any lingering concerns the Minister may have had after Mr. Lum made his written representations in response to the notice of intention. As indicated above, the *Cannabis Regulations* require that an applicant be provided with the opportunity to

respond to the notice of intention, which the Minister did in this case. There is, however, no provision requiring the Minister to follow up with an applicant or permitting an applicant to make any subsequent additional written representations. And again, the Applicants point to no representation made by the Minister in that regard.

[48] The Applicants point to a June 5, 2019 email from the Licensing and Medical Access Directorate, Controlled Substances and Cannabis Branch of Health Canada, which concerns Grun Labs' application to become a license holder. This email indicates that Health Canada had completed a preliminary and high-level review of the license application, and based on the information assessed, Health Canada had no critical concerns with the application at that time. However, that the review was limited in scope and that it was important to note that it did not constitute an approval of the site and should not be viewed as an indication that the application is fully compliant or that a licence will be issued in the future. The email also indicates that individuals who require a security clearance must submit their security application form before a licence application can be submitted. I also note that the Producer License Application submitted by the Applicants states that a producer's license will not be issued if all of the required individual security clearances have not been granted. This reflects s 62(7)(f) of the *Cannabis Act*, which states that the Minister may refuse to issue a license if a security clearance in respect of that application has been refused or cancelled.

[49] All of this is to say that, to the extent that the Applicants are suggesting that the June 5, 2019, email afforded them a legitimate expectation that they would have a further opportunity to respond to any remaining concerns of the Minister – or that they would be issued a production

license – the letter is assuredly not a clear, unambiguous and unqualified representation to that effect.

[50] In conclusion, considering the *Baker* factors in the context of this matter, I am of the view that the content of the duty of procedural fairness owed to Mr. Lum is at the lower end of the spectrum. This is because the security clearance application is not similar to a judicial process as described in *Baker* at para 23. Further, the *Cannabis Act* and *Cannabis Regulations* place the duty to grant security clearances on the Minister, afford the Minister significant discretion in determining if applicants pose a risk to public safety or public health and require that the Minister give an applicant notice of the Minister's intention to refuse a security clearance application and an opportunity to make written representations in response. Mr. Lum had no legitimate expectation that he would receive a security clearance or that he would be afforded any procedural safeguards other than those mandated by the legislative scheme. Further, while the outcome of the decision was important to Mr. Lum, as an affected individual, it was also of importance to the public interest in public safety. In the result, and despite the importance of the decision to Mr. Lum and that no appeal mechanism exists, in my view the factors weigh in favour of a low level of procedural fairness.

[51] Further, the process followed in this matter, notice of the Minister's intention to refuse the security clearance application and an opportunity to make written representations in response, has been held to be in keeping with the content of procedural fairness owed in comparable circumstances pertaining to security clearances (*Henri* at para 27(e); *Pouliot* at para 10; *Rivet* at para 25; *DiMartino* at para 36; *Peles* at para 16; *Clue* at para 17; *Haque* at para 65;

see also *Quan* at para 33). In my view, this level of procedural fairness is appropriate in this circumstance.

ii. Were the requirements of procedural fairness breached?

Applicants' position

[52] The Applicants submit that procedural fairness was breached in three ways.

[53] First, because the Director General prejudged the outcome of Mr. Lum's security clearance application as is evident from the fact that the wording of the notice of intention and the decision letter are identical, that the decision did not refer to all Mr. Lum's written representations which were contrary to the Minister's initial view as to risk, and because it was futile for Mr. Lum to provide proof of his co-director's resignation.

[54] In the alternative, the Director General may have relied on a new concern, credibility, which was not put to Mr. Lum thereby breaching procedural fairness. Further, Mr. Lum had a legitimate expectation that that he would be informed of new concerns, or of any concerns of the Minister that remained after the submission of Mr. Lum's written representations.

[55] And finally, because Mr. Lum was not provided with the RCMP's LERC report he did not have the opportunity to test its reliability or comment on the relevance of Subject B's criminal record as set out in the report. Accordingly, the Director General was required to test the LERC report and to inform himself of contrary publically available information.

Respondent's position

[56] The Respondent submits that the Director General is presumed to act impartially and with an open mind and the Applicants' allegations of bias do not meet the high threshold required to establish a reasonable apprehension of bias and are not consistent with the record. Specifically, the Director General would not have delayed his decision and requested further information from Mr. Lum had he prejudged the application. The fact that the Director General was ultimately not swayed by Mr. Lum's written representations does not amount to bias.

[57] Further, while Mr. Lum emphasises one element of the decision – his business dealings with Subject A – the Director General was entitled to weigh all of the concerns, including Mr. Lum's association with Subject B. The fact that the notice of intention and final decision letter were similar reflects the consistent nature of the Director General's concerns. The heart of the decision directly addressed Mr. Lum's representation that he was no longer associated with Subject A and that he was not aware of Subject B's involvement with organized crime. Ultimately, however, the Director General found that Mr. Lum had not alleviated his concern that Mr. Lum was or had been associated with an individual known to be involved in or to have contributed to activities related to s 53(2)(b)(ii) of the *Cannabis Regulations*.

[58] The Respondent also submits that the Director General had no obligation to conduct independent research to "test" the content of the RCMP's LERC report, which is presumed to be accurate. Mr. Lum was required to put his best foot forward in submitting his application and there was no obligation on the Director General to gather or seek additional evidence or to make

further inquiries. Nor could the Applicants claim to have a legitimate expectation that the Director General would test the content of the LERC report. Further, as a general rule, a court on judicial review can only consider information that was put before the decision maker. Accordingly, this Court should not consider the British Columbia Supreme Court decision discussed by the Applicants in their submissions, which, in any event, validates the history of narcotic possession and trafficking convictions concerning Subject B cited in the Director General's decision.

Analysis

a. Prejudgment of the decision

[59] The Applicants refer to *McEvoy v Canada (Attorney General)*, 2014 FCA 164 [*McEvoy*] in support of their position that the Director General prejudged the outcome of the decision. Specifically, the statement that:

> [41] In order to establish that the Committee had prejudged their reclassification request, the Appellants had to prove that "any representations at variance with the view, which has been adopted, would be futile" (see Old *St. Boniface Residents Association Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, at para. 57)…

[60] I note that in *McEvoy*, the decision makers received new information from the appellants, but ultimately found that it did not change their decision. There, the Federal Court of Appeal wrote:

> [43] The statement "[…] After giving careful consideration to the evidence submitted the Committee reached consensus that the new information would not change their decision", as I read it, can be interpreted as meaning that after weighing the new information, it did not outweigh the other evidence which warranted

> maintaining the classification level as it was. Therefore, it did not "change the decision". In other words, based on its analysis of the relativity study and the parties' submissions, the Committee found that the classification should remain the same, and the union's response did not justify another conclusion. This does not prove that the Committee failed to consider the new information or that it prejudged the issue.
>
> [44] The statement must be understood in its proper context. The important element being whether the Committee remained open to assess and evaluate the additional evidence adduced. There is no evidence to the contrary in the present case.

[61] In this matter, the Director General's decision letter clearly identified that it was being sent following the notice of intention; Mr. Lum's January 29, 2019 written representations in response; the Director General's subsequent request for further information; Mr. Lum's letter providing proof that Subject A was no longer a director in Mr. Lum's numbered company; and, the ISAF review of the relevant information in Mr. Lum's file, including both of his representations.

[62] The decision stated , regardless of Mr. Lum's representations that he was not aware that Subject B has been linked to organized crime or was convicted of drug-related offences and that Mr. Lum had always known Subject A and Subject B to be law abiding citizens, and regardless of the proof that Subject A had resigned as a co-director in Mr. Lum's company, the fact remained that he had an association with Subjects A and B. Given that Subject B has been linked to organized crime for the past 20 years, the Director General stated that Mr. Lum had not alleviated the Director's concerns that Mr. Lum is or has been associated with an individual who is a member of a criminal organization or an individual who is a member of an organization known to be involved in activities directed toward, or in support of acts of violence or the threat

of violence. Additionally, given that Subject B has been convicted of Trafficking in Narcotics and Possession for the Purpose of Trafficking, Mr. Lum had not alleviated the Director General's concern that Mr. Lum is or has been associated with an individual known to be involved in or contribute to activities related to s 53(2)(b)(ii) of the *Cannabis Regulations*. As a result, Mr. Lum fell within the situations contemplated by s 53(2)(c) and ss 53(2)(b)(vii)(A)-(B) of the *Cannabis Regulations.*

[63] In my view, the Applicants have not established that Mr. Lum's representations were futile on the basis that the Director General had prejudged the case. The Director General made clear reference to both representations but, for the reasons stated, found that this did not alleviate his concerns. The Director General's final decision reflects that he weighed all of the evidence, including the new evidence. The mere fact that the Director General's final decision did not vary after Mr. Lum made his written representations does not establish a closed mind and a breach of procedural fairness.

[64] As to the Applicants' argument that, because the decision letter was similar to the notice of intention, this establishes that the decision was prejudged, I do not agree. First, while the Applicants submit that the two letters are "identical", in fact, they are not. The two letters do identically describe the content of the RCMP's LERC report and similarly describe the factors that the Director General considered most relevant in making his decision. However, the final decision letter contains paragraphs describing the prior communications and responses, including both Mr. Lum's representation and his further submission, describing the ISAF's recommendation, and making the ultimate decision in light of Mr. Lum's written representation

and further submission. In my view, viewed in the context of the content of the final decision as a whole, the reusing or restating of paragraphs that contain necessary information relevant to both the notice of intention and the final decision, does not establish that the Director General prejudged the matter.

b. New credibility concern

[65] The Applicants next submit that, if the Director General did not prejudge the matter, then he may have made his decision based on a new concern, credibility, that was not put to Mr. Lum in the notice of intention and thereby breached the requirement of procedural fairness. In my view, the record contains nothing that supports this argument. Rather, the record reflects that the Director General, the manager who made the initial refusal recommendation, and the ISAF were all consistently concerned only with Mr. Lum's association with Subjects A and B. On my review of the record, there is no evidence of any new credibility concern not disclosed to Mr. Lum. The Applicants' argument on this point amounts to speculation.

c. Opportunity to respond

[66] The Applicants' final argument as to procedural fairness is that the Director General was obligated to "test" the information found in the RCMP's LERC report as this report was not given to the Mr. Lum and, therefore, he could not verify it himself. This argument is based, in part, on the content of a second affidavit of Mr. Lum, sworn on January 8, 2020 [Lum Affidavit #2]. In that affidavit, Mr. Lum noted that in Lum Affidavit #1 he had identified Subject A, the co-director of his numbered company, by name. I will refer to her as WM. In Affidavit #2, Mr.

Lum states that had been introduced to WM's spouse, Subject B, as Mr. Ricky Chu. Attached as Exhibit A to Lum Affidavit #2 is a CBC online news article dated April 19, 2017, titled "Retroactive changes to criminal pardons violate charter rights, B.C. judge rules". Attached as Exhibit B is a copy of the British Columbia Supreme Court decision *Chu v Canada (Attorney General)*, 2017 BCSC 630 [*Chu*]. Mr. Lum deposed his belief that the applicant in *Chu* is Subject B, Mr. Chu.

[67] *Chu* was a successful constitutional challenge to the retrospective application of amendments to the legislation governing pardons, or criminal record suspensions. In that decision, Mr. Chu is described as an individual who committed five indictable offences when he was between 21-27 years old. His criminal record is listed, being convictions for trafficking in a narcotic, two counts each of possession of a Schedule 1 substance for the purpose of trafficking, possession of an unregistered restricted weapon, and personation with intent. The decision states that Mr. Chu was released from custody in 2004 and has remained crime-free and living in the community since that time and that he deposed that he had not committed any offences while he was in custody nor had he done so since his release (*Chu* at paras 61-63).

[68] It should first be noted that *Chu* was not mentioned or provided by Mr. Lum in his January 29, 2019 written representations submitted in response to the Director General's notice of intention. Nor is any explanation offered at this judicial review as to why the *Chu* decision, which predates the Director General's decision, could not have been provided to the Director General, other than the statement in Lum Affidavit #2 that the materials were brought to Mr. Lum's attention after he affirmed his first affidavit. As noted by the Respondent, on judicial

review, the court is generally limited to the evidentiary record that was before the administrative decision maker. There are exceptions to that principle including, but not limited to, circumstances when new evidence is submitted in support of an alleged breach of procedural fairness, to provide general background information to assist the court in understanding issues relevant to the judicial review, or to demonstrate the complete absence of evidence before the decision maker when it made a particular finding (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20).

[69] In my view, the *Chu* decision is not admissible as it was available but was not put before the Director General and because the Applicant attempts to rely on it to challenge the reliability of the LERC report and the merits of the Director General's findings (*Thep-Outhainthany* at para 13; *Henri* at paras 21-22; *Henri* FCA at paras 3, 37-41). However, and regardless of the question of admissibility, one of the bases of the Applicants' argument on this point is that they had a legitimate expectation that the Director General would "test" the RCMP's LERC report and conduct his own legal research to uncover any related judicial decisions, specifically the *Chu* decision.

[70] However, as I have already determined, this argument cannot succeed. Conduct giving rise to legitimate expectations must be "clear, unambiguous and unqualified" (*Agraira* at para 95; *Drabinsky* at para 8). The Applicants refer to no evidence that the Minister made any representation that the RCMP LERC report would be verified or that independent research would be conducted by the Director General (see *Henri* at paras 33-35). This is determinative and the procedural fairness argument fails on this basis.

[71] The Applicants also submit that Mr. Lum was not provided with the LERC report, or the specific details of Subject B's criminal record – in particular, the dates of his convictions. Therefore, Mr. Lum himself was unable to test that information. The procedural fairness aspect of this position appears to be that Mr. Lum was not informed of the case against him, and therefore, was not provided with a meaningful opportunity to respond.

[72] However, the three findings of the LERC report were set out in the Director General's notice of intention. The notice of intention also stated that the Director General was of the view, given that Mr. Lum is associated to an individual who is a member of a criminal organization and has been convicted of Trafficking in a Narcotic and Possession for the Purpose of Trafficking, that Mr. Lum is in a situation contemplated by s 53(2)(c) and ss 53(2)(b)(vii)(A) and (B) of the *Cannabis Regulations*. In my view, the Director General clearly stated his concerns and thereby alerted Mr. Lum of the case to meet.

[73] It is also of note that Mr. Lum was able to identify Subjects A and B, who he confirmed that he knew in his written representation, and that he was therefore in a position to gather information that he deemed necessary by making inquiries of Subjects A and B, looking for information about them on the public record, or taking such other steps as he deemed necessary. This is demonstrated by his provision, subsequent to the decision being made, of a copy of the *Chu* decision in Lum Affidavit #2 and by his personal knowledge of Subjects A and B as set out in Lum Affidavit #1.

[74] The onus was on Mr. Lum to respond to the notice of intention in support of his position that he did not pose a risk to public safety because of his association with Subjects A and B (*Randhawa v Canada (Transport)*, 2017 FC 556 at para 42 [*Randhawa*]). However, his response provided little detail, and the Director General cannot be faulted for not responding to information that Mr. Lum did not submit.

[75] The Applicants also submit that because Mr. Lum "complied" by responding to the notice of intention letter and by providing the requested proof that Subject A was no longer a co-director in his numbered company, and because he asked in his email of May 21, 2019, if anything else was needed from him, this gave rise to a legitimate expectation that he would be informed of "any lingering concerns" and would be given an opportunity to respond.

[76] This submission also cannot succeed. As discussed above, there is no evidence of a clear, unambiguous and unqualified representation from the Director General that would give rise to such an expectation. Further, prior jurisprudence has rejected similar arguments. For example, in *Del Vecchio v Canada (Attorney General)*, 2017 FC 696 [*Del Vecchio*] the applicant therein asserted that it was his expectation that he would be contacted and requested to provide additional information if there were any concerns after the submission of his written representations. As he was not contacted before the decision was issued he argued that he was therefore not afforded a meaningful opportunity to respond, in breach of the requirements of procedural fairness. This Court rejected that submission, stating:

> [26] I find that Mr. Del Vecchio was entitled to be informed of the facts alleged against him and to be provided with an opportunity to respond, both of which occurred. There was no breach of procedural fairness as it was a fair and open procedure.

> The letter of August 20, 2015, outlined the contents of the LERC report which the Minister received from the RCMP. As a result, Mr. Del Vecchio knew everything the Minister did and was encouraged to provide written submissions in response. Mr. Del Vecchio took advantage of the opportunity, responding in his letter of September 21, 2015.
>
> [27] Mr. Del Vecchio suggests that further opportunities to respond should have been provided. Including that as someone called him that the Advisory Board should not have proceeded until they reached him as he has now extrapolated that the call was that the Advisory Board just needed a clarification that he would have given and would not have had his clearance taken away. However, neither the Advisory Board nor the Minister is under any obligation to conduct further research nor provide or seek out further particulars (*Lorenzen v Canada (Transport)*, 2014 FC 273 at para 51). Mr. Del Vecchio seeks an opportunity to refute or respond to conclusions reasonably arising from his conduct, an argument expressly rejected by this Court (*Pouliot*, at para 14). I find no breach of procedural fairness.

[77] A similar argument was unsuccessfully made in *Henri* FCA. There, the Federal Court of Appeal noted that Mr. Henri had provided a written response and that the Advisory Board indicated in its record of discussion that, before recommending revocation, it considered Mr. Henri's written statement but found it "did not provide sufficient information to dispel concerns" when weighed against the other evidence. The Minister's decision reflected a similar weighing of the evidence. The Federal Court of Appeal found:

> [33] There is no procedural defect here. Mr. Henri was presented with the evidence against him, and he was invited both to make inquiries and to respond. He was provided with sufficient time to provide his response, including extensions of the initially allotted time, and his response was considered by the Advisory Board and by the Minister.
>
> [34] Mr. Henri opines that in his case, this was not enough. If the Minister found the information insufficient, Mr. Henri should have been called in for an interview in order to supplement the information contained in the letter sent by his lawyer. He should

> have been given the opportunity to better explain his relationship with his ex-brother-in-law *viva voce*.
>
> [35] I disagree with this approach. Neither the Minister nor the Advisory Board was under the obligation to hold an interview with Mr. Henri because of the impact of a negative decision on his livelihood. Mr. Henri knew the importance of the decision for him and had the responsibility to defend his case when asked. Procedural fairness demands only that persons in his situation are provided with a meaningful opportunity to respond to the evidence against them, and for that response to be considered. This is exactly the treatment Mr. Henri received.

[78] In this matter, it is clear from the record that the Director General made his concerns known to the Mr. Lum in compliance with s 55(1) of the *Cannabis Regulations*. The notice of intention described the findings of the LERC report and set out the Director General's concerns. Mr. Lum was also afforded a meaningful opportunity to respond. I agree with the Respondent that the onus was on Mr. Lum to put his best foot forward in that response and that there was no obligation on the Director to make further inquiries of Mr. Lum. In summary, as the Director made no representation that the Applicant would be alerted to any lingering concerns or would be offered an opportunity to make further representations, no legitimate expectation arises. Further, the process set out in the C*annabis Regulations* was followed. Mr. Lum was provided with information sufficient to allow him to know the case he had to meet, he was afforded a meaningful opportunity to respond, and the Director General considered his response.

[79] In my view, for the reasons set out above, the procedure followed in this matter was fair having regard to all of the circumstances, including the *Baker* factors. Mr. Lum knew the case to be met and had a full and fair chance to respond (*CPR* at paras 54, 56). The requirements of the duty of fairness owed were met and there was no breach of that duty.

Issue 2: Was the decision reasonable?

Applicants' position

[80] The Applicants submit that the decision was unreasonable because the Director General failed to consider significant evidence supporting that Mr. Lum did not pose an unacceptable risk to public health or public safety. Specifically, the Director failed to mention or analyze Mr. Lum's written representations, made in response to the letter of intention, concerning his own character and intentions. Nor is this addressed elsewhere in the record. Further, that the Director General disregarded Mr. Lum's evidence regarding the nature of his relationship to Subjects A and B and the extent of Mr. Lum's knowledge of Subject B's criminal activities, which resulted in a fundamental gap in his reasoning.

[81] The Applicants also submit that the Director General approached the question under s 53(1) as whether Mr. Lum fell within the circumstances contemplated by s 53(2) and, in doing so, fettered his discretion by failing to engage with the ultimate issue that he was required to decide: whether despite his written representations to the contrary, Mr. Lum posed an unacceptable risk to public health or safety. By relying on the discretionary factors listed in s 53(2) as conclusive, the Director General exercised no independent judgment by failing to undertake the requisite analysis under s 53(1) and to consider the level of risk posed by Mr. Lum, taking into account both the factors in s 53(2) and the totality of the evidence in support of Mr. Lum's position.

[82] Finally, the Applicants submit that the Director General unreasonably relied on s 53(2)(c) of the *Cannabis Regulations* because there was no evidence before the Director General to suggest the Applicant could be induced to commit or aid or abet any person to commit an act that might constitute a risk to public health or safety and his own evidence was to the contrary.

Respondent's position

[83] The Respondent submits that it is trite law a decision maker is not required to address every argument or submission raised by an applicant (*Vavilov* at para 128). Here, Mr. Lum's educational qualifications and his business history were only tangentially related to the central issue in the application – whether Mr. Lum posed an unacceptable risk to public health or safety due to his association with Subjects A and B. Even peripheral association with individuals violating the *Controlled Drugs and Substances Act* is a relevant concern under the Director General's mandate. Nor did the Director err by focusing his analysis on a few predominant factors.

[84] Further, when the decision and record are read holistically and contextually, it is clear that the factors under s 53(2) informed the Director General's perspective under s 53(1) of the *Cannabis Regulations*. The link between his analysis of s 53(2) and his overall conclusion with respect to s 53(1) can be tied together through an internally coherent and rational chain of analysis.

[85] Finally, the Respondent submits that, contrary to the Applicants' argument that there is no evidence to suggest that Mr. Lum could be induced to commit an act – or to aid or abet any

person to commit an act – that might constitute a risk to public health or public safety, the record demonstrates that at the time of Mr. Lum's security clearance application he was in a close business relationship with Subject A, the spouse of an individual with an extensive criminal history in the possession and trafficking of controlled substances. The ISAF and the Director General employed their specialized expertise to infer that Mr. Lum's relationship with Subject B carried the potential to compromise the integrity of the Applicants' cannabis operations and constitute a risk to public health or public safety, which conclusion is to be afforded deference.

Analysis

[86] As to the Applicants' first argument, that the Director General erred by failing to refer to Mr. Lum's evidence about his education and business credentials, I do not agree.

[87] As stated in *Basanti v Canada (Citizenship and Immigration)*, 2019 FC 1068:

> [24] It is well recognized that a decision-maker is presumed to have weighed and considered all the evidence presented to it unless the contrary is shown (*Florea v Canada (Minister of Employment and* Immigration*)*, [1993] FCJ No 598 (FCA) at para 1). A failure to mention a particular piece of evidence does not mean that it was ignored (*Newfoundland Nurses* at para 16), and a decision-maker is not required to refer to each and every piece of evidence supporting its conclusions. It is only when a tribunal is silent on evidence clearly pointing to an opposite conclusion that the Court may intervene and infer that the tribunal overlooked the contradictory evidence when making its finding of fact (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9-10; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) [*Cepeda-Gutierrez*] at paras 16-17). However, *Cepeda-Gutierrez* does not stand for the proposition that the mere failure of a tribunal to refer to an important piece of evidence that runs contrary to the tribunal's conclusion necessarily renders a decision unreasonable and results in the decision being overturned. To the contrary,

> *Cepeda-Gutierrez* says that it is only where the non-mentioned evidence is critical and squarely contradicts the tribunal's conclusion that the reviewing court may decide that its omission means that the tribunal did not have regard to the material before it.

(See also *Vavilov* at para 128.)

[88] The Director General stated that he had considered Mr. Lum's representations. It is true that he did not explicitly mention that Mr. Lum had indicated that he holds a business degree; that he described himself as an upstanding entrepreneur having started various businesses, such as in mobile communications and software development; or, that he stated has received numerous awards and has been recognized in business magazines. Further, that he would not put his career or reputation at risk by engaging in activities that may a pose risk to public health and safety.

[89] However, in my view, Mr. Lum's statement generally describing his education, business experience and positive reputation is not critical evidence that runs contrary to the Director General's conclusion, which was concerned with the potential impact of Mr. Lum's association with Subjects A and B. As a result, failure to explicitly mention this evidence is not a reviewable error.

[90] When appearing before me, the Applicants' main focus was on the Director General's finding, that regardless of Mr. Lum's written representations, the fact remained that he had had an association with Subjects A and B. And, given that Subject B has been linked to organized crime for the past 20 years, that Mr. Lum had not alleviated the Director General's concern that

Mr. Lum is or has been "associated with an individual who is a member of a criminal organizations or an individual who is a member of an organization that is known to be involved in activities" directed towards, in support of or threatening violence.

[91] The Applicants submit that this finding, that Subject B "is" a member of such an organization, is unsubstantiated and that there is no reliable evidence to support it.

[92] In this regard, the Applicants essentially attack the reliability of the LERC report. They note that the report states that on April 21, 2015, RCMP Federal Serious and Organized Crime British Columbia, entered into an investigation regarding money laundering and drug trafficking. It was during that investigation that open sources verified that Mr. Lum was a director of the numbered company, as was Subject A. The Applicants do not dispute this finding but assert that the RCMP were required to update their open source investigations and, had they done so, they would have discovered the *Chu* decision which would have confirmed that Subject B has remained crime free since 2004. And, that the Director General should have done his own investigation to confirm the reliability of the LERC report.

[93] The Applicants further submit that the LERC report states that Subject A is the spouse of "a known Asian Organized crime figure in the Lower Mainland of BC, Subject B, who has been linked to organized crime for the last 20 years". However, the dates and specifics of those convictions were redacted. Accordingly, the Director General had no way of knowing when the offences occurred and should have conducted his own research to verify this. Had the Director General done so, he would have found the *Chu* decision and would have known that Subject B

has been crime free since his release from prison in 2004. The reliance on the LERC report and failure to look behind it caused the Director General to wrongly find that Mr. Lum is associated with Subject B who has been linked to organized crime "for the past 20 years" and is an "individual who is a member of a criminal organization or an individual who is a member of an organization that is known to be involved in activities" directed toward violence.

[94] As I have found above, the duty of procedural fairness did not require the Director to look behind the LERC report.

[95] Further, the Director General was entitled to rely on the LERC report and was not obliged to conduct independent research to "test" its content. As stated in *Del Vecchio*, which concerned a security clearance for an international airport, pursuant to the *Aeronautics Act*:

> [21] As part of this process, the Minister must rely on information provided from law enforcement agencies such as the RCMP (*Sidhu v Canada (Attorney General)*, 2016 FC 891 at para 19; *Henri v Canada (Attorney General)*, 2014 FC 1141 at para 40 [*Henri FC*], affirmed 2016 FCA 38). The Minister can rely on information provided by the RCMP without verifying or investigating the content of those reports. This information can be relied upon even it is hearsay and not cross-checked (*Mangat* at para 54; *Henri FC* at para 40). The onus is on the person wishing to obtain security clearance to address the Minister's concerns.

(See also *Rossi v Canada (Attorney General)*, 2015 FC 961 at para 26 [*Rossi*]; *MacDonnell v Canada (Attorney General)*, 2013 FC 719 at para 31 [*MacDonnell*], citing *Fontaine v Canada (Transport)*, 2007 FC 1160 at para 75 [*Fontaine*].)

[96] And, even if the *Chu* decision were admissible, its existence does not render the RCMP report unreliable. When appearing before me the Respondent indicated that, contrary to the Applicants' submissions, the dates and offences that were redacted in the copy of the LERC report in the CTR were not redacted from the copy of the report that the Director General reviewed. Thus, the Director General was aware of the dates of Subject B's convictions, and that none of them are recent, as well as the nature of the offences themselves and their disposition. In the result, all that the *Chu* decision establishes is that, for the purposes of the constitutional challenge before it, the British Columbia Supreme Court accepted Subject B's testimony that he had been crime free since 2004. That finding for that purpose cannot serve to rebut the LERC report statement that Subject B is a known Asian Organized crime figure who has been linked to organized crime for the past 20 years. To resolve the constitutional question before it, the British Columbia Supreme Court in *Chu* was not required to assess whether Mr. Chu has had any criminal connections since 2004.

[97] However, I agree with the Applicant that the LERC report does not explicitly say that Subject B "is" a member of a criminal organization. It describes him as a known Asian Organized crime figure who has been linked to organized crime for the last 20 years. It also lists his convictions (redacted), which the Applicants assert occurred prior to 2004. This timeframe is not disputed by the Respondent. Thus, the LERC report is ambiguous as to whether Subject B's link to organized crime is current or if it stems only from the prior convictions.

[98] This relates to the s 53(2)(vii)(B) factor in the *Cannabis Regulations*, which can be used to determine the level of risk posed by an applicant and is concerned with whether the applicant

"is or has been associated with" an individual who "is" a member of an organization referred to in subparagraphs (v) or (vi). In his decision, the Director General found that Mr. Lum had not alleviated the Director General's concern that Mr. Lum is or was associated with an individual who "is" such a member.

[99] The record indicates that the Director General or his office had at least some follow-up with the RCMP. A copy of the LERC report found in the record has three handwritten "sticky notes" affixed to it. The first of these notes reads:

> Nature of investigation
>
> - were they investigating the company
> - because subject B linked to organization

The second "sticky note" appears to answer this, stating:

> - Not a company investigation
> - Was a tip from the US regarding certain individuals
> - Will get back to us regarding who was being investigated

The third "sticky note" reads:

> #2 value?
> Any links B to applicant other than through Subject A?
> - Will get back to us.
> - no

[100] The Respondent submits that it can be inferred from this that Subject B was an individual being investigated. Accordingly, the Director General's interpretation of the LERC report to indicate a current membership was open to him. The Respondent concedes, however, that the LERC report itself does not confirm a current link between Subject B and a criminal organization or that he is currently a member of such an organization.

[101] In my view, the "sticky notes" raise at least as many questions as they answer. And, while the Director General or his office may have had further communications with the RCMP that satisfied the Director General that the link between Subject B and organized crime is current or that there is reason to suspect that it might be, the decision does not indicate this and relies only on the ambiguous LERC report. Moreover, while it was open to the Director to make reasonable inferences based on the evidence, the LERC report connects the 2015 RCMP investigation to Mr. Lum and Subject A only as co-directors in the numbered company. It makes no direct connection between Mr. Lum and Subject B. Nor does it state that Subject B was the subject of its investigation, the outcome of that investigation or if it is ongoing. To the extent that the Respondent is suggesting that the Director General could make reasonable inferences based on the content of the sticky notes, in my view, even if these could be construed as evidence, they lack sufficient clarity to ground such inferences. And, while in the context of information known only to the Director General, reasonable inferences may have been possible, an inference "standing as it does in a factual vacuum, with no indicia or evidence to support the inference, falls short of the *Dunsmuir v New Brunswick*, 2008 SCC 9, criteria of transparency and intelligibility" (*Meyler v Canada (Attorney General)*, 2015 FC 357 at paras 41, 43).

[102] As to s 53(2)(vii)(A), this factor can be used to determine the level of risk posed by an applicant and is concerned with whether the applicant "is or has been associated with" an individual who is known to be involved in or to contribute to – or in respect of whom there are reasonable grounds to suspect their involvement in or contribution to – activities referred to in s 53(2)(b)(i) to (iii). Again, the same concerns arise with respect to the very limited content of the LERC report.

[103] In this regard, it is also significant to note that jurisprudence upholding decisions wherein security clearance was denied often makes reference to much more detailed information, including that contained in LERC reports, relied upon by the decision makers in those cases.

[104] For example, in *Rossi* the LERC report revealed links between Mr. Rossi and an individual involved in the import and export of drugs at the airport where Mr. Rossi worked and stated a suspected association between Mr. Rossi and a named organized crime group (at para 3). There, the decision maker considered detailed information gathered by the RCMP during its investigation (at para 24). This revealed a close link between Mr. Rossi and the Subject A therein, who was one of the subjects of the investigation and was a member of the criminal organization. Subject A was convicted of conspiracy and importation of an unlawful substance. He also owned a restaurant identified by the RCMP as a meeting place used to discuss narcotic trafficking. Mr. Rossi had been observed in the restaurant associating with a key player for the organization then under investigation (also see *Christie v Canada (Transport)*, 2015 FC 210 at paras 5, 8 [*Christie*]; *Henri* at paras 10-12).

[105] Similarly, *Randhawa* concerned a reconsideration of a marine transportation security clearance which was denied on the basis that there were reasonable grounds to suspect that the applicant was in a position in which there was a risk that he would be suborned to commit an act or to assist or abet any person to commit an act that might constitute a risk to marine transportation. There, the LERC report stated that the applicant had no known criminal convictions but was identified as an active member of an Indo-Canadian organized crime group and listed the law enforcement authorities' encounters, over an eight-year period, with either the

applicant or two of his "very close associates", his brothers. Further, that one of those two associates was believed to be an executive member of an Indo-Canadian organized crime group involved in cross border narcotics smuggling and that this group had been used to assist in the transportation of cocaine from the United States [US] into Canada. The LERC report also indicated that there was information indicating that the group was involved directly and indirectly with the Hells Angels, the Japanese Mafia, and Chinese criminals. Further, that the applicant's other "very close associate" was caught in the US with 107 kilos of cocaine in 2008, pleaded guilty to cocaine possession and conspiracy and was sentenced to a 60-month jail term and three (3) years of supervised release.

[106] The Office of Reconsideration agreed with an independent security advisor report that there was not enough evidence to conclude that the applicant was an active member of a criminal organization. However, it remained concerned with his relationship with his brothers and denied the security clearance. In responding to the applicant's assertion that innocent associations will not normally warrant the denial of a security clearance, Justice LeBlanc stated:

> [30] As the Respondent points out, a section 509 assessment is not only concerned with a review of the applicant's character but also with the extent to which the applicant poses a risk to the security of marine transportation through the possibility of future intimidation or coercion (my emphasis). In other words, such assessment is "forward-looking and predictive" (*Farwaha*, at para 94). The fact that the apprehended risk of intimidation or coercion has not materialized at the time the assessment is made is therefore irrelevant.
>
> [31] In such context, I find that the Applicant's association with his brothers provided the Minister, in the totality of circumstances, with a rational basis for holding a reasonable suspicion of subornation and potential risk to marine transport security as:
>
> a) Both brothers have been incarcerated in the last 10 years for trafficking in narcotics;

> b) Their alleged involvement with an Indo-Canadian organized crime group specialized in the trafficking of cocaine between Canada and the United States is not in dispute;
>
> c) They both lived with the Applicant, in the family home, before being incarcerated;
>
> d) Albeit minimal, the Applicant does maintain contact with the older brother while the younger brother is incarcerated;
>
> e) The Applicant was concerned when his older brother went missing;
>
> f) The younger brother continued to live in the family home after his arrest up until his parents denied providing any further surety given his behavior while on bail; and,
>
> g) Both brothers had access to the Applicant's car and he to theirs and while driving one of his brother's car in 2010, the Applicant was stopped by the RCMP/British Columbia Combined Forces Special Enforcement Unit, a unit that does not conduct routine traffic stops but rather targets, investigates, prosecutes, disrupts and dismantles the organized crime groups and individuals that pose the highest risk to public safety due to their involvement in gang violence.
>
> [32] In addition, the record shows that the Office of Reconsideration expressed concerns over the Applicant's ignorance of the details of his brothers' arrests. As the Respondent points out, this reasonably suggests either naivety or willful blindness on the part of the Applicant, especially regarding the older brother who spent 60 months in jail in the United States for possession of more than 100 kilograms of cocaine. In other words, the Applicant may not have been as forthcoming as he claims to have been in respect to his brothers' arrests, which raises additional concerns.

[107] Conversely, here the LERC report states very little. It does not make a direct or even a suspected connection between Mr. Lum and Subject B, and it is ambiguous as to whether Subject B is currently a member of an organized crime group. Further, the Director General failed to

analyze Mr. Lum's evidence regarding the nature of his relationship to Subjects A and B. That is, the decision does not explain why the association between Mr. Lum and Subject B, said to be the severed co-directorship between Mr. Lum and Subject A (Subject B's spouse), posed a level of risk that rose to the level of an unacceptable risk to the public pursuant to s 53(1) of the *Cannabis Regulations*.

[108] The Respondent submits that even a peripheral connection to someone with a history of marked violation of the *Controlled Drugs and Substances Act* is significant when "viewed through the prism of a nascent industry regulating a product that was previously classified under the *Controlled Drugs and Substances Act*".

[109] I agree it may be significant. But, to arrive at a determination that a "peripheral" connection or association was, or was not, significant in determining the level of risk posed by an applicant for the purposes of the issuance of a security clearance (*Cannabis Regulations* s 53(1)), a decision maker must put their mind to that question and reach a justified and reasonable decision:

> [102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding

> the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.
>
> (*Vavilov* at para 102)

[110] Here, the Director General described the LERC report, Mr. Lum's representations and the ISAF recommendation, and he stated the factors he considered as most relevant under s 53(2) of the *Cannabis Regulations*. He concluded, based on the fact that Mr. Lum had had an association with Subjects A and B, that Mr. Lum was in a situation contemplated by s 53(2)(c) and ss 53(2)(b)(vii)(A)-(B) of the *Cannabis Regulations*. To my mind, what is missing from the decision is any analysis of the nature of the association and an explanation of why it was sufficient to support that Mr. Lum may, as a result, pose an unacceptable risk to public health or public safety (*Cannabis Regulations*, s 53(1)). That is to say, the Director General relied exclusively on the fact of the existence of the association of Mr. Lum, through Subject A, with Subject B, but failed to relate the circumstances of this relationship to a determination of the resultant level of risk.

[111] There is no doubt that the Director General was entitled to consider the convictions of Subject B, even if dated (*Yee Tam v Canada (Transport)*, 2016 FC 105 at para 16 [*Yee Tam*]; *Christie* at para 25). The Director General is also clearly entitled to err on the side of public safety (*Brown v Canada (Attorney General)*, 2014 FC 1081 at para 71 [*Brown*]. Further, personal involvement with organized crime is not required, just an association (*Del Vecchio* at para 34, aff'd 2018 FCA 168 at para 6; *Fontaine* at paras 83-84).

[112] However, all of these cases – *Yee Tam*, *Christie*, *Brown*, *Del Vecchio* and *Fontaine*, as well as *Henri* and *Rossi*, and others – differ from Mr. Lum's situation. In all of those cases, the applicants had a direct, even if dated, association with gang members or organized crime, had criminal charges laid against them related to controlled substances or were directly implicated in drug operations or other criminal activities and/or were in a close or ongoing family relationship with the person charged or implicated and had knowledge of the family members' criminal activity (also see *Randhawa* at paras 28-32; *Wu v Canada (Attorney General)*, 2016 FC 722 at paras 27-36). Those circumstances are not similar to Mr. Lum's situation. Mr. Lum has not been the subject of any criminal charges or convictions, as disclosed in the LERC report, and submitted that he had only indirect connection with Subject B by way of being in a co-directorship with Subject A, who was Subject B's spouse, which assertion is not put in question by the LERC report.

[113] In my view, given that the LERC report provides no information suggesting that there is a direct or close association between Mr. Lum and Subject B, and in light of the "sticky note" apparently indicating that Mr. Lum had no links to Subject B other than through Subject A, and considering that in all of the above jurisprudence there was evidence of a far more direct or close link between the applicants and the associated persons which was found to support the connected risk to public safety, the Director General was required to address the nature of the relationship between Mr. Lum and Subjects A and B. Absent any reasons or analysis explaining why and how that association results in a level of risk that is an "unacceptable risk to public health or public safety" (*Cannabis Regulations*, s 53(1)), the decision is unreasonable (*Vavilov* at para 102).

[114] The Applicants also submit that the Director General unreasonably relied on s 53(2)(c) of the *Cannabis Regulations*. Section 52 sets out the factors that the Minister may consider to determine the level of risk posed by an applicant. Section 53(2)(c) is one of those factors, being where there are reasonable grounds to suspect that the applicant could be induced to commit an act – or to aid or abet any person to commit an act – that might constitute a risk to public health or public safety. The Applicants submit that there was no evidence to suggest that he could fall into this circumstance and his own evidence denied that he would do so.

[115] However, the Director General was not required to believe, on a balance of probabilities, that Mr. Lum will commit or aid in the commission of such an act. He need only be convinced that there are reasonable grounds to *suspect* that he could do so, which act *might* constitute a risk to public safety or health (see *Henri* at para 27(c) citing *MacDonnell* at para 29; *Rossi* at para 23). The Director was engaged in the assessment of the level of the potential future risk. This assessment included determining the weight to be afforded to the evidence that was before him. In this case, that included: Mr. Lum's evidence; the LERC report, which identified Mr. Lum's association, through Subject A, with Subject B who had been convicted of criminal offences pertaining to narcotic trafficking and possession as well as possession of an unregistered restricted weapon; and, the ISAF recommendation. The Director General was entitled to afford greater weight to the LERC report, when assessing the potential level of risk, than to Mr. Lum's evidence that he would not put his career or reputation at risk by engaging in activities that might pose a risk to public health. That said, without an assessment of the nature of the relationship between Mr. Lum and Subjects A and B, it is impossible to know why the Director General was convinced that there were reasonable grounds to suspect that Mr. Lum could be induced to

commit an act – or to aid or abet any person to commit an act – that might constitute a risk to public health or public safety.

[116] The Respondent argues that this Court should give significant deference to the Director General and ISAF whose domain of expertise is personnel security. I agree and recognize that *Vavilov* stated that, "[r]espectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision" (at para 93).

[117] However, the Director General's decision lacks any analysis or reasons to allow me to understand why it was reasonable to conclude that the indirect or, as the Respondent describes it, the "peripheral" association of Mr. Lum to Subject B resulted in a level of risk that engaged s 53(1). Or why, given the indirect relationship, that association provided reasonable grounds to suspect that Mr. Lum could be induced to commit an act – or to aid and abet any person to commit an act – that might constitute a risk to public health or safety. The Director General found that the existence of the association put Mr. Lum "in a situation contemplated by" ss 53(2)(c), 53(2)(b)(vii)(A) and (B). This may be so. But, the Director General did not take the next step and explain why he considered the nature of the association to result in a level of risk posed by Mr. Lum which amounted to an unacceptable risk to public health and safety. Nor am I able to discern this from the record before me without reaching into the realm of surmise, speculation and the interpretation of cryptic "sticky notes".

[118] This is not to say that the Director General's decision could only be unreasonable. Rather, it is unreasonable because he failed to justify his conclusion.

JUDGMENT IN T-1533-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the Director General's decision, refusing to grant security clearance to Mr. Kan Paul Lum, is quashed.

2. The matter is remitted back to the Director General for re-determination, taking these reasons into consideration.

3. Costs to the Applicants.

"Cecily Y. Strickland"
Judge

ANNEX A

***Cannabis Act,* SC 2018, c 16**

Purpose

> 7 The purpose of this Act is to protect public health and public safety and, in particular, to
>
> > …
> >
> > (c) provide for the licit production of cannabis to reduce illicit activities in relation to cannabis;
> >
> > (d) deter illicit activities in relation to cannabis through appropriate sanctions and enforcement measures;

…

Authority to issue, renew and amend

> 62 (1) Subject to orders made under subsection 61(1), the regulations and subsection (2), the Minister may, on application, issue, renew or amend licences and permits that authorize the importation, exportation, production, testing, packaging, labelling, sending, delivery, transportation, sale, possession or disposal of cannabis or any class of cannabis.
>
> …

Grounds for refusal

> (7) The Minister may refuse to issue, renew or amend a licence or permit if
>
> > (a) the issuance, the renewal or the amendment is likely to create a risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity;
> >
> > (b) there are reasonable grounds to believe that false or misleading information or false or falsified documents were submitted in, or in support of, the application;
> >
> > (c) the applicant has contravened in the past 10 years a provision of this Act, the *Controlled Drugs and Substances*

Act or the *Food and Drugs Act* or of any regulation made under this Act or any of those Acts;

(d) there are reasonable grounds to believe that the applicant has contravened in the past 10 years

(i) an order made under this Act, the *Controlled Drugs and Substances Act* or the *Food and Drugs Act*, or

(ii) a condition of another licence or permit issued to the applicant under this Act or any of those Acts;

(e) the applicant is

(i) a young person,

(ii) an individual who is not ordinarily resident in Canada, or

(iii) an organization that was incorporated, formed or otherwise organized outside Canada;

(f) a security clearance in respect of the application has been refused or cancelled;

(g) the Minister is of the opinion that it is in the public interest to do so; or

(h) any prescribed grounds for refusal exist.

…

Security clearances

67 (1) Subject to the regulations, the Minister may grant or refuse to grant a security clearance or suspend or cancel a security clearance.

Applications for licences and permits

158 (9) Subject to regulations made under subsection 161(1), every application for a licence under section 35 of the *Access to Cannabis for Medical Purposes Regulations*, or for a permit under section 95 or 103 of those Regulations, in respect of which no final decision has been made before the commencement day is deemed to be an application for a licence or a permit, as the case may be, made under section 62 of this Act.

Applications for security clearance

158 (10) Subject to regulations made under subsection 161(1), every application for a security clearance under section110 of the Access to Cannabis for Medical Purposes Regulations in respect of which no final decision has been made before the commencement day is deemed to be an application for a security clearance made under section 67 of this Act.

***Cannabis Regulations*, SOR/2018-144**

Minister's approval

20(3) The Minister may, on receiving an application for approval, require the submission of any additional information that pertains to the information contained in the application and that is necessary for the Minister to consider the application.

…

Requirement for security clearance

50 The following individuals must hold a security clearance:

(a) an individual who holds a licence for cultivation, processing or sale;

(b) in the case of a corporation that holds a licence for cultivation, processing or sale,

(i) the directors and officers of the corporation,

(ii) any individual who exercises, or is in a position to exercise, direct control over the corporation,

(iii) the directors and officers of any corporation or cooperative that exercises, or is in a position to exercise, direct control over the corporation,

(iv) any individual who is a partner in a partnership that exercises, or is in a position to exercise, direct control over the corporation, and

(v) the directors and officers of any corporation that is a partner in a partnership that exercises, or is in a position to exercise, direct control over the corporation;

…

51 Only the following individuals may submit an application for a security clearance:

(a) an individual who is required to hold a security clearance;

(b) an individual who will be required to hold a security clearance if an application for a licence, or for its renewal or amendment, that has been filed with the Minister results in the issuance, renewal or amendment of the licence;

(c) an individual who will be required to hold a security clearance if a pending business transaction is completed;

(d) an individual who has been selected for a position referred to in any of paragraphs 50(e) to (h) or as an alternate for such a position; and

(e) an individual who has been selected for a position that has been specified by the Minister under subsection 67(2) of the Act or who has been notified that the Minister intends to specify them, by name or position, under that subsection.

Checks

52 The Minister may, at any time, conduct checks that are necessary to determine whether an applicant for, or the holder of, a security clearance poses a risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity. Such checks include

(a) a check of the applicant's or holder's criminal record; and

(b) a check of the relevant files of law enforcement agencies that relate to the applicant or holder, including intelligence gathered for law enforcement purposes.

Grant of security clearance

53(1) Before granting a security clearance, the Minister must, taking into account any licence conditions that he or she imposes under subsection 62(10) of the Act, determine that the applicant does not pose an unacceptable risk to public health or public

safety, including the risk of cannabis being diverted to an illicit market or activity.

Factors

(2) Factors that the Minister may consider to determine the level of risk posed by the applicant include

(a) the circumstances of any events or convictions that are relevant to the determination, the seriousness of those events or convictions, their number and frequency, the date of the most recent event or conviction and any sentence or other disposition;

(b) whether it is known, or there are reasonable grounds to suspect, that the applicant

(i) is or has been involved in, or contributes or has contributed to, an activity that is prohibited by, or conducted in contravention of, any of the provisions of Division 1 of Part 1 of the Act — other than paragraphs 8(1)(a) to (e) — or Subdivision E of Division 2 of Part 1 of the Act,

(ii) is or has been involved in, or contributes or has contributed to, an activity that is prohibited by, or conducted in contravention of, any of the provisions of Part I of the *Controlled Drugs and Substances Act* — other than subsection 4(1) — or subsection 32(1) or (2) of that Act,

(iii) is or has been involved in, or contributes or has contributed to, an activity that is prohibited by, or conducted in contravention of, any provision of the *Criminal Code* relating to fraud, corruption of public officials, terrorism financing, counterfeiting or laundering the proceeds of crime,

(iv) is or has been involved in, or contributes or has contributed to, an offence involving an act of violence or the threat of violence,

(v) is or has been a member of a criminal organization as defined in subsection 467.1(1) of the *Criminal Code*, or is or has been involved in, or contributes or has contributed to, the activities of such an organization,

(vi) is or has been a member of an organization that is known to be involved in or to contribute to — or in respect of which there are reasonable grounds to suspect its involvement in or contribution to — activities directed toward, or in support of, acts of violence or the threat of violence, or is or has been involved in, or contributes or has contributed to, the activities of such an organization,

(vii) is or has been associated with an individual who

(A) is known to be involved in or to contribute to — or in respect of whom there are reasonable grounds to suspect their involvement in or contribution to — activities referred to in subparagraphs (i) to (iii), or

(B) is a member of an organization referred to in subparagraph (v) or (vi), or

(viii) has conspired to commit

(A) an offence under any of the provisions of the *Criminal Code* referred to in subparagraph (iii),

(B) an offence referred to in subparagraph (iv), or

(C) an offence under any of sections 467.11 to 467.13 of the *Criminal Code*;

(c) whether there are reasonable grounds to suspect that the applicant could be induced to commit an act — or to aid or abet any person to commit an act — that might constitute a risk to public health or public safety;

(d) whether there are reasonable grounds to believe that the applicant's activities, including their financial activities, pose a risk to the integrity of the control of the production and distribution of cannabis under the Act;

(e) whether the applicant has had a security clearance suspended or cancelled;

(f) whether there are reasonable grounds to believe the applicant has, now or in the past, submitted false or misleading information, or false or falsified documents, to the Minister; and

(g) whether an entity has refused to issue a security clearance to the applicant — or has suspended or cancelled one — and the reason for the refusal, suspension or cancellation.

…

Refusal to grant security clearance

55 (1) If the Minister intends to refuse to grant a security clearance, the Minister must provide the applicant with a notice that sets out the reason for the proposed refusal and that specifies the period of time within which they may make written representations to the Minister. The period must start on the day on which the notice is provided and must be not less than 20 days.

Notice of refusal

(2) If the Minister refuses to grant the security clearance, the Minister must provide the applicant, and any affected holder of or applicant for a licence, with notice of the refusal in writing.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1533-19
STYLE OF CAUSE:	KAN PAUL LUM AND GRUN LABS, INC. v CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	JULY 2, 2020
REASONS FOR JUDGMENT AND JUDGMENT:	STRICKLAND J.
DATED:	JULY 28, 2020

APPEARANCES:

Claire E. Hunter, QC and Julia E. Roos	FOR THE APPLICANTS
Arnav Patel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Hunter Litigation Chambers Vancouver, British Columbia	FOR THE APPLICANTS
Attorney General of Canada Department of Justice Vancouver, British Columbia	FOR THE RESPONDENT